

- THE INHERENT REVIEW JURISDICTION OF THE SUPREME COURT -

by

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Being a Thesis submitted for the degree of Doctor of Laws in the
Faculty of Law, University of Cape Town.

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ABSTRACT

This thesis concerns the inherent review jurisdiction of the Supreme Court. The remedy is isolated from, examined and compared with the (general) inherent jurisdiction of the Court.

The purpose of the remedy is:

- i) to control, supervise, or otherwise confine administrative authorities, tribunals and voluntary associations to their respective enabling Acts, terms of reference or constitutions and to certain judicially required norms of conduct;
- ii) to do justice in regard to the proceedings of inferior courts where no other remedy is available.

The inherent review jurisdiction is not an appellate remedy. In the exercise of such jurisdiction the Court will not interfere with merits of the decision a quo - it is concerned only with the validity of such decision.

The remedy is examined under the following headings:

- i) its principal features;
- ii) the ground for its grant;
- iii) the various methods by which it may be invoked.

Thereafter the remedy is evaluated. Although its importance is acknowledged, certain defects in the remedy are indicated.

The remedy was not conferred upon the Court by legislation, yet by 1890 its existence was acknowledged. The question of the origin of the remedy is raised not only for its academic interest but also for the possible practical advantage of improving the remedy.

The origin of the remedy was sought first in the Roman-Dutch procedural law period at the Cape (1652 - 1834). This enquiry showed that the source of the remedy is not to be found in this period or in the Roman-Dutch law. Thereafter the origin was sought during the English procedural law period (from 1834). The remedy was unknown at the Cape in 1834 yet by 1890 it was fully acknowledged by the Cape Supreme Court. Accordingly this period may be regarded as the gestation stage of the remedy. It was necessary, too, to investigate the relevant law, in England and in the former Dutch colonies of Ceylon and those in South America (which became British Guiana), during this period. Although the research showed certain similarities between the remedy and the (then) English writ of certiorari, neither the latter nor any other English remedy was found to be the direct source of the remedy at the Cape. Apart from its academic interest the examination of the relevant law and the administration of Justice in Ceylon and British Guiana was of little pertinent value to the research.

Through the decided cases of the Cape Supreme Court, during the period 1834 - 1890, the origin of the remedy was ascertained. The remedy is found to be the result of judicial creativity, in other words it is judge made. Accordingly it is suggested that the defects in the remedy are capable of rectification by the Court itself. The thesis concludes with a number of suggestions for the improvement of the remedy.

These relate to:

- i) The furnishing of reasons for the decision, a quo;
- ii) the 'delay rule';
- iii) the right to be heard in administrative proceedings and the 'functional approach';
- iv) judicial intervention resulting from an unreasonable act and in respect of an error of law;
- v) the extension of the remedy to certain company law situations.

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Lastly, and most certainly not least, I wish to express my gratitude to my wife Marguerite who had daily to endure the "Inherent Review Jurisdiction of the Supreme Court" for almost five years. Without her encouragement I doubt whether the thesis would have been completed.

Jérolde Taitz

- POSTSCRIPT -

- i) As this work was prepared on a word-processor it became necessary to give certain pages the same number as the previous page in order to avoid difficulties with cross-references. The letter A was added to the second page to obviate any confusion e.g., pages 75 and 75A.
- ii) All annexures are included after the last page of text in the relevant chapter before the commencement of footnotes (which are at the end of each chapter). Annexures are paginated with the page number of the last page of the text followed by Roman numerals in parenthesis, e.g., Annexure 3 which appears in Chapter Three commences with page 246(i) and terminates with page 246(xxi).
- iii) Due to the intricacies of photocopying some annexures are not clear. This is particularly so when the annexure is a photocopy of one made in a Government department. Where the copies are not clear a typescript of the contents of the document have been included. For example the annexure of a statement by MRS C E NORDIN in the case of S v Taylor (at page 343(iii)) is very poor. Accordingly, I have included a clear typescript on the following page. As a result of the quality of this particular photocopy, MRS NORDIN was erroneously referred to as Mrs Nadin in the Table of Contents under Chapter Four.
- iv) During the final stages of this work I noticed that there are two different printings of the 1912 Appellate Division Reports (see footnote 4 at page 247). The page references in the two versions are different. When referring to 1912 AD cases, more particularly SHIDIACK v UNION GOVERNMENT where possible I have given both page references. The page reference of the case in the original publication (1913) is page 642 while that in the (1921) reprint is page 575.

- v) Although the law relating to the inherent review jurisdiction, as contained in this thesis, is at 31 March 1983 and concerns almost exclusively the law of South Africa, it is apposite to refer to a recently reported decision of the House of Lords. The decision BROWN v HAMILTON DISTRICT COUNCIL relates to an appeal from the Court of Session in Scotland and is reported in the Scots Law Journal of 3 June 1983 (at 397 et seq).

The case concerned the use of declaratory proceedings before the Sheriff's court at Hamilton (an inferior court).

The proceedings would have had the effect of reviewing (or to use the Scottish term, reducing, see the thesis at page 437) the decision of a local authority under the Housing (Homeless Persons) Act 1977. The local authority objected inter alia to the declaratory procedure. It was argued that while the Sheriff's court enjoyed the jurisdiction to issue declaratory orders, under certain circumstances, it did not have the power to use such procedure in order to review (reduce) the decisions of administrative authorities. The power of review (reduction) is enjoyed exclusively by the Court of Session. The House of Lords upheld this objection. The Court, per Lord Fraser of Tullybelton, held inter alia that while,

"the jurisdiction of the Sheriff's Court was extended by the Sheriff Court (Scotland) Act 1907 ... to include actions of declarator ... (T)hat extension ... did not carry any implied extension of their jurisdiction to review the decisions of other bodies."

(Scots Law Journal at 416).

The importance of this judgment as far as the thesis is concerned relates to the review process (thesis, page 284 et seq). Although the judgment concerns a foreign jurisdiction the principle, that an inferior court which enjoys jurisdiction to grant certain remedies may not exercise those powers to effectively grant (other) remedies beyond its jurisdiction,

is relevant to the subject of the thesis. The judgment, in principle, supports the writer's view that although the magistrate's court in South Africa has the power to grant certain remedies, e.g., a prohibitory interdict, a mandament van spolie etc., it may not entertain such remedies if in so doing it effectively exercises the power of review (the thesis at pages 298 and 308). The power of review is a jurisdiction enjoyed exclusively by the Supreme Court of South Africa, as a court of first instance.

Cape Town,
3 August 1983.

JÉROLD TAITZ .

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INTRODUCTION

This thesis concerns the inherent review jurisdiction of the Supreme Court of South Africa, as a court of first instance. Initially the research was directed at the remedy known as review on motion or common law review, by which the proceedings of administrative authorities, tribunals and voluntary associations may be reviewed by the Supreme Court. It became apparent that review on motion was only a part of a far wider remedy or power i.e. the inherent review jurisdiction of the court. It became apparent also that review on motion (common law review) was only one of eleven procedures by which the inherent review jurisdiction of the Court could be invoked.

Save for the procedure of applying for common law review, which in terms of the Uniform Rules of Court must be by way of motion, there are no legislative provisions regarding the many features of the Court's inherent review jurisdiction. The relevant law is to be found only in the decided cases. For this reason great emphasis has been placed on the decisions of the Superior Courts in South Africa to the virtual exclusion of decisions of the courts of other jurisdictions. English and Commonwealth decisions will be referred to only in regard to the research into the origin of the remedy in South Africa and when examining the (general) inherent jurisdiction of the South African Court. The law, derived from the South African decisions, is the law as at 31 March 1983. Further, when considering judgments, the status of the judge is given as that at the time of the judgment. The term 'as he then was' has been omitted. No disrespect is intended by this omission, which is no more than an attempt to preserve space and time. During the years spent in researching the topic of this thesis, the writer has had a number of articles and case notes regarding aspects of the topic published. Where relevant these articles have been referred to. One article "The Audi Alteram Partem Rule in South African Administrative Law" published in (1982) 45 THRHR, has been reproduced in full as an annexure, with the kind permission of Professor A D J van Rensburg, editor of the 'Tydskrif'.

The research contained in this work shows that the inherent review jurisdiction of the Court is an over-riding remedy or power which, at the instance of an aggrieved party, may be resorted to by the Court (as a court of first instance) in order:

- i) to control, supervise, limit or otherwise confine administrative authorities, domestic tribunals and voluntary associations to their respective enabling Acts, terms of reference or constitutions; and to certain judicially required norms of conduct;
- ii) to do justice in regard to the proceedings of inferior courts where no other remedy is available.

The inherent review jurisdiction of the Court is not an appellate jurisdiction, it is supervisory. The Court will not intervene in regard to the merits of a decision a quo. It will exercise this jurisdiction only where a judicially recognised irregularity has taken place in the proceedings of the authority, tribunal or association a quo. The function of the reviewing court (which is referred to in this work as the review process) is described by Potgieter J A in the following terms:

"... the application to the Court ... was not an appeal from the Secretary's decision ... but a review of his decision ... this Court is not called upon to adjudicate on the correctness of the classification but merely on the validity thereof."

(Changuion and Another v Secretary for the Interior 1971 (1) SA 1 (AD) at 5A)

Recently the use of the remedy has been extended by the Court to the proceedings of inferior (or lower) courts. An analysis of the relevant cases indicates that the Court has resorted to its inherent review jurisdiction only where no other remedy is available and by so doing injustice was avoided. It is apposite that under these circumstances in regard to criminal cases heard before inferior courts not only has the Court set aside convictions (inter alia: S v Taylor 1976 (4) SA 185 (T)) but has also set aside an acquittal and remitted the matter to the court a quo for hearing (S v Lubisi 1980 (1) SA 187 (T)). It should be pointed out that

although the term 'lower courts' is today used in preference to 'inferior courts' the latter term will be used in this thesis in order to avoid any confusion. First, the term 'inferior courts' is well-known. Secondly, the statutory review remedy in terms of the Charter of Justice, and latterly in terms of Section 24 of the Supreme Court Act 1959, is known as 'the review of the proceedings of inferior courts'.

An examination of the (general) inherent jurisdiction of the Court in Chapter One indicates that such jurisdiction may be described as those unwritten powers possessed by the Court which enable it to act in the exercise of its judicial function and includes its powers: to prevent an abuse of its process; to supervise, control and protect its officers, and; to protect its own dignity. Thereafter the inherent review jurisdiction of the Court is examined fully and the results of the examination are set out as follows:

CHAPTER TWO.

THE PRINCIPAL FEATURES OF THE REMEDY.

In this chapter the principal features of the remedy are examined. The various features considered include such matters as: the exclusionary effect on the jurisdiction of the Court by reason of the so-called functional approach; the time period afforded to an aggrieved party within which to institute proceedings for review; the availability of the remedy in regard to part-heard or interlocutory matters; the degree of proof required by applicant for review etc.

CHAPTER THREE.

THE GROUNDS OF REVIEW.

An analysis of the decided cases indicate that the judicially recognised irregularities may conveniently be classified under the following four

separate (major) classifications:

- i) irregularities which are concerned with or which relate to the jurisdiction of the authority or other body;
- ii) irregularities which are founded on a lack of good faith or ulterior motive on the part of the authority or body;
- iii) irregularities which offend the rules of natural justice;
- iv) irregularities caused by an abuse of discretion on the part of the authority or body (other than those classified under (i), (ii) and (iii) above).

Where appropriate these four major classifications were further classified.

CHAPTER FOUR.

THE VARIOUS METHODS BY WHICH THE INHERENT REVIEW JURISDICTION OF THE COURT MAY BE INVOKED.

No less than eleven separate and distinct procedures and remedies, by which the inherent review jurisdiction of the Court may be invoked, were examined. The eleven remedies were classified under the following three separate headings:

- i) where the review process is the direct and sole issue before the Court e.g. review on motion, a declaration of rights;
- ii) where the review process is relevant to the issue, that is the relief sought, where the applicant seeks an interdict in order to restrain an authority from putting into effect an irregular or illegal decision;

- iii) where the review process becomes the issue despite unrelated relief being sought initially e.g. where an appeal or criminal trial is before the Court and the Court resorts to its inherent review jurisdiction in order to do justice.

As a result of the research into the original features of certain procedures, a number of accepted legal principles are questioned. For example it would appear that the present essential requisites for the grant of a mandatory interdict do not accord with Roman-Dutch practice. Another example is the apparent erroneous acceptance by the Courts that the interdictum de homine libero exhibendo is of Roman-Dutch origin. It would appear that this remedy was unknown in Roman-Dutch law.

Also examined and considered in this chapter is the statutory review of the criminal proceedings of inferior courts in terms of Section 304 of the Criminal Procedure Act 1977. Attached to this chapter are photostatic copies of the papers of certain cases in which this procedure was instituted. It is apposite that in these cases the Court found it necessary to resort to its inherent review jurisdiction. Among the documents attached is a memorandum by one of the reviewing judges to the Attorney-General of the Transvaal questioning the relief sought and the latter's reply.

CHAPTER FIVE.

AN EVALUATION OF THE REMEDY.

The remedy is summarised and evaluated in this chapter. After weighing the advantages of the remedy against the disadvantages the importance of the remedy emerges clearly. It is seen as dynamic and capable of being adapted to changing socio-economic conditions. None the less the remedy is found to contain certain unfortunate defects. It is suggested that by the removal of these defects, greater justice may be done. The efficacy of the remedy, too, would be improved and its scope could be extended.

A case is made out for the possible improvement of the remedy by ascertaining its origin. The remainder of the thesis concerns the search for the origin of the remedy. At the outset it should be pointed out that to seek the origin of the Court's inherent review jurisdiction in its (general) inherent powers would be fruitless. In Chapter One entitled 'The (General) Inherent Jurisdiction of the Court as a Court of the First Instance', the subject was fully analysed. From an analysis of the subject it is submitted by the writer that the (general) inherent jurisdiction of the Court owes its origin to English law and may be seen as relating to:

- i) the regulation of its proceedings by the Court and the prevention of an abuse of its process;
- ii) the imposition of sanctions by the Court for the impairment of its dignity or for failure to comply with its lawful order;
- iii) the control and supervision of its officers.

The (general) inherent jurisdiction is no more the source of the Court's inherent review jurisdiction than the inherent jurisdiction of the English superior courts is the source of the prerogative orders (formerly the prerogative writs). In the locus classicus on the subject of the Court's review powers, namely Johannesburg Consolidated Investment Co v Johannesburg Municipal Council (1903 TS 111 at 115) Innes CJ stated that review on motion was not created by legislation but

"... is a right inherent in the Court which has jurisdiction to entertain all civil proceedings within its territorial jurisdiction".

It is anomalous that at the time of the decision the remedy was unknown to C H van Zyl, a law professor, practitioner and leading procedural writer. In the final analysis he is incorrect regarding the existence of the remedy. On the other hand the learned Chief Justice is incorrect in suggesting that the remedy flows from 'a right inherent in the Court'. As will be

observed the remedy is proved ultimately to be judge-made but its creation is not the result of any right to create remedies which may be said to be inherent in the Court. A need existed for the remedy and 'for better or for worse' the Cape Supreme Court created the remedy which was cemented in our law as a result of the doctrine of stare decisis.

CHAPTER SIX.

HISTORICAL PERSPECTIVE I.

THE ROMAN DUTCH PROCEDURAL LAW PERIOD (1652 - 1834).

The search for the origin of the remedy commences with the Roman-Dutch procedural law period at the Cape. Although this period terminated with the first Charter of Justice 1828, for purposes of the thesis the date of the second Charter of Justice 1834 is regarded as the date of the demise of the period. The general administration of justice and the civil procedure of this period are considered. The cumbersome Roman-Dutch quasi-inquisitorial form of trial with its various pre-trial stages is examined as is the more summary application for a spoliation order. The Roman-Dutch trial and spoliation procedures may be compared with those procedures employed after 1834 by the Cape Supreme Court, which are set out in the following chapter. The reasons for examining and comparing the trial of an action and an application (for which purpose the mandament van spolie was used) during the Roman-Dutch procedural law period are:

- i) to show the vast differences between the two (basic) procedures during the respective periods;
- ii) to establish that the inherent review jurisdiction of the Cape Supreme Court, and the summary method employed in obtaining the remedy, could not have originated from Roman-Dutch law, either directly or indirectly.

The various forms of appeal and review known to Roman-Dutch law are also examined, more particularly appel, reformatie, re-auditie, reductie, revisie, evocatie and restitutio in integrum (relief). The conclusion is that the inherent review jurisdiction of the Court does not owe its origin to Roman-Dutch law.

CHAPTER SEVEN.

HISTORICAL PERSPECTIVE II.

THE ENGLISH PROCEDURAL LAW PERIOD (1834 - 1890).

The English procedural law period did not end in 1890, on the contrary it may be said to continue today, certainly as far as civil procedure and the law of evidence are concerned. The reason for terminating this period in 1890 for purposes of this work is that during that year the Cape Supreme Court explicitly acknowledged the existence of its inherent review jurisdiction. In this chapter the effect of English procedural law on the administration of justice and civil procedure is examined. The English adversary form of trial with its pre-trial pleading stage and 'day at court' (where the oral evidence of witnesses is tested by cross-examination before an impartial judge in whom both parties have confidence) is examined. Thereafter motion proceedings, as adapted from English law, are examined in the form of an application for a spoliation order. Also examined in this chapter are the statutory form of appeal stricto sensu and the statutory review of the proceedings of inferior courts. The conclusion reached in this chapter is that the source of the inherent review jurisdiction of the Court is not to be found directly in any existing remedy or procedure known to the early Cape Supreme Court.

CHAPTER EIGHT.

COMPARATIVE PERSPECTIVE.

THE HISTORY AND DEVELOPMENT OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN ENGLAND, CEYLON AND BRITISH GUIANA.

As the origin of the remedy could not be found in the Roman-Dutch procedural law period at the Cape nor in the early English procedural law

period it was necessary to investigate the subject of judicial review in England, Ceylon and British Guiana until 1890. English law exerted its greatest influence on South African law from the middle to the end of the nineteenth century. The early history of judicial review in Ceylon and British Guiana was important to the research also as both Colonies regarded Roman-Dutch law as their common law and the political history of both colonies was similar to that of the Cape. The influence of English law on these colonies especially in the area of judicial review make the history of the subject in these colonies an important area for comparative study.

The history and development of the (then) English prerogative writ of certiorari was reviewed from medieval times until the end of the nineteenth century. The principal features of the remedy during the latter half of the nineteenth century were examined and compared with those of the inherent review jurisdiction of the Cape Supreme Court. While similarities between the two remedies indicate the influence of the English prerogative writ there are essential differences which make the English remedy an unlikely direct source of the remedy at the Cape.

The history and development of judicial review in Ceylon and British Guiana was then examined. For practical purposes reference to the New Law Reports of Ceylon are designated NLR (Cey) to avoid any confusion with the Natal Law Reports (NLR). These comparative areas of the law of Ceylon and British Guiana, coupled with aspects of the administration of justice and of the early civil procedure in those colonies, are interesting academically. Unfortunately they are of little value in the research for the origin of the remedy at the Cape.

As indicated in the thesis, there is little material on the law of British Guiana available in South Africa. It would appear that there is not one set of the law reports of the Supreme Court of that former colony (LRBG) available for research. Fortunately most of the research regarding the law of British Guiana could only be done by the writer in England during 1979. It was not possible to check the correctness of certain authoritative texts nor case citations.

CHAPTER NINE.

THE DECIDED CASES AT THE CAPE (1834 - 1890).

An important factor in the research which emerged clearly was that the remedy was unknown at the Cape in 1834. Yet by 1890 the existence of the remedy and its (embryonic) basic features were acknowledged by the Court as a remedy to test the validity of administrative action (Van Ryn & Co v Licensing Court of Cape Town (1890) 7 SC 295). The remedy was not the result of legislation. The question must then be asked, if the remedy did not come to the Cape Supreme Court through the Roman-Dutch common law nor was it directly adopted (or adapted) from the contemporary English law, was the remedy the result of judicial creativity?

This chapter is devoted to an analysis of the decided cases of the Cape Supreme Court, both reported and unreported. Investigation into the post - 1881 cases of the Cape Supreme Court and of the High Court of Griqualand showed that the Court based its assumption of review jurisdiction largely on an unreported earlier case of Kannemeyer v Rivers allegedly decided in 1866.

The search for the records of this seminal case in the National Archives was long and difficult. First, the year cited by subsequent courts for the case was erroneous - Kannemeyer v Rivers was not heard in 1866 but in 1869. Secondly, no general index of cases heard by the Cape Supreme Court exists nor is there a general annual index. There is a manuscript index attached to the relevant bound annual volumes but this index is not reliable. Frequently in regard to cases heard on motion only the name of the applicant appears. Frequently this proved to be insufficient. Ultimately this vital case was discovered in one of the bound volumes for the year 1869. What was of the greatest importance was that the Court did not acknowledge its review jurisdiction and act in accordance therewith in favour of the applicant, as was alleged in the subsequent cases - the application was dismissed!! As there was no written judgment, save as to the order dismissing the application, a further search to find out whether

the case was reported in the local papers at the time proved fruitful. The Court had clearly dismissed the application which was for a mandatory interdict, seemingly on the ground that the applicant had not established a case for its grant (Cape Argus 5 June 1869).

It would thus appear that the subsequent courts based their assumption of review jurisdiction largely on a false premise. On the other hand there was a need for the remedy. It is indeed strange that the subsequent courts did not examine the judgment in Kannemeyer v Rivers carefully. Another unreported case relied upon by the subsequent courts was the Clifton House (or Goderson) case. Despite considerable effort the writer was unable to trace this decision. The conclusion reached by the writer from an examination of the cases is that the remedy was the result of judicial creativity based on the erroneous belief that Kannemeyer v Rivers was authority for the assumption of the remedy.

Finally in this chapter the (1863) Privy Council decision of Long v The Bishop of Cape Town (1 Moore (NS) 411) was analysed. This decision was not referred to as an authority for its review jurisdiction by the Cape Supreme Court. None the less it would have provided a sounder basis for assuming the jurisdiction than the cases cited by the Court, erroneously or otherwise. It is significant that subsequent to the acknowledgment of its review jurisdiction by the Cape Supreme Court, the Natal Supreme Court cited Long v The Bishop of Cape Town as authority for its inherent review jurisdiction (Qiqqa v Shlangane (1891) 12 NLR 291 at 300).

CHAPTER TEN.

THE FINAL ANALYSIS.

This chapter may be seen as a summary of the findings and conclusions reached at each phase of the research. In the final analysis there would appear to be little doubt that the remedy is the result of judicial creativity or ingenuity. Further the remedy became cemented in our law as a result

of the doctrine of stare decisis and remains an essential remedy. Over the years its use has been extended and its features and nuances altered or adapted to meet changing socio-economic conditions.

CHAPTER ELEVEN.

THE REMEDY AS IT OUGHT TO BE.

Despite the extension of the remedy and the altering of its features, the remedy can be greatly improved. As stated in Chapter Five, if the defects in the remedy may be removed greater justice may be done. There is scope for the improvement of the efficacy of the remedy and its extension to provide relief in additional situations. If the origin of the remedy is the result of judicial creativity and its features (and limitations) have been established by the Court itself, then it lies within the power of the Court to improve the remedy. Six proposals for the improvement and extension of the remedy are made. These proposals or 'oughts' relate to:

- i) the right of an aggrieved party to be furnished with reasons for the decision a quo;
- ii) the 'delay rule';
- iii) the right to be heard in administrative proceedings and the 'functional approach';
- iv) an unreasonable act or decision as a ground for judicial intervention;
- v) an error of law as a ground for judicial intervention;
- vi) the extension of the remedy to certain company law situations.

CHAPTER ONE

The Inherent Jurisdiction of the Supreme Court as a Court of First Instance.

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CHAPTER ONE

THE INHERENT JURISDICTION OF THE SUPREME COURT AS A COURT OF FIRST INSTANCE

A BASIC MISCONCEPTION CONCERNING THE GENERAL JURISDICTION OF THE SUPREME COURT - THE SUPREME COURT IS A CREATURE OF STATUTE - THE GENERAL JURISDICTION OF THE SUPREME COURT IS DERIVED FROM LEGISLATION, THE COMMON LAW AND ITS INHERENT JURISDICTION - THE INHERENT JURISDICTION OF THE SUPREME COURT - THE REGULATION OF ITS PROCEEDINGS AND THE PREVENTION OF ABUSE OF ITS PROCESS - THE PROTECTION OF ITS DIGNITY, REPUTE AND AUTHORITY AND THE COMPELLING OF ITS LAWFUL ORDER - THE CONTROL AND SUPERVISION OF ITS OFFICERS - JUDICIAL REVIEW OF THE PROCEEDINGS OF ADMINISTRATIVE AUTHORITIES (AND VOLUNTARY ASSOCIATIONS) - REGARDING CERTAIN RELIEF GRANTED BY THE COURT AND ATTRIBUTED TO ITS INHERENT JURISDICTION - THE INHERENT JURISDICTION OF THE APPELLATE DIVISION - INFERIOR COURTS AND THE CONCEPT OF INHERENT JURISDICTION - A SUMMARY OF THE PRINCIPAL FEATURES OF THE INHERENT JURISDICTION OF THE SUPREME COURT AS A COURT OF FIRST INSTANCE - A COMPARATIVE VIEW OF THE INHERENT JURISDICTION OF THE COURT - ENGLISH LAW AND COMMONWEALTH LAW - THE INHERENT JURISDICTION OF THE SUPERIOR COURTS OF SRI LANKA - THE INHERENT REVIEW JURISDICTION OF THE SUPREME COURT OF SOUTH AFRICA.

Before proceeding to the subject of this thesis it is necessary to analyse fully the extent of the inherent jurisdiction of the Supreme Court of South Africa as a court of first instance. First however, a basic misconception regarding the term inherent jurisdiction must be clarified. The misconception concerns no less a fundamental area of our law than the general jurisdiction of the Supreme Court. We are informed that by reason of its inherent jurisdiction the Supreme Court "... may do anything which the law does not forbid ..."¹. In other words it is suggested that the general jurisdiction of the Court is derived from its inherent jurisdiction. This statement as to the jurisdiction of the Court is attributed to the judgment

of Innes CJ in Connolly v Ferguson². An examination of the judgment fails to reveal any such ruling by the learned Chief Justice, who stated:

"... but as we have laid down upon several occasions recently magistrates' Courts have no inherent jurisdiction, such as superior courts in this country possess. The jurisdiction of magistrates' Courts must be deduced from the four corners of the statute under which they are constituted ..."

This is a far cry from the notion that on account of its inherent jurisdiction the Court may do anything which the law does not forbid³. In a recent publication the misconception was further perpetuated by the following statement as to the law.

"... the various divisions of the Supreme Court effectively have an inherent jurisdiction. In other words, their jurisdiction is derived from the common law and the courts need not point to any statute to justify their existence in any particular case. In this regard the Supreme Court may be contrasted with the magistrates' courts, which can claim no authority which cannot be found within the four corners of their constituent Act."⁴

Much appears to be made of the fact that the Magistrates' Courts have been created by statute. The issue in Connolly v Ferguson (above) concerned the (inherent) power of a magistrate to attach debts due by third persons to a judgment debtor. The issue had nothing to do with the general jurisdiction of the Supreme Court and in any event the statement by Innes CJ, cited above, is no more than obiter dictum. From the second quotation it would appear that the term inherent jurisdiction is being used synonymously with the term common law - a further misconception⁵.

It is likely that these misconceptions may have arisen from a misunderstanding of the ancient English law principle that a superior court, on account of being a superior court, possesses all (judicial) powers necessary to function as such. Thus, in the early case Peacock v Bell & Kendal⁶ the Court held:

"and the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so..."

Regarding inferior courts, which may be described as courts of limited jurisdiction, the Court continued:

"... and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged."^{6a}

This principle of law is not as simplistic as it may appear. One of the major reasons for the principle is that the rule of evidence omnia praesumuntur rite esse acta (all acts are presumed to have been done properly and regularly)⁷ applied to superior courts only. Therefore it was unnecessary in proceedings before a superior court to allege that the court was possessed of jurisdiction. The issue in Peacock v Bell & Kendal (above) was whether a declaration issued out of the Court of the County Palatine of Durham was valid as it contained no allegation that the cause of action arose within the jurisdiction of that Court. The Court of the Queens Bench found that the Court of the County Palatine:

"... was an original Superior Court and therefore the declaration was good: but if it had been so in an Inferior Court, it had been bad."⁸

The omnia praesumuntur rule was not applicable to courts of limited jurisdiction i.e. inferior courts. A party who relied on the decision of such court was obliged to prove that the proceedings were within the court's jurisdiction⁹. This principle would appear to be the origin of the statement that the jurisdiction of superior courts is unlimited while inferior courts are limited by their enabling Acts. The notion of unlimited jurisdiction is separate and distinct from the notion of inherent jurisdiction possessed by superior courts. The learned Chief Justice in Connolly v Ferguson¹⁰ did not suggest otherwise. By the very nature of the case it is clear that his understanding of the inherent jurisdiction of superior court is not different from the meaning given below.

To revert to the general jurisdiction of our Supreme Court it is submitted that:

- (i) The Supreme Court is no less a creature of statute than is the magistrates court, (1.1)

- (ii) The general jurisdiction of the Supreme Court is not derived from its inherent jurisdiction alone. The Court owes its general jurisdiction to legislation, the common law and its inherent jurisdiction. (1.2)
- (iii) The inherent jurisdiction of the Court, which will be considered below, consists of those unwritten powers possessed by the Court which enable it to act in the exercise of its judicial function and includes its powers to control and protect its officers and to protect its dignity. The Supreme Court possesses these powers by virtue of being a 'superior court'; these powers are not derived from the common law nor from legislation. (1.3)

1.1 The Supreme Court is a creature of statute.

The Supreme Court of South Africa was established by the South Africa Act 1909¹¹ and reconfirmed by the Constitution of the Republic of South Africa Act 1961.¹² The South Africa Act 1909 provided that the Supreme Courts of the former colonies were to become the Provincial Divisions of the newly formed Supreme Court of South Africa with territorial jurisdiction extending throughout each respective Province.¹³ The Court of the Eastern Districts of the Cape, the High Court of Griqualand, the High Court of the Witwatersrand and the several circuit courts were to become the local divisions of the Supreme Courts having jurisdiction within their respective areas of jurisdiction.¹⁴ The Appellate Division of the Supreme Court, possessing an appellate jurisdiction only, was established and the Act further provided that all criminal and civil appeals which previously would have been made to the King-in-Council were to be made to the Appellate Division.¹⁵

Historically the Supreme Court of the Cape of Good Hope (Cape Supreme Court) is the most important. It was the first superior court to be established by England in Southern Africa and was the immediate successor to the Raad van Justitie which was established in 1654 by the Dutch East India Company. Apart from the fact that both were the highest judicial authority at the Cape during their respective periods of existence, they

had little else in common. In terms of the Charter of Justice 1834, the Cape Supreme Court was obliged to follow English judicial procedure. The introduction of the English judicial system was the logical conclusion to the adoption of the English law of evidence¹⁶. English criminal procedure had already replaced the Roman-Dutch procedure.¹⁷ The Charter provided further that the rules of civil procedure, the forms of practice and process of the new court were to be framed "... with reference to the corresponding Rules and Forms..." in use before the King's Courts at Westminster.¹⁸

The Supreme Courts of Natal¹⁹, the Transvaal²⁰ and the Orange River Colony²¹ were established by statute, as were the Court of the Eastern Districts of the Cape²², the High Court of Griqualand²³ and the High Court of the Witwatersrand.²⁴ The Charter of Justice 1834 and the statutes establishing the other supreme courts were subsequently repealed by legislation²⁵ which enacted the constitution and statutory jurisdiction of the Supreme Court of South Africa.²⁶

From the above there can be little doubt that the Supreme Court of the four Colonies were creatures of statute as is the Supreme Court of South Africa and its constituent divisions.

1.2 The general jurisdiction of the Supreme Court is derived from legislation, the common law and its inherent jurisdiction

As indicated above the Appellate Division possesses only an appellate jurisdiction and any reference hereafter to the Supreme Court is to the Provincial or Local Divisions as courts of first instance. In terms of the Supreme Court Act 1959,

- S.19 (1) (a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance

The jurisdiction as conferred by the enabling section is complimented by the following general enactment:

S.19 (3) The provisions of this section shall not be construed as in any way limiting the powers of a provincial or local division existing at the commencement of this Act, or as depriving any such division of any jurisdiction which could lawfully be exercised by it at such commencement.

The wording of section 19 (1)(a) is substantially similar to the enabling sections in the Charter of Justice and the statutes establishing the Supreme Courts of the former Colonies, more particularly the references to "... all persons residing or being in..." and to "... all causes arising..." The Appellate Division had cause to interpret a similar enabling clause relating to the Court of the Eastern Districts Local Division in the well known case of Steytler NO v Fitzgerald.²⁷ The section was held to confer jurisdiction upon the Court to entertain "any legal proceeding" instituted before it in respect of a defendant residing or being within its territorial area of jurisdiction. On the other hand S 19(3) specifically reserves to the Court all powers previously enjoyed by it, but not stipulated in the Act. This would include its common law and inherent powers. It is only in cases of a defendant not being subject to the statutory jurisdiction of the Court e.g. by not residing or being within the territorial jurisdiction that the common law principles of jurisdiction arise, more particularly, the doctrine of submission²⁸, attachment to found or confirm jurisdiction²⁹, the causa continentia rule³⁰, and the overriding doctrine of effectiveness³¹. In the final analysis it would appear that the Court's common law and inherent powers are confirmed by S 19(3) of the Supreme Court Act, thereby disproving any suggestion of the reverse position viz. [that the general jurisdiction of the Court is derived from its inherent jurisdiction³²].

1.3 The inherent jurisdiction of the Supreme Court as a court of first instance.

In the first instance the administration of justice lies in the hands of the State. In South Africa this has been delegated to the Supreme Court.³³ The jurisdiction of the Court, as a court of first instance, is set out in the Supreme Court Act 1959 and includes all powers possessed by the Court

prior to the Act.³⁴ This would include the common law powers of the Court and its inherent jurisdiction. This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, which enable the Court to act in accordance with justice and good reason. The inherent powers of the Court are quite separate and distinct from its common law³⁵ and its statutory powers e.g. in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court.³⁶ The inherent jurisdiction of the Court was defined by the Manitoba Court of Appeal as:

"... the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."³⁷

The superior courts in South Africa have long acknowledged being possessed of such inherent jurisdiction.³⁸ Before analysing the content of such jurisdiction it is apposite to consider the source thereof. The following facts tend to suggest that the notion of inherent jurisdiction, as exercised by our Supreme Court as a court of first instance, is derived from English rather than Roman-Dutch law. First, the very nature of the Supreme Court of South Africa is largely of English origin. The Cape Supreme Court, which was established by the Charter of Justice, was modelled on the lines of an English superior court. The rules of evidence³⁹ and the procedure⁴⁰ applied by the Court emanated from English law. The official language of the court was English.⁴¹ In other words the Cape Supreme Court was a superior court in terms of the English definition of the term with the inherent powers possessed by an (English) superior court of law. The notion of viva voce evidence tested by cross-examination together with all the nuances of an adversary system could not have been countenanced by an inquisitional Roman Dutch court with its emphasis on documentary proof of facts. Therefore the inherent powers necessary for the Court to function justly and reasonably as an adversary type court would appear to be derived from English rather than Roman-Dutch law. Secondly, the notion of inherent jurisdiction and the powers exercised in connection therewith by the Court as a superior court is substantially similar to that applied by

English and Commonwealth superior courts and their understanding of the notion of such jurisdiction^{41a}. While it is likely that the Roman-Dutch superior courts of the Netherlands exercised an inherent jurisdiction, an examination of the leading authorities fails to reveal any positive proof as to an inherent jurisdiction as articulated by the English courts. Although Merula indicates that the judicial power (of the State) i.e. the administration of justice is exercised through the jurisdiction possessed by the judges⁴² this should not be equated with the notion of an inherent jurisdiction enjoyed by the Court on account of its status as a superior court.

Perhaps the strongest argument militating against the inherent jurisdiction of the Court being derived, even partly, from Roman-Dutch law is that judicial powers inherited or adopted from Roman-Dutch law are regarded as principles or rules of common law and are expressed as such by the Court. A recent example is the adoption of the causa continentia rule by the Appellate Division in Roberts Construction Co Ltd v Wilcox Bros (Pty.) Ltd.⁴³ The rule (lit. the principle of continuity) was practised in the superior courts of the Netherlands. A causa continentia situation may arise only where a number of suits between the same parties flow or continue from a main claim or suit. The supreme court which enjoys jurisdiction over the main claim, by virtue of the rule, may accept jurisdiction over claims, continuing or flowing from such main claim, which otherwise would be beyond its territorial jurisdiction. The raison d'être for the rule is the avoidance of a multiplicity of suits with the possibility of conflicting decisions. The Appellate Division recognised this rule as a valid and binding common law rule. No reference to inherent jurisdiction was made by the Court.

All principles or rules of Roman-Dutch law, substantive or procedural, which have been recognised as binding on our courts are regarded as being part of our common law. Save for the two exceptions considered below, the writer has been unable to trace any other rule or principle, or indeed any procedural rule originating from Roman-Dutch law which is referred to as part of, or extending to, the inherent jurisdiction of the Court. The two exceptions are to be found first, in Weinerlein v Goch Properties Ltd.⁴⁴ in which case Wessels JA erroneously referred to what is clearly the exceptio doli as the inherent equitable jurisdiction of the Court. This

case is considered more fully below.⁴⁵ The second exception is to be found in Ex parte Millsite Investment Co (Pty.) Ltd.⁴⁶ In this case Vierya J, in seeking jurisdiction in order to remove certain onerous title deed conditions, ruled that the Court is possessed of inherent (conveyancing) powers derived from the Roman-Dutch courts. This case, too, is considered more fully below.⁴⁷

The dichotomy between common law rules and inherent powers was recognised by Hiemstra AJP in De Wet and Others v Western Bank Ltd.⁴⁸ The learned judge acknowledged the distinction between the common law power of the Court to rescind its own judgment granted by default and the inherent power enjoyed by the Court to order such rescission.⁴⁹ Rescission of judgment under the common law is founded on the Praetorian restitutio in integrum and referred to in Roman-Dutch law as relief or herstelling.⁵⁰ On the other hand the inherent jurisdiction is based on the power of the Court to prevent abuse of its process and the regulation of its proceedings.

The inherent powers of the Court are diverse and cover a wide range of circumstances concerning as they do the independent regulation by the Court of its functions in accordance with justice and good reason. For the purpose of the analysis, contained hereinafter, the inherent powers have been classified under the following headings:

- (a) The regulation of its proceedings and the prevention of an abuse of its process (1.3.1);
- (b) the imposition of sanctions for the impairment of its dignity or for failure to comply with its lawful order (1.3.2);
- (c) the control and supervision of its officers (1.3.3);
- (d) the control, supervision and regulation or the review of the proceedings of administrative authorities (and voluntary associations) (1.3.4).

These headings may be considered as being convenient rather than definitive as there is a degree of overlapping, e.g. the term abuse of process is used frequently in judgments relating to the regulation of judicial pro-

ceedings. As a result both will be considered under the first heading. A further problem militating against precise definition is that relief granted by the Court, e.g. the staying of proceedings or contempt proceedings is not limited to any particular classification or circumstance.

Before considering the content of the respective headings it is apposite to consider the effect of legislation in the form of statutes or rules of Court in relation to the Court's inherent jurisdiction. Many aspects relating to the Court's inherent jurisdiction are today the subject of legislation. The Court is always obliged to give effect to an act of Parliament.⁵¹ But in regard to subordinate legislation in the form of rules of court or like regulations, the Court is not so bound. While it will generally follow the rules of court where these are applicable, under the appropriate circumstances the Court may act contrary thereto.⁵²

Apart from its powers conferred by legislation, the Court enjoys an inherent power to grant relief not specifically provided for in the rules of court.⁵³ On the other hand where necessary, e.g. to prevent an abuse of its process or to avoid an injustice if rules of court are followed to the letter, the Court may (and has) acted contrary to such rules. In Federated Trust Ltd. v Botha^{53a} the Appellate Division held that it does not encourage formalism in the application of the Uniform Rules of Court. Van Winsen AJA, expressing the view of the Court, held that:

"... the rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts..."

After reviewing, the authorities, a full bench of the Transvaal Court in the earlier case of Moluele and Others v De Schatelets NO. found that:

"... the Court has not hesitated to relax the provisions of other Rules, even where peremptory in form, when necessary in the interests of justice."⁵⁴

On the other hand in Western Bank Ltd. v Packery,⁵⁵ Coetzee J found that any departure from the Rules by the Transvaal Court related only to:

- (i) an extension of time for the doing of an act;
- (ii) condonation of irregularities or non-compliance with the Rules.

While the view of the learned Judge may be a correct factual representation of cases decided by the Transvaal Court, it is unfortunately a narrow interpretation of the inherent powers of the Court. Under the appropriate circumstances it is submitted that the Court will depart from the Rules of Court in other than the two types of cases mentioned by him. The recent English case of Steward Chartering Ltd. v C & O Managements SA⁵⁶ is illustrative of the Court's power in the exercise of its inherent jurisdiction. The court ordered the continuance of an injunction in breach of its own peremptory rules of court. Had it not done so a clear injustice to the plaintiff would have resulted.

1.3.1 The regulation of its proceedings and the prevention of abuse of its process

While these functions are distinguishable they may overlap, particularly regarding cases where the Court regulates its proceedings to prevent an abuse of its process. None the less the Court has the inherent power to regulate its proceedings other than when an abuse of its process may occur. The Court may exercise such power:

- (a) for the more efficient administration of its judicial functions e.g. it may order informal meetings in order to settle the cause-list of dates for the hearing of trials in the presence of the Registrar and the legal representatives of the parties,⁵⁷ it may give directions regarding the manner of preparation of pleadings and other documents;⁵⁸
- (b) maintaining the dignity and decorum of the Court e.g. it may give directions as to manner of dress of the parties and their witnesses;
- (c) to bring about fairness and justice during the course of a trial or other hearing e.g. by protecting a witness against abusive and over-bearing cross-examination by counsel. In spite of the accepted traditional rules it may allow counsel a further opportunity of addressing it before judgment is given.

These examples are not exhaustive but serve to illustrate the inherent power of the Court in maintaining its dignity and the just and efficient administration of its functions.

In regard to litigation the Court has exercised its inherent powers in many cases including the following: to order further particulars;⁵⁹ to allow the Registrar to act as a stakeholder pending settlement of a dispute;⁶⁰ to revive a superannuated provisional sentence summons;⁶¹ to rescind a default judgment not falling under the Rules of Court;⁶² to permit joinder of defendants;⁶³ to order a party to produce documents for inspection not referred to in his discovery affidavit and also to produce for inspection items of machinery;⁶⁴ to condone the late filing and non-compliance with Rules of Court where principles of justice and fair play demand an order to avoid hardship to a party;⁶⁵ to control its own proceedings by refusing to accept unnecessarily prolix affidavits in Rule 43 proceedings;⁶⁶ to grant a peregrinus relief to sue in forma pauperis.⁶⁷

One of the most interesting of the cases in which the Court exercised its inherent jurisdiction to avoid an injustice to the parties concerned is Liebowitz and Others v Schwartz and Others.⁶⁸ In this case the plaintiffs instituted action for the setting aside of a will. It is trite that any plaintiff seeking such relief is obliged to join all beneficiaries as defendants. In this case one of the beneficiaries was a foreign State. It is an acknowledged principle of international law that a foreign State may not be impleaded before the Court. The Court, per Nicholas J, held that procedural rules must yield to principles of international law. This would have meant that the plaintiffs would be unable to proceed with the action. In order to prevent such injustice the Court in the exercise of its inherent jurisdiction ordered a notice of motion to be served on the foreign State. This would give the latter an opportunity of being joined if it so wished. In the event of its choosing not to be joined, the Court held that it was prepared to proceed with the matter in its absence. The learned judge stated that:

"... The Court has an 'inherent power to grant relief where an insistence upon exact compliance with a Rule of Court would result in a substantial injustice to one of the parties'... The Court must in my view similarly have power to grant relief where it is concerned not

with a Rule of Court, but with a rule of practice - even in a case, it seems to me with great respect, where the rule of practice has been declared by the Appellate Division."⁶⁹

The term 'abuse of process' suggests the employment of the judicial process for purposes other than for which it was intended. In other words it is the use of the judicial process for a mala fide or ulterior motive. The Court is not prepared to countenance such practice and in the exercise of its inherent jurisdiction may refuse to entertain proceedings which it considers vexatious or frivolous.⁷⁰ The Appellate Division upheld the decision of a Provincial Division in refusing to consider an exception to a plea noted for the purpose of delaying the action. De Villiers JA, in the Appeal Court stated that:

"... to allow such a procedure would be a very grave abuse of the machinery of the Court which cannot be tolerated..."⁷¹

In Corderoy v Union Government⁷² the Appellate Division found that persistently repeated litigation in respect of the same cause of action by the same plaintiff against the same defendant is vexatious and that, by virtue of its inherent jurisdiction, the Court is empowered to prohibit further litigation between the parties. In the interests of justice the Court does not absolutely bar the plaintiff from instituting such proceedings, but obliges him to obtain leave initially from the Court in order to proceed again.⁷³ In another case the Court stayed an action for damages at the instance of the Attorney-General as the case would have the effect of intimidating the defendants who were material witnesses in a criminal case.⁷⁴ Apart from merely staying proceedings which it considers vexatious or an abuse of its process the Court may dismiss any unfounded action of any mala fide or frivolous defence.⁷⁵

The Court will not lightly exercise its inherent power to stay or dismiss proceedings as such action may deny the parties the fundamental right of access to the Court.⁷⁶ The Court has indicated that its inherent jurisdiction, more particularly its inherent power to stay or dismiss proceedings, is for purposes of preventing abuse of its process and/or regulating its proceedings and in so doing avoiding injustice and inequity and should not be seen merely as a means to further abstract ideas of justice and

equity.⁷⁷ The Court, too, has stated that it will not exercise its inherent jurisdiction to refuse to entertain a matter simply because another forum, e.g. the magistrate's court, would be more convenient or less expensive to the litigants. Under such circumstances the Court has held that it should exercise its discretion in regard to costs.⁷⁸ Finally, under the same heading are those cases in which the Court has exercised its inherent power to prevent an abuse of its process and subsequent injustice where no fault may be attributed to the parties before the Court. Thus in Head v Woolastan & Another⁷⁹ in the exercise of its inherent powers the Court ordered the stay of a sentence of imprisonment imposed by a magistrate. The order was made pending the result of an application to be made to the Appellate Division for leave to appeal against dismissal of review proceedings. Also in the exercise of its inherent power, the Court has set aside its own judgment founded on a total misconception of the facts⁸⁰ and on a grave mistake of law.⁸¹ In Grasop v Estate Levy⁸² the Court, resorted to its inherent powers to correct a serious error regarding jurisdiction by a magistrate. In this case the defendant had successfully excepted to the jurisdiction of a particular magistrate's court. Although he had upheld the exception the magistrate had awarded costs against the successful excipient. The latter had instituted review proceedings in regard to the order of costs. The unsuccessful plaintiff did not oppose the application for review. However the Court when considering the matter came to the conclusion that in the first instance the Magistrate had erred in upholding the exception. Although the exception per se was not before the Court, it set aside the original order and substituted in its place an order dismissing the exception with costs. The Court held that it possessed the inherent power "... to put the case in its true position". These examples are not exhaustive.

From an examination of the cases cited, regarding this aspect of the Court's inherent jurisdiction, there is little doubt that the Court has leaned heavily on English authorities.

1.3.2 The protection of its dignity, repute and authority and the compelling of its lawful order.

Despite any legislation on the subject the Court possesses inherent power to punish persons for the impairment of its dignity (and repute) and to

compel the observance of its lawful order. These powers are essential for the effective administration of justice. The distinction between criminal and civil contempt of court is relevant to this section; more particularly the wilful violation of its dignity, repute and authority amounts to criminal contempt,⁸³ while civil contempt may be seen as the intentional and/or mala fide disregard or refusal by a party to comply with its lawful order.⁸⁴ But, as will be observed below, not all orders of court carry the threat of committal for contempt in its wake, e.g failure to comply with a procedural interlocutory order. It would be convenient at this stage to consider first criminal contempt.

Criminal contempt of court may be committed in facie or ex facie curiae. Contempt in facie curiae must take place in or near the Court⁸⁵ and during its sitting.⁸⁶ Contempt in facie curiae is punished summarily by the Court.⁸⁷ The following are some examples of the offence; appearing in court drunk;⁸⁸ a witness remaining in court after witnesses had been ordered to leave;⁸⁹ an advocate accusing the court of recording evidence incorrectly and then refusing to apologise;⁹⁰ an attorney unjustifiably accusing a magistrate of bias and insisting he recuse himself.⁹¹

Contempt ex facie curiae are those acts of contempt committed other than in facie curiae. Such acts are not tried summarily. The accused may be summoned or indicted to appear before an ordinary criminal court or the offender may be ordered on motion to show cause in the Supreme Court why he should not be committed for the alleged contempt.⁹² Examples of ex facie curiae contempt are writings or comments calculated to bring the administration of justice into contempt;⁹³ simulating the process of the court or pretending to be an officer of the court;⁹⁴ writings or comments which are calculated to prejudice pending judicial decisions.⁹⁵

An abuse of the judicial process may lend itself to contempt proceedings. This would appear to be the situation in English law today⁹⁶ although such acts may be confined to the following:⁹⁷

- (a) acts which involve the forging or altering of any judicial process;
- (b) acts which involve falsehoods intended to deceive the court;
- (c) acts which misuse the process thereby prejudicing other persons.

It would appear that in the past the English courts used contempt proceedings to punish any abuse of its process. In 1565 the Court in Milward v Weldon⁹⁸ fined a litigant the sum of £10, (a huge sum in those days), for filing too prolix a replication, (it was some sixty pages long). Apart from the fine the unfortunate litigant was ordered to be brought by the Warden of the Fleet:

"... into Westminster Hall on Saturday next about ten of the clock in the forenoon, and then and there shall cut a hole in the myddest of the same engrossed replication, which is delivered unto him for that purpose, and put the said Richard's head through the same hole, and so let the same replication hang about his shoulders with the written side outward, and then the same so hanging, shall lead the same Richard, bareheaded and bare-faced, round Westminster Hall whilst the Courts are sitting, and shall show him at the bar of the three Courts within the Hall."⁹⁹

Civil contempt, on the other hand, may be seen as the intentional and/or mala fide disregard or refusal by a party to comply with a lawful order of court. Although compelling a defaulting party to comply with the order of court may be regarded as a method of execution,¹⁰⁰ civil contempt should be seen as being of a quasi-criminal nature carrying with it penal consequences.¹⁰¹ As has been indicated above it is only a failure to comply with certain orders that will bring contempt proceedings in its wake. The subject of a lawful order ad factum praestandum only may be the subject of contempt proceedings.¹⁰² There is no precise definition of such order but it may be described as any order of court other than a procedural or interlocutory order, or an order for the payment of a sum of money, i.e an order ad pecuniam solvendum.¹⁰³

This explanation is further complicated by the fact that certain orders to pay sums of money are not considered by the court to be orders ad pecuniam solvendum, more particularly, maintenance and/or contributions towards costs in matrimonial and possibly paternal suits.¹⁰⁴ Examples of orders ad factum praestandum are interdicts restraining a party from doing some act¹⁰⁵ or ordering a party to perform some act;¹⁰⁶ an order to pass transfer of a property;¹⁰⁷ an order to furnish accounts of a partnership;¹⁰⁸ an

order upon an executor to pay costs de bonis propriis;¹⁰⁹ an order not to participate or hold an interest in a particular type of business, etc.¹¹⁰

In the past there was some contention as to whether contempt of court was recognised by the Roman-Dutch courts of the Netherlands¹¹¹ and that it found its way into South African law through English law.¹¹² It is trite that contempt of court was recognised in ancient English law¹¹³ but on the other hand there appears to be little doubt that the offence was known also in Roman-Dutch law.¹¹⁴ The distinction between criminal and civil contempt would appear to originate from English and not Roman-Dutch law.¹¹⁵ The procedure regarding committal for contempt as followed in South African law is of English origin.¹¹⁶ The dichotomy between criminal and civil contempt and the reliance on English authorities on the topic is another consequence of the establishment at the Cape, and elsewhere in South Africa, of an English form of superior court and the employment of the English adversary system. The inherent jurisdiction of the court, including its inherent powers to commit for contempt are powers enjoyed by an English superior court and is a jurisdiction which devolved naturally on the Cape Supreme Court (and the other supreme courts of the four (pre-Union) Colonies).

Apart from its inherent powers to commit for contempt in cases where its order is disregarded, the court has the inherent jurisdiction to postpone, stay or dismiss proceedings. Thus where the plaintiff has failed to comply with an order ad factum praestandum or an interlocutory order the court may postpone the matter.¹¹⁸ The court too may stay proceedings pending the payment by the plaintiff or applicant of the costs of former proceedings.¹¹⁹ The court also has the inherent power to dismiss an action or grant default judgment where its order to furnish further particulars has been ignored¹²⁰ and where a party has failed to furnish security for costs¹²¹. These examples are not exhaustive.

Finally in regard to contemptuous behaviour in court or the failure by persons in court to comply with an order from the bench, e.g. to keep silent, etc., the Court may, instead of committing offenders for contempt, adjourn the case or order persons to leave the court building.¹²²

1.3.3 The control and supervision of its officers.

Despite current legislation concerning most aspects of the subject, the Court retains the inherent power to control, supervise and protect its officers when such legislation is silent or where in the opinion of the Court it would be appropriate to do so. For the purpose of this section the term 'officers of the court' includes advocates, attorneys, such officials whose duties are directly involved in the functions of the Court and includes the Registrars of the Courts, State prosecutors, interpreters, clerks and court orderlies, the sheriff and his deputies, the Master of the Supreme Court, the Registrar of Deeds¹²³ their duly appointed assistants, curators, trustees, liquidators and like officials duly appointed by the Court. It would appear that despite comprehensive legislation regarding legal practitioners¹²⁴ the reported cases relating to the Court's inherent powers to control and supervise its officers relate in the main to attorneys and, to a lesser extent advocates.

In Pesskin v The Incorporated Law Society¹²⁵, a case concerning an application by an advocate for admission as an attorney, the Court held:

"It was argued that the applicant's case may be a hard one and, although well-qualified, his case is not covered by the Act and he must therefore start articles de novo... I would be prepared to assume jurisdiction under the inherent jurisdiction of the Supreme Court to come to the applicant's relief... This Court has wide powers over its own officers and potential officers. If a person has all the necessary professional and academic qualifications the Court may still decide not to admit him as an attorney. Similarly... if this Court is of the opinion that a person is well qualified to be admitted, but his case is not specifically covered by the existing legislation, I can see no reason why the Court should not assume jurisdiction and admit such an applicant."¹²⁶

This inherent jurisdiction of the Court extends inter alia to regulating the conduct of attorneys and prescribing general rules to practice¹²⁷ to condoning non-compliance of rules regarding procedure for admission;¹²⁸ mero motu ordering a practitioner to show cause why he should not be struck

off the roll for misconduct;¹²⁹ re-admitting an attorney previously struck off the roll for misconduct.¹³⁰ Van Zyl cites the unreported case of a notary who applied for his name to be removed from the roll. During the hearing it came to the attention of the Court, that the applicant had been convicted of 'embezzlement' and had been sentenced to twelve months hard labour. The Court refused the application and ordered the applicant to show cause why he should not be struck off the roll on account of the conviction. The applicant was thereafter struck off the roll.¹³¹

The Court exercises its inherent power over advocates in a similar manner as it does over attorneys. In Ex Parte Christodolides,¹³² the Court came to the relief of an applicant for admission to the Bar in much the same way as it assisted the applicant in Pesskin v Incorporated Law Society above.¹³³ Although this case concerned a rule regarding admission to the Bar which the Court found ultra vires, the Court exercised its inherent jurisdiction which it compared with its statutory powers.¹³⁴ In Society of Advocates of Natal and Anor. v Knox and Others,¹³⁵ the Court held that in the exercise of its inherent jurisdiction over practitioners it may strike an advocate from the Roll of Advocates for misconduct. The applicant, in this case the Society of Advocates, was a purely voluntary association.¹³⁶ The various decisions referred to above cited authorities from both Roman Dutch law and English law. Many of the references relate to English cases and refer to English text books on professional practice while others refer to classical Roman Dutch authorities.

The English court has, in the exercise of its inherent jurisdiction, punished persons who have interfered with officers of court in the exercise of their duties.¹³⁷ This jurisdiction was seen by Bowen LJ in the following terms:

"The law has armed the High Court of Justice with the power and imposed upon it the duty of preventing brevi manu and by summary proceedings any attempt to interfere with the administration of justice... The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom..."¹³⁸

This protection has in English law been extended to solicitors,¹³⁹ to sheriffs or their deputies;¹⁴⁰ liquidators and sequestrators¹⁴¹ and admiralty marshals.¹⁴² It is submitted that in South African law where such acts of interference are not protected by legislation the Court in the exercise of its inherent jurisdiction will act accordingly and commit offenders with contempt proceedings.¹⁴³

Finally there are the instances where the Court has protected practitioners and in exercising its inherent jurisdiction punished persons who have unlawfully held themselves to be attorneys, etc.¹⁴⁴ Such conduct is today a criminal offence.¹⁴⁵ None the less if any person should commit an act encroaching on the rights or duties of practitioners and other officers of the court, which are not the subject of legislation, there is little doubt that the Court may intervene by way of its inherent powers.

1.3.4 Judicial review of the proceedings of administrative authorities (and voluntary associations).

This is the subject of the thesis. The origin of the remedy is attributed by the Court to its inherent jurisdiction. As indicated elsewhere in this work the locus classicus on the subject is Johannesburg Consolidated Investment Co v Johannesburg Town Council (hereafter referred to as the JCI case)¹⁴⁶. In that case Innes CJ held that the remedy is not created by legislation '... it is a right inherent in the Court...'¹⁴⁷ The relevant portion of this vital judgment is set out below in full.¹⁴⁸ The judgment has been cited with approval by the Appellate Division¹⁴⁹ and has been followed frequently, without question as to its correctness or otherwise, by the various divisions of the Supreme Court. The subject will be considered below inter alia after further examination of the Court's general inherent jurisdiction.¹⁵⁰

1.4 Regarding Certain Relief granted by the Court and attributed to its Inherent Jurisdiction

From time to time the Court has granted relief which it has attributed to its inherent jurisdiction. The employment by the Court of the term 'inherent jurisdiction' in certain cases is considered by the writer to be erroneous. The relief in those circumstances is not a necessary ancillary

to the Court's function as a superior court of justice but appears to be founded on principles of common law. Relief is granted sometimes where no substantive remedy is available and would appear to be founded on the principle 'ubi jus ibi remedium'.¹⁵¹

First are those powers enjoyed by the Court as the upper guardian of all minors.¹⁵² There is some suggestion that the Court exercises an inherent jurisdiction by reason of such common law status.¹⁵³ According to Spiro these inherent powers concern such matters as the judicial authority to permit the marriage of minor,¹⁵⁴ the consent to the alienation or hypothecation of a minor's immovable property etc.¹⁵⁵ It is submitted that these powers are based on the common law and do not concern the Court's inherent jurisdiction. If the leading judicial decisions regarding the above topics are examined, it will be found that the relief granted by the Court emanates from the common law, certainly the Court does not suggest otherwise.¹⁵⁶ In cases of children being declared 'children in need of care' by a Child Commissioner in terms of the Children's Act 1960¹⁵⁷, the Court has held that by the virtue of its inherent review jurisdiction it is competent to review proceedings leading to such orders.¹⁵⁸ The inherent review jurisdiction thus entertained by the Court is not founded on its status as the 'upper guardian of all minors'. It is the same power described by Innes CJ in the JCI case as the inherent review jurisdiction of the Court.¹⁵⁹

Another example of the erroneous use of the term inherent jurisdiction by the Court may be found in Weinerlein v Goch Properties Ltd.¹⁶⁰ This case concerned an application for rectification of a written deed of sale of immovable property. The written contract did not set out the original oral terms agreed between the parties and which the parties had intended to include in the contract. As a result, the defendant acquired certain rights to which it was not entitled. The Appellate Division ordered the rectification, Wessels JA stating:

"...It is therefore clear that under the civil law the Courts refused to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law. This inherent equitable jurisdiction of the Roman Courts (and of our Courts) to refuse to allow a particular plaintiff to enforce an unconscionable claim against a particular defendant where under the special circumstances it

would be inequitable, dates back to remote antiquity and is embodied in the maxim "summum jus ab aequitate dissidens jus non est"... the Court will not allow it to be used as an instrument of fraud... and in order to prevent this it (the court) will cause the written contract and the register to be rectified. I think this right is an inherent right of our courts and is well within their traditional equitable jurisdiction..."
(my italics) 161

Examined in isolation this judgment would appear to suggest that the Court possesses an inherent equitable jurisdiction. However, from the concurring judgment by Kotze JA it becomes clear that the 'so called' inherent equitable jurisdiction is nothing more than principles of substantive common law.¹⁶² Nowhere in his judgment does Kotze JA use the term inherent jurisdiction. The assertion by Wessels JA is offset by Kotze JA who cited the well known statement by De Villiers CJ in Mills and Sons v Benjamin Bros:¹⁶³

"Now it is quite true that this Court is a Court of Equity only so far as it is consistent with the principles of Roman-Dutch law."

From the various terms used by Wessels JA and the tenor of his judgment there seems little doubt that he is referring to the actio doli. The use of the term inherent jurisdiction (which the learned Judge of Appeal combines and equates with equitable jurisdiction) is erroneous.

An example of a case in which the Court erroneously used the term inherent jurisdiction in order to grant relief where no specific remedy existed may be found in Ex parte Millsite Investment Co (Pty.) Ltd.¹⁶⁴ This interesting case concerned an application for the removal of certain township conditions pertaining to certain sites owned by the applicant. In terms of the proclamation of approval of the township the use of the particular sites was confined to special residential purposes, general residential purposes and to a motor garage.¹⁶⁵ The owner wished to erect blocks of flats on the sites, contrary to the township conditions. The Administrator

of the Transvaal, the Township Board and the local authority had no objection to the removal of the township conditions subject to certain other conditions which are not relevant here.

The application was heard by Mr Justice Vierya who found that there was no statutory provisions providing for the removal of such conditions. The learned Judge traced the history of land registration and allied matters to Roman-Dutch law. In terms of a placaat issued by Charles V in 1529 all sales, transfers, mortgages, etc. of any house, land, leases of any immovable property (hereinafter referred to as conveyancing powers), were to be approved by the appropriate Court.¹⁶⁶ In other words what today is the jurisdiction of the Registrar of Deeds was then a function of the Court. This system was brought by the early colonists to the Cape where all title deeds and matters pertaining thereto were registered before a judge (commissioner) of the Raad van Justitie. It was only under the British rule that these functions were transferred to special registration authorities. The learned Judge found that as matters relating to the registration of title deeds were originally judicial functions the Court retained an inherent jurisdiction in regard thereto.¹⁶⁷ Factually neither the Courts in the Netherlands nor the Raad van Justitie at the Cape exercised conveyancing powers by virtue of an inherent jurisdiction. In so far as these Courts were concerned, conveyancing powers were controlled by legislation. The Cape Supreme Court was not a successor in title to the Raad van Justitie nor did the Cape Supreme Court inherit such conveyancing powers. Further, sight should not be lost of the fact that the Cape Supreme Court was modelled on the lines of an English Supreme Court, which court enjoyed minimal conveyancing powers. If the description of inherent jurisdiction, as set out above,¹⁶⁸ is accepted then the Court enjoys no inherent jurisdiction regarding conveyancing.

The applicant in the Millsite case would have been remediless had the relief sought not been granted. It is suggested that the learned judge applied the maxim 'ubi jus ibi remedium' and relying on earlier authorities regarding conveyancing matters¹⁶⁹ he granted the necessary relief. The term 'inherent jurisdiction' would appear to be an erroneous foundation for the decision. It should be noted, too, that the application was not

opposed. Finally it is submitted that any conveyancing power possessed by the Court is derived from the common law as is, for example, the causa continentia principle of common law by which the Court is able to extend its jurisdiction.¹⁷⁰

These examples are not exhaustive, on various occasions the Court has granted relief based on common law principles which it has (erroneously) referred to as its inherent powers. For example, in Marais v Smit¹⁷¹ the Court held that by virtue of its inherent jurisdiction it was competent to consider and grant orders of perpetual silence. In R. v Thompson¹⁷² the Court found that by virtue of its inherent jurisdiction it was able to consider the validity of a Provincial Ordinance.¹⁷³ These cases illustrate the erroneous use of the term inherent jurisdiction. It would appear too, at least in certain of these cases, the term has been equated with unwritten law.

1.5 The Inherent Jurisdiction of the Appellate Division.

Although it may appear beyond the scope of this research project, the subject is of importance, as it not only makes an interesting contrast with the inherent jurisdiction exercised by the Supreme Court as a court of first instance, but is helpful also in isolating what may correctly be described as the inherent powers of the Court. The study is apposite, too, in that the dichotomy between inherent powers and prerogative powers is clearly shown.

As with the Provincial and Local Division, the Appellate Division was created by statute.¹⁷⁴ The Appellate Division possesses only an appellate jurisdiction. It is the highest court in the Republic and its decisions are binding on all other courts. The Appellate Division is bound by its own judgments unless they are subsequently found to be per incuriam.¹⁷⁵

There can be little doubt that the Appellate Division enjoys an inherent jurisdiction:

- (i) To prevent an abuse of its process.¹⁷⁶

- (ii) To regulate its own proceedings, e.g. by condoning a failure to comply with its rules. While today condonation of any failure to comply with its rules may be condoned by the Court in terms of its rules,¹⁷⁷ there are cases where the Court condoned such failures before the relevant (condoning) rule was promulgated. For example in Halliwell v Johannesburg Municipality¹⁷⁸ the Court dispensed with the necessity of the filing of security, and in Foxon v Foxon¹⁷⁹ the Court ordered a contribution towards the costs of appeal. The Appellate Division has regulated its proceedings other than by way of framing rules. In the past the Chief Justice has circulated instructions regarding matters of procedure before the Court.¹⁸⁰
- (iii) To rectify its own ambiguous judgments or orders.¹⁸¹
- (iv) Within the terms of relevant legislation to control and regulate the conduct of its officers and the grounds for their removal from the roll for misconduct. Further the Court may regulate the terms for the readmission of legal practitioners removed from the roll on account of misconduct.¹⁸²
- (v) To grant bail pending its decision in a criminal appeal.¹⁸³
- (vi) To punish persons impairing its dignity.¹⁸⁴

These powers it is submitted, are enjoyed by the Appellate Division by reason of its being a superior court and are necessary or incidental to its functioning as such.

The Appellate Division does not enjoy the inherent power to review the proceedings of administrative authorities. This inherent power, if it is an inherent power, is denied the Court by reason of its enjoying only a appellate jurisdiction. An anomalous situation arises in regard to contempt proceedings. In convicting an accused for contempt against it, the Appellate Division is functioning as a court of first instance. However erroneous or unjust the conviction the accused has no right of appeal.^{184a}

The Appellate Division enjoys no jurisdiction to review the proceedings of any superior court.¹⁸⁵ This means that unless an aggrieved party brings a matter before it by way of appeal the Court has no jurisdiction.¹⁸⁶ In criminal cases, too, the Appellate Division has no (inherent) jurisdiction to review any matter, which may not be brought before it by way of appeal,¹⁸⁷ special entry¹⁸⁸ or an appeal on a point of law reserved¹⁸⁹, even to prevent a miscarriage of justice. In R. v Milne and Erleigh (6)¹⁹⁰ in response to an application to review the proceedings of a superior court (the Witwatersrand Local Division) by virtue of its inherent jurisdiction, the Court, per Centlivres JA held:

"...Prior to the decision in Rex v Kalogeropoulos 1945 AD 38, the jurisdiction of this Court to entertain an application for special leave to appeal in criminal cases heard by a superior court was described as "inherent", "assumed" or "extra-statutory" (vide Rex v Kalogeropoulos (supra) at p. 43). In that case it was pointed out by Watermeyer, CJ, that in Rex v Didat 1913 AD 299, this Court construed sec 104 of the South Africa Act as impliedly investing it with that jurisdiction and it was held that that jurisdiction did not exist by virtue of inherence nor was it acquired by assumption or in some extra-statutory way..."¹⁹¹

The learned Judge of Appeal then pointed out that any power which the Appellate Division may have acquired (by implication) under section 104 of the South Africa Act 1909 to review proceedings in criminal cases (heard by a superior court) had been 'abolished by section 2 of Act 37 of 1945, which amended section 104 of the South Africa Act by confining its operation to civil cases only.'¹⁹² In regard to the application to review the proceedings of the Court a quo the learned judge stated:

"... the jurisdiction contended for by Mr Beyers is not a jurisdiction which is incidental to a jurisdiction conferred by statute but a jurisdiction to hear a matter which is not provided for in the statute."¹⁹³

He further held that the accused were not remediless. They could have employed the special entry procedure, which the learned Judge of Appeal found was "... in essence review proceedings".¹⁹⁴ The Court was not prepared

to assume review jurisdiction over the proceedings of superior courts. While the learned Judge of Appeal declined to express an opinion as to a situation where no other remedy was available, he suggested, by way of obiter dictum, that only under such circumstances can a possible assumption of review jurisdiction be justified.¹⁹⁵

The statutory jurisdiction of the Appellate Division was set out in the South Africa Act 1909.¹⁹⁶ The intention of the Legislature was the establishment of a court of appeal to take the place of the Judicial Committee of the Privy Council (hereafter referred to as the Privy Council). The Act did not absolutely abolish appeals to the Privy Council which tribunal retained the power to grant special leave to appeal to it from a decision of the Appellate Division.¹⁹⁷ For the purposes of this study it is appropriate to describe the terms of sections 103, 104 and 105 of the South Africa Act 1909 (as amended):

(i) section 103.

In terms of this section certain judgments and orders more particularly those given by a single judge (of a provincial or local division) upon an application by way of motion or petition or on summons for provisional sentence or a judgment as to costs (the section was amended by S 3 of Act 1 of 1911 to include interlocutory orders and judgments by consent) could not be the subject of an appeal to the Appellate Division save with special leave of that court.

(ii) section 104.

In terms of this section appeals which before the passing of the Act could have been made to the Privy Council, could be made only to the Appellate Division. The limitation previously placed on the monetary value of the judgment a quo was repealed.

(iii) section 105.

This section related to appeals from Magistrates' Courts or other inferior courts to Provincial Divisions. A further

appeal against the decision of such Provincial Division to the Appellate Division was possible only if special leave was given by the latter court.

These sections gave rise to a number of problems. For example section 104 which provided for the right of appeal to the Appellate Division in criminal and civil cases made no provision for civil appeals against judgments which could not be expressed in monetary terms, e.g the status of parties.¹⁹⁸ Accordingly special leave to appeal was considered necessary in cases not provided by section 104. Under what circumstances if any could the Court grant such special leave and, perhaps more important to this study, what was the source of power exercised by the Appellate Division in granting such special leave to appeal? Reference to the powers enjoyed by the Privy Council prior to 1910 would appear to assist in regard to this question.

The Privy Council enjoyed jurisdiction in respect of the following types of appeals:¹⁹⁹

- (i) appeals as of right. This power was conferred upon the Privy Council by the relevant legislature, e.g in terms of section 50 of the Charter of Justice, subject to certain prerequisites, the Council enjoyed appellate powers over certain civil appeals against the decision of the Cape Supreme Court;
- (ii) appeals by virtue of the special leave of the Monarch. In cases where no appeal as of right to the Privy Council existed it was still possible to have the matter heard. This was done by way of petition to the Monarch for such special leave, which, if granted, was by virtue of his prerogative as the fountain of justice. The petition was considered by the Privy Council which advised the Monarch accordingly.

The question arose whether the Appellate Division as successor to the Privy Council enjoyed the prerogative power to grant special leave to appeal in respect of such matters for which no appeal as of right had been provided by the Act. In Geduld Property Mines Ltd. v Briesch²⁰¹ both de Villiers CJ

and Innes JA declined to express an opinion whether the Appellate Division had acquired the prerogative powers exercised by the Privy Council.²⁰² In support of the acquisition of such prerogative powers counsel for the appellant cited Fichardt Ltd v Faustman²⁰³ An analysis of that case indicates that this contention by counsel is incorrect.

The facts in the Fichardt case were that, shortly before Union, judgment had been granted against the appellant by the full bench of the High Court of the Orange River Colony. The matter was appealable as of right to the Privy Council. The appellant failed to furnish the necessary security in terms of the relevant Ordinance. Despite this omission he could still have obtained special leave to appeal from the Privy Council. The appellant applied to the newly established Appellate Division for special leave to appeal to it against the decision of the High Court. The Appellate Division held that it possessed the power to grant such leave. This case was decided before the rule regarding security for costs of an appeal to the Appellate Division had been promulgated.²⁰⁴ In essence the Appellate Division had merely permitted the appellant to proceed with an appeal the right to which he had previously enjoyed albeit originally to the Privy Council. In permitting the appeal the Court had exercised its inherent jurisdiction to regulate its own proceedings by condoning any failure to comply with formal requirements as to time limits for the lodging of an appeal. The learned Chief Justice in the Geduld Property Mines case saw the grant of special leave to appeal in the Fichardt case as emanating from the Court's inherent jurisdiction and not arising from the Royal Prerogative as argued by counsel and in regard thereto stated:

"... It was held that the right in this respect (i.e. the right to have granted the special leave to appeal in the Fichardt case) which could previously have been exercised by the Judicial Committee can now be exercised by this Court. It was not a right arising out of the King's prerogative, but one which is inherent in every Appellate Court..."

(my italics) 205

The distinction between powers arising from the prerogative and those forming part of the inherent jurisdiction of the court was clearly recognised in this case. This distinction is most important to the subject of this thesis, especially regarding the origin of its inherent review jurisdiction

and particularly, where the source of the remedy is sought in English law and compared with the English prerogative writs (now orders) of certiorari, prohibition and mandamus. 206

In conclusion the subsequent cases regarding the grant of special leave to appeal in respect of cases not provided for in the Act, clearly indicate a progressive reluctance on the part of the Court to grant such relief. The Court was more liberal in granting relief in criminal cases especially before the Criminal Procedure Act 1917 and the provision therein for a special entry on the record in respect of an irregularity²⁰⁷ and the reservation of a question on a point of law.²⁰⁸ In respect of jury trials the Appellate Division adopted an approach similar to that of the Privy Council viz. refusing special leave to appeal if in its opinion there was evidence upon which the jury could convict. The allegation that the jury was wrong in convicting on such evidence or that the court would have acquitted the accused on the evidence was regarded by the Court as being insufficient grounds for the grant of relief.²⁰⁹ Apart from the question of a lack of evidence the only other ground for the exercise of its so-called 'extra-statutory or inherent power' in order to grant leave to appeal was a 'disregard by the court a quo of the form of legal process, or by the violation of the principles of natural justice or where a grave injustice had been done'.²¹⁰ However, as pointed out by Centlivres JA in R. v Milne and Erleigh,²¹¹ the power of the Court to grant special leave to appeal in criminal cases not provided for by the South Africa Act 1909 had been repealed by Act No 37 of 1948.²¹²

In regard to civil cases, the Appellate Division appears to have been even less inclined to exercise its inherent power to allow an appeal in respect of matters not provided for in the South Africa Act 1909. Such civil cases, considered by the Appellate Division, were those decisions of Provincial Divisions that were not appealable as of right in terms of section 104, on account of their not being founded on a civil suit or action.²¹³ Decisions of Provincial Divisions where the latter was empowered by statute to decide an appeal or to decide a case stated from a tribunal that was not an inferior court in terms of section 105 of the Act, were also considered

by the Appellate Division.²¹⁴ The Court stated that it possessed the necessary inherent power to grant special leave to appeal, but that jurisdiction:

"... is one which the Court will be slow to exercise. And it would require very special circumstances to induce it to go outside the terms of the statute (i.e. the South Africa Act)..."²¹⁵

This strict approach would appear to be founded on decisions by the Privy Council regarding petitions for special leave to appeal from judgments of criminal and civil jury trials.²¹⁶ Despite the repeal of the unpopular civil jury system in 1919 the Appellate Division retained this narrow approach. None the less the Court granted special leave to appeal in a few cases where no right of appeal (ordinarily) lay.²¹⁷

1.6 Inferior Courts and the Concept of Inherent Jurisdiction.

Although not strictly relevant to the subject of this thesis, this section, like the previous one, is of value in clarifying the meaning of the term inherent jurisdiction. Any reference here to inferior courts shall mean the magistrates' courts except where otherwise stated.

As the inherent jurisdiction enjoyed by a superior court is co-extensive with and flows from its status as a superior court, it follows that an inferior court possesses no inherent powers.²¹⁸ In Connolly v Ferguson,²¹⁹ which as indicated above, concerned an order by a magistrate attaching debts due by third persons to a judgment debtor, no such power was conferred upon the Magistrates' Court by the relevant Proclamation. The Court, per Innes CJ, stated:

"...but as we have laid down upon several occasions recently, magistrates' courts have no inherent jurisdiction, such as the superior courts in this country possess. The jurisdiction of magistrates' courts must be deduced from the four corners of the statute under which they are constituted..."²²⁰

A more recent case on the subject is Santam Insurance Co Ltd. v Liebenberg NO. and Another²²¹ The facts of this case were that the plaintiff instituted action in the magistrates court against the defendant for the payment

of the sum of R626,40 in respect of damages. The defendant insurance company entered an appearance to defend and requested particulars to the plaintiff's claim. One of the particulars requested was details as to how the sum of the claim was made up. In his further particulars the plaintiff indicated that the quantum of damages actually amounted to R1 359,50 and not R626,40 as claimed. The further particulars contained a statement to the effect that prior to the hearing an application would be made to the Court to increase the claim accordingly. Shortly after receiving the further particulars the defendant paid the initial claim into court in terms of Rule 18(1) of the Magistrates Court which provides:

"A defendant may at any time pay into court unconditionally the amount claimed in the summons and thereupon all further proceedings in the action shall be stayed save as hereinafter provided for the recovery of any costs not included in such payment"

The plaintiff thereupon applied to increase the sum of the claim as set out in his further particulars. This application was granted largely on the ground that the magistrate disapproved of the defendant's conduct in that "... it looked very much as if (the defendant) was trying to take advantage of the Rules of Court... in order to prevent the action from proceeding".²²² On review in terms of the Supreme Court Act 1959,²²³ the Natal Provincial Division held that, while the Supreme Court possesses the inherent jurisdiction to prevent an abuse of its proceedings, such jurisdiction is not enjoyed by the magistrates' court. The Court, per Hefer J, suggested that to prevent an abuse of its process:

'...it may well be necessary... to approach the Supreme Court having jurisdiction, even though its order will relate to a matter pending in the magistrate's court...'²²⁴

In passing, it is of interest to note that the Court 'appears not to have considered the defendant's conduct an abuse of the court's process.'²²⁵

Towards the end of the last century the Cape Supreme Court found that the magistrates' court enjoyed certain inherent powers. Thus in Barnes v White²²⁶ in regard to the discharge by a magistrate of an order of civil imprisonment granted by him, De Villiers CJ stated:

"The only question that need be seriously considered is, whether the Magistrate who had committed the prisoner to goal could, for sufficient cause shown, discharge the same person. I am satisfied that such power must be inherent in him by virtue of the very nature of his office. Suppose such a Magistrate had, under certain circumstances in the exercise of his jurisdiction, committed a man to goal, and then discovered that he had made a mistake in the order, it could not be contended that there was no remedy without an appeal to the Supreme Court."

Also in regard to civil imprisonment the Court made a similar finding in H. v Bossi²²⁷ save that in this case the Court referred to an 'implied or inherent jurisdiction'. In B v Magistrate of St Marks²²⁸ De Villiers CJ found that:

"...there is nothing in the Act of 1885... which gives the Magistrate power to strike an agent off the rolls at all, or suspend him at all. But it may be fairly argued that such a power must be inherent in the Court. If a Magistrate's Court has the power of admitting agents to practice before it, it must also have the power of suspending, or striking off the roll, an agent, who has abused the confidence of the Court by professional misconduct'.

An examination of these cases will indicate that the Legislature had conferred certain positive powers upon a magistrate, namely, to grant an order of civil imprisonment, to admit law agents to practice before it, etc. The additional powers which the Court found the inferior court to be possessed of, viz. to discharge an order to civil imprisonment etc. are powers which may be considered incidental to or implied from the actual powers conferred. Such incidental powers should not be equated with inherent jurisdiction. The Magistrate's Court would enjoy such powers only on account of the statutory powers conferred in the first instance. A superior court enjoys its inherent jurisdiction not on account of any legislation but in spite of, or concurrent with legislation.²²⁹ It is doubtful today whether the Court would give a similar decision to that in B. v Magistrate of St Marks (above). In any event there are a numbers of cases in which the Court has held that once an authority has exercised its function it is functus officio and, unless it has the specific power to amend or repeal its decision, any such action is invalid.²³⁰

The Court has long confirmed the principle of statutory interpretation by implication flowing from the consequences of the enactment.²³¹ The principle was expounded by the Appellate Division in Bloemfontein Town Council v Richter.²³² The facts of this case were that the Town Council had acquired the right to dam a river for the purpose of obtaining a water supply. The right was conferred both by statute and by servitude. In the course of maintaining the dam, the Town Council removed the silt deposited in the dam by an ordinary method of scouring.

This removal of the silt caused damage to the plaintiff who was a riparian owner. In an action for damages by the plaintiff, the Court held that the right to remove the silt was necessarily implied from the major right conferred, Stratford JA stating:

"I have no hesitation in coming to the conclusion on the evidence that without the right to remove the silt the right and power of the Municipality cannot be properly enjoyed or exercised. If this is the position in fact the law is clear that the right to clean (i.e. take away the silt) is one conferred by necessary implication..."²³³

This principle has been acknowledged by the Appellate Division in a number of other cases.²³⁴ It has been applied to various acts by magistrates' courts where the statute conferring specific powers was silent as to ancillary aspects pertaining to such powers,²³⁵ for example where a statute conferred powers on the inferior court to decide certain matters, authority to enforce such decision was implied.²³⁶ A further example occurs where the enabling statute confers powers of execution, in the absence of statutory authority the power to suspend²³⁷ or to set aside such execution, has been implied.²³⁸ Although much of what previously was regarded as implied powers have now been incorporated in the relevant Acts, the authors of Jones and Buckle point out that there are still a number of powers exercised by the Magistrates' Court which may be recognised as being implied, e.g. the power to order the inspection of property or movables, the power to grant leave to a woman married in community of property, or otherwise subject to the marital power of her husband, to sue without the assistance of her husband where he is absent or otherwise out of reach.²³⁹

1.7 A Summary of the Principal Features of the Inherent Jurisdiction of the Supreme Court as a Court of First Instance.

Throughout this chapter references to cases from other than South African law have largely been avoided. The reason for this limited approach has been a purposeful attempt to produce as pure a South African perspective of the subject as possible. While the importance of comparison is acknowledged, no good purpose would have been served in introducing comparative material before this summary. A comparison between the approach by the South African Court and those of England and the Commonwealth, will follow immediately hereafter.

Flowing from the analysis of the inherent jurisdiction of the South African Court certain features may be observed. Of these features the following would appear to be definitive:

- (i) On occasion the term inherent jurisdiction has been used somewhat loosely by the Court. As a result the term is often misused by jurists as a convenient 'umbrella term'.²⁴⁰
- (ii) The inherent jurisdiction of the Court is a limited subject which must not be confused with the general jurisdiction of the Court. The Court's inherent jurisdiction is only one component of its general jurisdiction, the others being jurisdiction conferred by statute and the Court's common law jurisdiction e.g. the causa continentia rule.²⁴¹
- (iii) The inherent jurisdiction of the Court should not be equated with any prerogative powers enjoyed by it.²⁴²
- (iv) The inherent powers enjoyed by the Court are not synonymous with principles of common law. The latter may be seen as positive substantive law, which are largely unwritten. On the other hand inherent powers are discretionary in nature.²⁴³

- (v) Although the inherent jurisdiction of the Court is incidental or ancillary to its statutory and common law powers, it remains quite separate and distinct from powers which may be considered necessarily incidental to principal powers conferred by statute, more particularly where the latter is silent regarding powers necessary to perform conferred functions. Such incidental powers should be seen as an adjunct to the actual (statutory) powers conferred.²⁴⁴

The following features become apparent on an examination of decided cases. While these features may not be seen as absolute or even be considered arguable, they appear to be consistent both with the case law and the general approach to the subject as contained in this chapter:

- (i) The inherent powers of the Court may be exercised in a summary manner. Although this may be considered doubtful in regard to its power to control and protect its officers and perhaps in regard to contempt proceedings, in practice proceedings in regard to officers of the court are on motion. Contempt of court proceedings, too, may be instituted by way of motion. Where the contempt has taken place in facie curiae the court will dispose of the matter summarily.²⁴⁵
- (ii) The Court is not obliged to exercise its inherent powers, these being discretionary and will be exercised according to the particular factual situation. On the other hand not all discretionary powers enjoyed by the Court are founded on its inherent jurisdiction. For example, the Court has the discretion to grant or refuse an application for an interdict despite the applicant establishing the essential requisites. This latter discretionary power does not emanate from its inherent jurisdiction but from the common law.
- (iii) The inherent jurisdiction of the Court may be exercised over, and in respect of any party before it, e.g. litigants, witnesses, officers of the Court, etc. The jurisdiction, too, may

be exercised over persons not so involved in the judicial process, e.g spectators in court, the editor of a newspaper which commits an impairment of the dignity of the court, etc.

- (iv) The inherent powers of the Court are largely, but not entirely, procedural. The exceptions relate to the control and protection of its officers and the protection of its dignity, etc.

1.8 **A Comparative View of the Inherent Jurisdiction of a Superior Court.**

1.8.1 **English Law and Commonwealth Law.**

The concept that nothing is beyond the jurisdiction of a superior court, save that specifically removed from its jurisdiction by lawful authority while "nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged", has been recognised in English law since ancient times.²⁴⁶ Neither in Peacock v Bell and Kendal,²⁴⁷ nor in any case examined, does it appear that a superior court in England has claimed to possess its general jurisdiction by virtue of its inherent powers. It should be noted that neither the early English superior court nor its inferior counterparts were creatures of statute, in the modern sense of the term or at all. The distinction between the two types of courts and their respective jurisdiction is vital. Primarily, an inferior court was always subject to the control of the Court of the Kings Bench by virtue of the prerogative writs (today the prerogative orders).²⁴⁸ The effect of the control was to prevent an inferior court from deciding its own jurisdiction. This limitation did not apply to a superior court which had the power to decide judicially whether it was acting within its jurisdiction.²⁴⁹ This meant that any erroneous decision by a superior court as to its jurisdiction could be corrected only by way of an appeal. The exercise of jurisdiction by a superior court was therefore not controlled in the same manner, if at all, as that of an inferior court.²⁵⁰ It is in this sense that a superior court enjoys an unlimited jurisdiction. This situation does not apply to the South African legal system and as indicated above the notion that the Supreme Court of South Africa has an un-

limited jurisdiction by virtue of its so called inherent jurisdiction is false.²⁵¹ The superior Courts in England exercise an inherent jurisdiction, which is seen, by Jacob:

"... (to exist) as a separate and independent basis of jurisdiction, apart from statute or Rules of Court... It stands upon its own foundation and the basis for its exercise is... to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings... (it) is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by superior courts of law as an indispensable adjunct to all their other powers... it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice." ²⁵²

Jacob classifies the subject matter of the Court's inherent jurisdiction under three major headings viz. control over powers, persons and the powers of inferior courts and tribunals. These, where necessary, he further sub-classifies to give the following format to his paper:

A Control over process.

- (i) Regulating process and proceedings.²⁵³
- (ii) Abuse of process.²⁵⁴
- (iii) Compelling observance of process.²⁵⁵

B Control over persons.

- (i) On behalf of the sovereign as parens patriae in relation to infants.²⁵⁶
- (ii) Over officers of the court (including barristers, solicitors, liquidators, sequestrators, jurors, witnesses, judges of inferior courts).²⁵⁷

C Control over powers of inferior courts and tribunals.²⁵⁸

The following are the conclusions²⁵⁹ reached by Jacob who has found that the nature of the subject is not a simple one but exists in a complex of features the most important of which he sees as follows:²⁶⁰

- (i) the inherent jurisdiction of the court is exercisable as part of the process of the administration of justice;
- (ii) the distinctive and basic feature of the inherent jurisdiction of the Court is that it is exercisable by summary process, i.e. without a plenary trial; ²⁶¹
- (iii) because it is part of the machinery of justice the jurisdiction of the Court may be invoked not only in relation to the litigant parties in pending proceedings but in relation also to anyone, whether a party or not, and in respect of matters which are not raised as issues in the litigation between the parties; ²⁶²
- (iv) the inherent jurisdiction of the Court is a concept which must be distinguished from the exercise of judicial discretion; ²⁶³
- (v) the inherent jurisdiction may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of each. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. ²⁶⁴

When compared with the features of the South African Court's inherent jurisdiction²⁶⁵ those described by Jacob will be seen to be substantially similar. The differences between the features of both respective superior courts are of little importance. The essence of Jacob's analysis is contained in the statement cited above.²⁶⁶ This finding, it is submitted, is equally applicable to the Superior Courts in South Africa.

Finally a further point made by Jacob, which will be referred to below, is that the jurisdiction of the English High Court to review the decisions of inferior courts and tribunals does not form part of its inherent jurisdiction. That Court enjoys such jurisdiction by virtue of the prerogative orders, formerly the prerogative writs.²⁶⁷ In other words the power of the English Court to review the decisions of inferior courts and statutory tribunals owes its origin to the Royal Prerogative.

The inherent jurisdiction of English superior courts, as explained by Jacob, may be corroborated not only by English decisions but also through the decisions of Commonwealth courts. It must be noted that a number of aspects relating to the subject are today adequately covered by legislation, e.g the control and regulation of legal practitioners.²⁶⁸ This has resulted in there being but a few judicial decisions concerned with the Courts' inherent jurisdiction in respect of such matters. On the other hand there are many decided cases regarding the abuse of the judicial process and the regulation of proceedings. It is not possible for the legislature to foresee all (possible) contingencies. The Court has been forced on occasion to rely on its inherent jurisdiction to prevent abuse of its process and concomitant injustice. During the period 1970-1975 a number of such cases were reported throughout the Commonwealth.²⁶⁹ The following are examples of decisions relating to the exercise of inherent jurisdiction by superior courts in order to prevent an abuse of their process and/or to regulate their proceedings. Cases decided by the Supreme Court of Ceylon and the superior courts of Sri Lanka will be considered separately below.²⁷⁰ This is on account of the similarity in the legal history of Sri Lanka and South Africa and the fact that the common law of both systems is Roman-Dutch law.

(i) the Court may exercise its inherent jurisdiction to control its own process quite independently of the provisions of the Rules of Court;²⁷¹

(a) to order a party to be orally interrogated on behalf of a receiver or liquidator of a company although no such power is provided by the Rules of Court;²⁷²

- (b) to determine how best to proceed in the conduct of a trial in order to do justice to both parties.²⁷³
- (ii) the Court has an inherent jurisdiction to prevent its process from being obstructed and abused:²⁷⁴
 - (a) to stay execution pending an appeal, in order to prevent an appellant, if successful, from being deprived of his victory;²⁷⁵
 - (b) to prevent the rights of a party being barred by procedural manoeuvres;²⁷⁶
 - (c) to prevent proceedings from being frustrated on account of the pleadings being too complex and prolix;²⁷⁷
 - (d) to stay a civil action pending the conclusion of criminal proceedings arising from the same cause of action;²⁷⁸
 - (e) to stay proceedings not only where same are frivolous or vexatious but also where the Court considers it just and equitable to do so, subject to none of the parties being prejudiced by such stay;²⁷⁹
 - (f) to stay an action where the plaintiff had deliberately chosen the most inconvenient forum in order to harass his opponent;²⁸⁰
 - (g) to set aside its own erroneous or irregular judgment or order;²⁸¹
 - (h) to permit an adjournment on account of the illness of one of the litigants;²⁸²
 - (i) to reconstruct its lost records;²⁸³

- (j) to order restitution by the plaintiff of the defendant's property executed by virtue of a judgment subsequently rescinded by the Court.²⁸⁴

While these decisions are not exhaustive they are illustrative of the inherent powers of an English type of superior court. Further these decisions are corroborative of the views expressed by Jacob and in turn are indirectly corroborative of the views expressed in this thesis.

1.8.2 The inherent jurisdiction of the superior courts of Sri Lanka.

The legal history of Sri Lanka (Ceylon) and that of South Africa have many common features. Both Ceylon, more particularly the Maritime Provinces, and the Cape of Good Hope were out-stations (buiten-comptoiren) of the Dutch East India Company under the direct control of the Company's East India offices at Batavia. A similar form of superior court (Raad van Justitie) was established at Cape Town and Colombo. Until 1796 these courts were subject to the appellate jurisdiction of the Raad van Justitie in Batavia. Although in terms of its Charter²⁸⁵ the Company was empowered inter alia to appoint judicial officers for most of the period of their existence under the Company the membership of both Superior Courts consisted mainly of local company officials. The Charter did not indicate which law was to be applicable to its possessions in the East, including the out-stations. Both the Council of Seventeen (het Here Sewentien) which controlled the Company and the so-called Hooge Regeering van Indie, the head office of the Company in Batavia, ultimately instructed that de gemeene civiele rechten soosals die in de Vereenichde Nederlanden²⁸⁶ (the common civil law of the United Netherlands) was to be applied. Despite these vague instructions it is generally accepted that the law applied at both Cape Town and Colombo was in the first instance the legislative enactments of:

- (i) the States-General of the United Provinces of the Netherlands;
- (ii) the States of Holland;

(iii) the Raad van Politie at Batavia;

(iv) the local Raad van Politie.

Where the statutory law was silent the Roman-Dutch law of the Province of Holland as expounded by authoritative Roman-Dutch jurists, e.g. Grotius, Van Leeuwen, Voet etc,²⁸⁷ was applied. In Ceylon the local customary law was also considered.²⁸⁸ The procedure adopted by both courts was that practised by the Roman-Dutch courts of the Netherlands and described by Roman-Dutch law jurists in their works on procedure²⁸⁹ as amplified by rules of procedure as contained in the Statutes of Batavia.²⁹⁰

With the permanent English occupation of the Cape and Ceylon the development of their legal systems was more or less parallel. Commissions of Enquiry examined the administration of justice in both colonies and in the 'eighteen thirties' a final Charter of Justice was conferred upon both Ceylon and the Cape by William IV of England. The 1833 Charter of Justice conferred upon Ceylon, (which established the Supreme Court of Ceylon), was the fifth and final Charter to be conferred on that Colony. The Charter of Justice 1834, which established the Cape Supreme Court, was the second to be conferred upon that Colony. Both at the Cape and Ceylon English rules of evidence and procedure (civil and criminal) were introduced. The judges of both Colonies were largely trained in England.²⁹¹

In the latter half of the last century a revival of Roman-Dutch law took place in South Africa. This revival would appear to have culminated in the recent attempt by the so-called "purist" judges to purge South African law of its English influence.²⁹² On the other hand a number of factors militated against the preservation of Roman-Dutch law in Ceylon.²⁹³ None the less it is submitted that the law of Sri Lanka is important in a study of this nature, not only from a comparative point of view but also that the history and development of that sibling system may explain, or at least accentuate, important differences in the respective systems.

Reverting to the inherent jurisdiction of the superior courts of Sri Lanka (which for purposes of this study will include the former Supreme Court of Ceylon) it will be observed at the outset that the Civil Procedure Code provides for the inherent jurisdiction of the court. In 1921 the Code²⁹⁴ was amended by the inclusion of the following section²⁹⁵ which provides:

"Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." (my italics)

This enactment is identical to that appearing in the earlier Indian Civil Procedure Code.²⁹⁶ Both the Supreme Courts of India and Ceylon acknowledged their inherent powers before the promulgation of the 'inherent jurisdiction' clauses in their respective Civil Procedure Codes.²⁹⁷ The Supreme Court of Ceylon (now Sri Lanka) has exercised its inherent jurisdiction inter alia in the following instances:

- (a) to enforce the attendance of a judgment debtor where this had not been provided in the Civil Procedure Code²⁹⁸;
- (b) to compel delivery of property purchased at a sale in execution²⁹⁹;
- (c) to postpone the hearing of an action in order to afford a party the opportunity of obtaining the judicial rectification of a deed vital to his case³⁰⁰;
- (d) to reject a claim (plaint) which owing to an oversight on the part of the Court had not been rejected timeously³⁰¹;
- (e) to amend the description of the defendant on a decree issued by the Court, when it was shown that the defendant described and held himself out as another person³⁰²;
- (f) to stay proceedings in an action between two parties pending the decision of an action between them in another court in which the material facts were identical³⁰³;

- (g) in an action to set aside a will, to condone the failure of the deceased's widow in not citing all heirs as respondents.³⁰⁴

As with the English and Commonwealth decisions (cited above) these cases clearly indicate the parameters of the Court's inherent jurisdiction. In Asilin Nona v Perera et al³⁰⁵ the Supreme Court of Ceylon, per Keuneman J, reiterated the judicial approach to its inherent powers:

"Section 839 has been enacted reserving to the Court the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court..."

1.9 The Inherent Review Jurisdiction of the Supreme Court of South Africa.

The existence of the Court's 'so-called' inherent review jurisdiction (the subject of this thesis) was confirmed by Innes C J, in Johannesburg Consolidated Investment Co v Johannesburg Town Council (the JCI case).³⁰⁶ In his judgment is contained the initial judicial pronouncement that the source of the remedy is the Court's inherent jurisdiction. The learned Chief Justice found that, at that time, there were three species of review procedure in South African law:

- (i) the review of the proceedings of inferior courts;
- (ii) the review of the proceedings of public bodies, administrative authorities, etc, this being the Courts' inherent review jurisdiction, today referred to as common law review or judicial review;
- (iii) the various types of statutory review.

The relevant portions of the judgment are as follows:

"In its first and most usual signification it denotes the process by which, apart from appeal, the proceedings of inferior Courts of Justice, both Civil and Criminal, are brought before this Court (the Supreme

Court) in respect of grave irregularities or illegalities occurring during the course of such proceedings...³⁰⁷ there is a second species of review analogous to the (first) but differing from it in certain well-defined respects. Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of its duty, this Court may be asked to review the proceedings complained of and set aside or correct them³⁰⁸ ... Then as to the third signification of the word. The Legislature has from time to time conferred upon this Court or a Judge a power of review which in my opinion was meant to be far wider than the powers which it possesses under either of the (above) review procedures..."³⁰⁹

The third species of review, i.e. special statutory review is not of particular relevance to this thesis. It defies precise definition or even explanation as it varies from statute to statute. Despite the learned Chief Justice's comment that such review is wider than the first two species of review this is not necessarily the case today. Depending on the relevant statute review powers, more restrictive or extensive than common law review, may be conferred upon the Court. An example of more restrictive review powers may be found in the Liquor Act 1977³¹⁰ which provides only specific grounds for review. On the other hand a more extensive power of review may be found in the Insolvency Act 1936³¹¹ which effectively permits the Court to reconsider the offending decision de novo.³¹²

The first type of review, that of proceedings of inferior courts is, and has always been, a statutory remedy in South Africa. It was a power conferred upon the Cape Supreme Court by the Charter of Justice, the enabling enactment providing:

"... full power, jurisdiction and authority to review the proceedings of all inferior Courts of Justice within Our said Colony, and, if necessary, to set aside or correct the same..." ³¹³

The remedy was invoked by way of summons³¹⁴ and it was obligatory for the applicant to set out in his summons the grounds upon which he sought relief.³¹⁵ Originally it was necessary for the applicant to obtain leave of the Registrar to institute review proceedings.³¹⁶ Today review of the

proceedings of inferior courts is governed by the Supreme Court Act 1959³¹⁷ as are the grounds of such review,³¹⁸ more particularly:

- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) gross irregularity in the proceedings; and
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

The procedure today is by way of motion as is the procedure for the other species of review, save where the legislature has decreed otherwise.³¹⁹ For the purpose of review the following have been held to be inferior courts: Magistrates' Courts (both District and Regional),³²⁰ the Children's Court³²¹ and the Water Court.³²² There has been some suggestion that a military court-martial in terms of the Defence Act 1957³²³ and a Police Disciplinary Court in terms of the Police Act 1958³²⁴ are inferior courts, but it would appear that the better view is that such bodies are statutory disciplinary tribunals and not inferior courts as defined by the Supreme Court Act 1959.³²⁵ While the Court of the Commissioner of Patents would appear to fall within such definition, the Court in Gentiruco AG v Firestone SA (Pty) Ltd³²⁶ held that on an interpretation of its enabling Act the legislature intended such court to have the status of a superior court. These examples of inferior courts are merely illustrative and are not intended to be exhaustive. Further it is apposite that in its earlier judgments the Appellate Division considered that the term 'or other inferior courts' as contained in section 105 of the South Africa Act 1909 for the purpose of an appeal (to the Appellate Division) included licensing courts³²⁷ and even certain tribunals exercising what today may be considered quasi-judicial powers.³²⁸

In regard to the Court's inherent review power, the second species of review (the subject of this thesis), it must be indicated that nowhere in the JCI case, does Innes CJ refer to the common law or to the remedy as 'common law review'. He stated that the remedy was not created by legislation but:

"... is a right inherent in the Court, which has jurisdiction to entertain all civil causes and proceedings (within its territorial jurisdiction)."³²⁹ (my italics)

Neither Innes CJ nor Wessels J, who constituted the majority of the Court in the JCI case, cited any Roman-Dutch or English authority for this pronouncement. The learned Chief Justice merely referred to the fact that the Cape Supreme Court had repeatedly set aside or corrected decisions of public bodies such as liquor licensing courts on account of irregularities or illegalities which had occurred in their proceedings.³³⁰ In support of this statement Innes CJ cited two Cape Supreme Court decisions, Gibson v Manley³³¹ and Raubenheimer v Parsons.³³² An examination of these cases reveals little of the origin of the remedy save statements that the Court is possessed of such review jurisdiction, but with further references to two earlier cases, namely Riddelsdell v Hall³³³ and Van Ryn & Co v Licensing Court of Cape Town and Another.³³⁴ An analysis of these earlier cases³³⁵ also reveals little of the origin of the remedy. In the Riddelsdell case there is a reference by counsel to an even earlier (unreported) decision of Kannemeyer v Rivers³³⁶. This most important case is unfortunately unreported and as will be observed below the archival records are of little consequence,^{336a} in so far as the (direct) origin of the remedy is concerned.

It is interesting, too, to note that the learned Chief Justice in the JCI case, cited an unofficial, and possibly private, statement by Wessels J (who concurred in his judgment) as an authority for the existence of the remedy:

"... My brother Wessels informs me that the same course was followed in certain cases by the late High Court. (High Court of the Zuid-Afrikaanse Republiek)." ³³⁷

Corroboration of this extraordinary source of authority would have been expected in the judgment of Wessels J. But this does not appear nor is any reference made to the 'certain cases'. An examination of the Transvaal Reports fails to provide evidence of such cases.

Further, a close examination of the law reports of the various Supreme Courts indicates that the remedy was not so well known as to be considered notorious or trite, as apparently suggested by Innes CJ. The paucity of

references in the law reports, such as they were, and the fact that no references to the procedure are to be found in the Cape and Transvaal Rules of Court indicates clearly that the remedy was not common or well known.

Finally, regarding the dearth of authority regarding the remedy, there is no mention of the remedy in a contemporary text book on civil procedure 'Judicial Practice of South Africa' by C H van Zyl. The second edition was published in 1902, one year before the JCI decision. The author, a respected practitioner, a professor of law and lecturer in civil procedure at the S A College, the predecessor of the University of Cape Town, regarded the review of the proceedings of licensing courts as synonymous with the review of the proceedings of inferior courts.³³⁸ According to him the procedure to review the decision of a licensing court was by way of summons.³³⁹ This is contrary to the view expressed by Innes CJ in the JCI case, who held that the procedure was by way of motion.³⁴⁰

In Klipriver Licensing Board v Ebrahim³⁴¹ the newly formed Appellate Division found reason to consider the remedy. The Court unanimously approved the analysis of review procedures by Innes CJ in the JCI case. It is apposite that the judgment of the Court was that of Innes himself, then a Judge of Appeal.³⁴² Since then the JCI decision has been cited with approval by the Appellate Division in a number of cases.³⁴³

Finally, an examination of the features and grounds for the grant of the remedy makes it difficult to accept that a remedy, so essential to any legal system, owes its origin to the inherent jurisdiction of the Court. In his seminal article on inherent jurisdiction of the English Courts,³⁴⁴ Jacob rules out any possibility of the review power of such courts originating from, or being part of, its inherent jurisdiction. These powers, he finds, are derived from no less than the Royal Prerogative.³⁴⁵

If the remedy does not owe its origin to the inherent jurisdiction of the court what is the origin of the remedy?³⁴⁶ Perhaps of greater importance is whether the answer to the question is of any consequence?³⁴⁷ Apart from any interest to legal historians and proceduralists the origin of the remedy may be of great value to the Courts and practitioners as the answer may provide the means of alleviating some, if not all, of the weaknesses and limitations of the remedy.³⁴⁸

Annexure 1

being a photostatic copy of a precedent of
a summons to review the proceedings of a
Licensing Court.

Van Zyl, Judicial Process in South Africa (2ed), at 572

Summons to review the proceedings of a Licensing Court.

(Heading.)

Command, etc., W.C.S., the Resident Magistrate for . . . , the Chairman, and F.P.W. and the members of the Licensing Court for . . . all of . . . District, hereinafter called the defendants, that they appear before our Justices of our Supreme Court of our said Colony, at Cape Town, on . . . the . . . day of . . . next, at 10 o'clock in the forenoon, or so soon thereafter as counsel can be heard, to answer,

H . . . and B . . . trading together as H. B. and Company at . . . in . . . hereinafter called the plaintiffs, and to shew cause why the proceedings of the Licensing Court for . . . holden at . . . on the . . . day of . . . , 1891, shall not be reviewed, on the ground of gross irregularity in and about the refusal by the said Licensing Court of the renewal, then and there duly applied for by the plaintiffs, of a retail wine and spirit license, theretofore for three years and upwards held by them upon certain conditions for and in respect of certain premises situate at . . . in . . . aforesaid, which renewal the plaintiffs were under and by virtue of the 50th Section of Act No. 28 of 1883, entitled to by law, and to which renewal no lawful objection was raised in accordance with any of the provisions of the said Act or any other law (as will more fully appear by reference to the record of the aforesaid proceedings as the said record was taken at the time, when such record is produced in Court), but the said renewal was in a grossly irregular manner refused, without notice to the plaintiffs of any objection, and without the hearing of any evidence for and on behalf of the plaintiffs then applicants for the said renewal.

And command the said W.C.S. as such Resident Magistrate as aforesaid to return and certify to the Supreme Court the aforesaid record.

And also command the said members of the said Licensing Court, the defendants, to shew cause why the plaintiffs should not be declared entitled to a renewal of the aforesaid license upon the same conditions upon which the plaintiffs had theretofore held the same as aforesaid : and further to shew cause why they should not be ordered to pay the costs of these proceedings, *de bonis propriis* : as it is said.

And serve on each of the said defendants a copy of this summons, and return you then and there this summons immediately after the service thereof, with whatsoever you have done thereupon.

Witness, etc.

Annexure 2

being a photostatic copy of a precedent of
a summons to review the proceedings of a
Magistrate in a civil case.

Van Zyl, Judicial Process in South Africa (2ed), at 573

Summons to review the proceedings of a Magistrate in a civil case.

(Heading.)

Command F. of . . . in his capacity as Resident Magistrate of . . . , hereinafter called the defendant, that he appear before our Supreme Court of our said Colony at Cape Town, on the . . . day of . . . at 10 o'clock in the forenoon, when an application will be made on behalf of G. of . . . in terms of this summons, and at which time he will be required to produce, return and certify to the said Supreme Court, the record, or a true copy, of the summons, pleadings, records, evidence with all objections, and all other proceedings in the case of one K. against the said G., in which the said K. claimed from the said G. the sum of £ . . . sterling for damages for alleged slander, tried before the said Magistrate on or about the . . . day of . . . last past, and in which he gave judgment against the said G. for the sum of £ . . . sterling.

And further command K. also of . . . to appear before our Supreme Court at the date, hour and place aforesaid to answer the said G. and to shew cause why the judgment of the said Magistrate and all the proceedings before him in the said case shall not be reviewed, set aside or corrected, upon the following grounds :—

1st. Because the said Resident Magistrate has upon the trial of the said cause, rejected legal and competent evidence then and there tendered on behalf and in defence of the said G., viz. the evidence of the witnesses (*here name them*).

2nd. Because of the gross irregularity of the said proceedings in that the said Magistrate unlawfully and unjustly declined to receive and to act upon and to allow evidence to be called in proof of certain pleas tendered by the agent of the said G. for and on his behalf as his defence to the said action whereby he was greatly injured and prejudiced in his defence, also by the refusal of the said Magistrate to allow the reasonable and proper questions put on behalf of the said G. to be answered by the said K. Also because there was no evidence, or not sufficient evidence to justify the said Magistrate to give judgment against the said G.

3rd. Because the proceedings in the case by the said Magistrate were otherwise wholly irregular and contrary to law.

As it is said : and serve on each of the said defendants a copy of this summons, and return you then and there this summons immediately after the service thereof, with whatsoever you have done thereupon.

Witness, etc. (usual conclusion).

FOOTNOTES TO CHAPTER ONE

1. Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa (3 ed), 23.
2. 1909 TS 195 at 198.
3. Cf. Santam Insurance Co Ltd v Liebenberg NO and Another 1976(4) SA 312(N) at 323 H.
4. Forsyth, Private International Law, (1981), 'The Jurisdiction of the Supreme Court (by T W Bennett) at 140.
5. S A Steel Equipment Co (Pty.) Ltd. v Lurelik 1951(4) SA 167 (T) at 172 E-F; cf. De Wet and Others v Western Bank Ltd 1977(2) SA 1033(W) at 1036 C.
6. I Wm Saund. (1667) 73, 85 ER 84 at 87 - 88.
- 6a. Op. Cit. 88.
7. See Broom, A Selection of Legal Maxims (8 ed) at 737 et seq., and the cases cited therein; cf. Co. Litt 6b : 332. See also, the case of Taafe v Downes 3 Moore (PC) 36 regarding the power of Superior Court in respect of a decision by an inferior court in respect of its jurisdiction. (Broom, supra 71).
8. Peacock v Bell and Kendal (note 6) 85 ER 84 at 88. See also, Gossett v Howard 10 QB 453 and Mayor of London v Cox (1867) LR 2 HL 259.
9. Stanton v Styles 5 Exch 583; Mayor of London v Cox (note 8).
10. Note 2.

11. Part VI ss 95 - 98.
12. S. 94 of Act No 32 of 1961.
13. S. 98(i) of the South Africa Act 1909.
14. S. 98(2).
15. Ss. 103, 104.
16. Ordinance 72 dated 1 March 1830.
17. Ordinance 40 dated 25 January 1828.
18. S. 45 of the Charter of Justice. The early courts in Natal, the Orange Free State Republic and the Transvaal Republic all followed the Cape Rules of Civil Procedure; see inter alia : Hahlo and Kahn, South Africa - The Development of its Laws and Constitution (1960), 21 - 23; Kotze, 'The Administration of Justice in the South African Republic (Transvaal)' 36 SALJ (1919) 128 at 132; Kahn, 'The History of the Administration of Justice in the South African Republic.' 75 SALJ (1958) 294 at 302 et seq; Van Rensburg, Die Rol deur Landdroste, Vrederegters en Veldkornette in die Distrik van Bloemfontein vanaf 1854 - 1880 gespeel, (MA Thesis) Archives Year Book for South African History (1954) 187 at 196 et seq; see further, Wypkema, Die Invloed van Nederland op Ontstaan en Ontwikkeling van die Staatsinstellingen der Z.A. Republiek tot 1881, (1939) at 189 and 348: and by the same author Die Invloed van Nederland en Nederlandse-Indië op Onstaan en Ontwikkeling van die Regswese in Suid-Afrika tot 1881. (1934) at 157 and 198 et seq.
19. Ordinance 14 of 1845 (Cape) established the District Court of Natal with its seat at Pietermaritzburg. When representative government was established in 1857, the District Court was abolished and the Supreme Court of Natal was established by Law No. 10 of 1857 (Natal).

20. The Establishment of the Supreme Court and the High Court Ordinance No 2 of 1902 (Transvaal).
21. The Administration of Justice Ordinance No 4 of 1902 (ORC).
22. Act No 21 of 1864.
23. Proclamation No 69 of 1871 (27 October 1871).
24. See note 20.
25. S. 46 read with the Second and Fourth Schedules to the Supreme Court Act No 59 of 1959.
26. Ss. 19 and 21 read with the First Schedule to the Supreme Court Act 1959.
27. 1911 AD 295.
28. Pollak, The South African Law of Jurisdiction (1937) 18; Herbstein and Van Winsen (note 1) 30.
29. Herbstein and Van Winsen (note 1), 35 - 40.
30. Roberts Construction Co Ltd. v Wilcox Bros' (Pty.) Ltd. 1962(4) SA 326(AD); cf. 1962 Annual Survey of South African Law at 451.
31. Pollak (note 28), at 15 et seq; Herbstein and Van Winsen (note 1), 29.
32. See text relating to notes 1 and 4.

33. S. 94 of the Republic of South Africa Constitution Act No 32 of 1961.
34. S. 19(3) of Act No 59 of 1959.
35. See page 9 below.
36. See page 10 et seq below and the cases therein cited.
37. Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd (1971) 2 DLR (3 rd) 75, see also Jacob, "The Inherent Jurisdiction of the Court" 23 Current Legal Problems (1970) 23; cf. Ex parte Millsite Investment Co (Pty) Ltd 1965(2) SA 582 (W) at 585 F - H.
38. See inter alia: Ritchie v Andrews (1881 - 1882) 2 EDL 254; Conolly v Ferguson (note 2).
39. See note 16.
40. See note 18.
41. In 1827 English was first introduced as the sole language in the Supreme and Inferior Courts at the Cape, see C Graham Botha, "The Early Influence of the English Law on the Roman-Dutch Law in South Africa", 40 SALJ (1923) 396 at 400.
- 41a. Compare the text relating to note 37 ie. the comment by the Manitoba Court of Appeal with the similar statement by Vierya J in Ex parte Millsite Investment Co (Pty.) Ltd. (note 37) at 585 F - H.
42. Merula, Manier Van Procederen 1.9.4; cf. Voet 2.1.6.
43. Note 30.

44. 1924 AD 282.
45. See page 21 below.
46. Note 37.
47. See page 22 below.
48. Note 5.
49. At 1036 B et seq.
50. See page 440 below.
51. S. 59(2) of the Republic of South Africa Constitution Act No 32 of 1961.
52. Moluele and Others v De Schatelets NO. 1950(2) SA 670(T) at 675.
53. Moulded Components and Rotomoulding South Africa (Pty.) Ltd. v Courakis and Another 1979(2) SA 457(W) at 461 F - G.
- 53a. 1978(3) SA 645(AD) at 654D.
54. Note 52; cf. SWA Munisipale Personeel Vereeniging v Minister of Labour and Another 1978(1) SA 1027(SWA).
55. 1977(3) SA 137(T) at 141; cf. the decision in the Moulded Components and Rotomoulding case (note 53) at 461F et seq.
56. [1980] 1 ALL ER 179.
57. For example Rule 4 of Order III of the former Natal Rules of Court was informally amended to permit the attendance of Attorneys when the term's cause-lists were prepared.

58. For example, the manner of preparation of pleadings and the record to be lodged in the Appellate Division is set out in a circular letter dated 15 May 1962 at the instance of the Chief Justice.
59. Natal Bank Ltd v Joosub 1908 TS 542.
60. Corrans and Another v Transvaal Government and Coull's Trustee 1909 TS 605.
61. Orphan Chamber v Strydom 3 Menz 412.
62. De Wet and Others v Western Bank Ltd. 1977(2) SA 1033(W) at 1036C; Roopnarain v Kamalapathy 1971(3) SA 387(D).
63. Montana Steel Corp (Pty.) Ltd. v. New Zealand Insurance Co (South Africa) Ltd. and Another 1975(4) SA 339(W) at 342 E.
64. The Moulded Components and Rotomoulding case (note 53) at 461 F.
65. Federated Trust Ltd. v Botha (note 53a); The SWA Munisipale Personeel Vereeniging case (note 54) at 1038B; Moluele and Others v De Schatelets NO. (note 52) at 675.
66. Smit v Smit 1978(2) SA 720(W); see the 1565 English case of Milward v Weldon (note 98).
67. Neal v Neal 1959(1) SA 830(N).
68. 1974(2) SA 661 (T).
69. At 662 B - C.
70. Hudson v. Hudson and Another 1927 AD 259 at 269; Western Assurance Co Ltd. v Caldwell's Trustee 1914 AD 262 at 271 - 272; Corderoy v Union Government 1918 AD 512 at 518 - 519.

71. Hudson v Hudson and Another (note 70) at 269.
72. Note 70.
73. In terms of the Vexatious Proceedings Act 1956 the inherent powers of the Court were extended to impose a general prohibition on a party in respect of all litigation instituted by him : see State Attorney v Sitebe 1961(2) SA 159(N).
74. Attorney-General and Jefferson v Raynor (1906) 27 NLR 145 at 147 - 148.
75. Hudson v Hudson and Another (note 70) at 268; Western Assurance Co Ltd. v Caldwell's Trustee (note 70) at 272; Sussman v Testa 1951(2) SA 226(0); Gildenhuys v Kotze 1964(2) SA 167(0); LF Boshof Investments (Pty.) Ltd. v Cape Town Municipality 1971(4) SA 532(C) at 535; JR and M Moffett v Kolbe Eiendoms Bpk. 1974(2) SA 426(0) at 428 A.
76. Western Assurance Co Ltd. v Caldwell's Trustee (note 70) at 271; Texas Company SA Ltd. v Wilson Bros Garage 1936 NPD 510; Argus Printing and Publishing Company v Anastassides 1954(1) SA 72 (W) at 74.
77. Western Assurance Co Ltd. v Caldwell's Trustee (note 70) at 275; Kent v Transvaalsche Bank 1907 TS 765 at 773 - 774; Fisheries Development Corporation of SA Ltd. v Jorgenson and Another 1979(3) SA 1331(W) at 1340 - 1341; cf. Weinerlein v Goch Buildings Ltd. (note 44) at 292 - 293.
78. Goldberg v Goldberg 1938 WLD 83.
79. 1927 TPD 19.
80. Meintjies v Theunissen (1895 - 1896) 10 EDL 55.
81. Ritchie v Andrews (1881 - 1882) 2 EDL 254

82. 1923 SWA 65.
83. Hunt defines criminal contempt as the unlawful and intentional violation of the dignity, repute or authority of a judicial body, or the interference in the administration of justice in a matter before it (South African Criminal Law and Procedure) (Vol 2) 179.
84. Verkouteren v Savage 1918 TPD 62 at 68; S. v Beyers 1968(3) SA 70 (AD) at 77 et seq; Cape Times Ltd. v Union Trades Directories (Pty.) Ltd. 1956(1) SA 105(N); see, Milton, 'Defining Contempt of Court' 85 SALJ (1968) 387 for a comparison of criminal and civil contempt.
85. S. v Magerman and Others 1960(1) SA 184(0).
86. S. v Magerman and Others (note 85) at 189; S. v Nene 1963(3) SA 58(N) at 60.
87. R. v Silber 1952(2) SA 475 (AD) at 480.
88. R. v Lloyd (1904) 22 SC 347.
89. R. v Joe 1906 EDL 16.
90. R. v Rosenstein 1943 TPD 65.
91. R. v Silber (note 87).
92. Taitz, "Are Summary Proceedings for Contempt of Court in facie curiae absolutely necessary in our Law?" 4 SACC (1980) 60 at 61.
93. In re Neethling 1874 Buch 133, In re Dormer (1891) 4 SAR 64; S. v Olivier 1964(3) SA 660(N); S. v Tobias 1966(1) SA 656 (N); S v Van Niekerk 1970(3) SA 655 (T).

94. Incorporated Law Society v Hesom 1909 ORC 85; Incorporated Law Society v Chick (1908) 25 SC 620.
95. Inter alia: S. v Van Niekerk 1972(3) SA 711 (AD).
96. Borrie and Lowe, The Law of Contempt (1973), 248 et seq.
97. Op. cit. 249.
98. [1565] Toth 101; cited by Borrie and Lowe (note 96), at 249.
99. Loc. cit. ; cf. Smit v Smit (note 66) in which case King A J held that unnecessarily prolix affidavits in Rule 43 applications defeat the object of the Rule and 'is an abuse of the process of the Court. Unlike the unfortunate litigant in Milward v Welden (note 98) the only penalty incurred by the ensuing applicant in Smit v Smit (above) was the dismissal of the application with costs.
100. Ferreira v Bezuidenhout 1970(1) SA 551(0) at 552.
101. Verkouteren v Savage (note 84) at 67 - 68; cf. Cape Times Ltd. v Union Trade Directories (Pty) Ltd. (note 84) at 121; S. v Beyers (note 84) at 80 - 81; see also Spiro, "Non-compliance with Orders of Court", 86 SALJ (1968) 65 at 68 (et seq).
102. Metropolitan Industrial Corporation (Pty.) Ltd. v Hughes 1969(1) SA 224(T) at 227; Ferreira v Bezuidenhout (note 100) at 553; Protea Holdings Ltd v WRIWT and Another 1978(3) SA 865 (W).
103. Swanepoel v Bovey 1926 TPD 457; Ferreira v Bezuidenhout (note 100).
104. Hofmeyer v Fourie 1975(2) SA 590(C) at 594, 597.
105. S. v Beyers (note 84).
106. Verkouteren v Savage (note 84).

107. Ngoma v Ntshagi 1913 EDL 338.
108. Burton v Rosentrauch & Co. 1932 GWL 49.
109. Asst. Master v Van Blerk 1934 GWL 79.
110. Protea Holdings Ltd. v Wriwt and Another (note 102).
111. Cf. M'Dermott v Judges of British Guiana V Moore (NS) 466 (PC) to be found also in 16 ER 590.
112. De Wet and Swanepoel, Strafreg (1 ed) 401, the section on contempt of court has been omitted from the latest edition (1975).
113. Beames, A Translation of Glanville (1812) 36 and 80.
114. See the authorities cited in: In re Dormer (note 93); Makapane v Khope 1923 AD 551. Cf. M'Dermotts case (note 111) 16 ER 590 at 596 et seq, in this case the Privy Council found it unnecessary to decide this issue.
115. Voet 5.1.2 and 5.1.62; cf. Attorney-General v Crockett 1911 TPD 893 at 900; see also, Verkouteren v Savage (note 84) and the English cases cited therein. Cf. S. v Beyers (note 84) at 77 F - G.
116. Attorney-General v Crockett (note 115) at 917; cf In re Dormer (note 93) at 79 and S. v Beyers (note 84) at 76 G - H; see Milton (note 84) at 388.
117. Cf. S. v Beyers (note 84) at 76 G - H.
118. Van Vuuren v Agricura Laboratories (Edms) Bpk 1974(2)SA 324 (NC at 326).
119. Simson & Co v Fleck 2 Menz 255; Lloyd v Horn 1915CPD 13; Meyer v Meyer 1945 TPD 118. In Jessen v Jessen 1904 TH 98 the Court clearly indicated its reliance on English law: De Jong v Sliom 1930 TPD 570 at 572; cf. Stoner v SA Railways 1933 TPD 265 at 271 and also Win and Son v Levin 1916 WLD 36.

120. Houtlands Investments (Pty.) Ltd. v Traverso Construction (Pty.) Ltd. 1976(2) SA 261(C); Pietersburg Produce Co v Minnie Stores 1961(1) 702 (N); cf. Commercial Motors v Caledonian Motors 1960(1) SA 366(SR); see also, Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk 1971(3) SA 455(T).
121. Excelsior Meubels Bpk. v Trans-Unie Ontwikkelingskorporasie Bpk. 1957(1) SA 74(T); Caluza v Minister of Justice 1969(1) SA 251(N).
122. In a recent case in Cape Town (S v Oscar Mpetha and Others) the Court, per Williamson J, ordered a protesting spectator to leave the Court The Argus, 3 March 1981.
123. Before the establishment of the office of Registrar at the Cape, many of his functions were carried out by a commissioner (a judge) of the Raad van Justitie; see Ex parte Millsite Investment Co (Pty.) Ltd. 1965(2) SA 582 (W) at 586 A - B.
124. Attorneys Act No 53 of 1979; Admission of Advocates Act No 74 of 1964.
125. 1966(3) SA 719(T).
126. At 723 F - H.
127. Pienaar and Versfeld v Incorporated Law Society 1902 TS 11 at 16; De Villiers and Another v McIntyre NO 1921 AD 425 at 435, 444 - 447, 463 et seq.
128. Pesskin's case (note 125) at 724; Ex parte Braatveldt and Ex parte Mortinson 1982(2) SA 621(T) 625 C - H, 627 D - E.
129. Re Cairncross (1877) 7 Buch 122; Trustees of Pretorius v A.B. (1876) 6 Buch 205.
130. Kudo v Cape Law Society 1977(4) SA 659 (AD) at 675; cf. Law Society Transvaal v Behrman 1981(4) SA 538(AD) at 557.

131. Van Zyl, The Judicial Practice of South Africa (2 ed) 759.
132. 1953(2) SA 192 (T).
133. Note 125.
134. Ex parte Christodolides (note 132) at 193 C - 194A.
135. 1954(2) SA 246 (N).
136. See also, Johannesburg Bar Council v Stein 1946 TPD 115.
137. For the English law on point see Borrie and Lowe, The Law of Contempt (note 96) at 205 et seq.
138. Re Johnson (1887) 20 QBD 68 at 74.
139. Ibid. Cf. Clements and Costa Rica Republic v Erlanger (1877) 46 LJ Ch 375.
140. Alliance Building Society v Austen [1951] 2 All Er 1068.
141. Re Henry Pound, Son and Hutchins (1889) 42 ChD 402; Angel v Smith (1804) 9 Ves 335.
142. The Jarlinn [1965] 3 ALL ER 36.
143. Voet 2.1.57; see also Trotter v Lelmkuhl and Moore (1861) 4 Searle 69.
144. Incorporated Law Society v Chick (1908) 25 SC 620; Incorporated Law Society v Wessels 1927 TPD 592; Law Society v Donner & Co 15 CTR 213.
145. S. 83(1) of Act No 53 of 1979.
146. 1903 TS 111.

147. At 115.
148. See text relating to notes 307 - 309.
149. See inter alia: Klipriver Licensing Board v Ebrahim 1911 AD 458 at 463 - 464 Loxton v Kenhardt Liquor Licensing Board 1942 AD 275 at 281, 286 and 308; SA Medical and Dental Council v McLoughlin 1948(2) SA 335(AD) at 392; West Rand Bantu Affairs Administration Board v Jacques 1976(4) SA 903(AD) at 913; Wolgroeiërs Afslaërs (Edms.) Bpk. v Munisipaliteit van Kaapstad 1978(1) SA 13(AD) at 36.
150. See page 45 below.
151. See for example Ex parte Millsite Investment Co (Pty.) Ltd. 1965(2) SA 582(W) considered more fully at page 22 below.
152. Grotius, Inleiding 1.7.10.
153. Spiro, The Law of Parent and Child (3 ed) 84, 146 - 147 and 171.
154. Op. cit. 171.
155. Op cit. 146 et seq.
156. For example see, A v B 1906 TS 956; Hildebrand v Hildebrand 1923 WLD 151; Paton v Paton 1929 TPD 776.
157. S. 31 of Act 33 of 1960.
158. Ex parte Commissioner of Child Welfare : In re Schmidt 1956(4) SA 787 (T) at 789; Holzhausen v Linde NO. 1978 (3) SA 27 (O) at 32.
159. JCI case 1903 TS 111 at 115.
160. 1925 AD 282.
161. At 292 - 293.

162. At 293 - 297.
163. At 295. The learned Judge of Appeal has abridged the original quotation by De Villiers CJ in Mills and Sons v Benjamin Bros. (1876) 6 Buch 115 at 121. The full quotation is:
"Now it is quite true that this Court is a Court of Equity as well as of Common law, but it can administer equity only so far as it is consistent with the principles of Roman-Dutch law."
This section in italics was omitted by Kotze JA.
164. 1965(2) SA 582 (W).
165. At 583.
166. At 586 A.
167. At 586 C - F
168. See page 9 above.
169. See Millsite Case (note 164) at 585H - 586G.
170. Roberts Construction Co Ltd v Wilcox Bros' (Pty.) Ltd. (note 30).
171. 1909 TS 147 at 149.
172. 1914 TPD 426.
173. Cf. Municipality of Cape Town v Morkel and de Villiers 3 Menz 561.
174. S. 96 of the South Africa Act 1909.
175. Inter alia: Union Government v Rosenberg (Pty.) Ltd. 1920 AD 120 at 130; Harris v Minister of the Interior 1952(2) SA 471 (AD); LTA Engineering Ltd. v Seacat Investments (Pty) Ltd. 1974(1) SA 747 (AD) at 771.
176. Hudson v Hudson and Another (note 70); Verkouteren v Savage 1919 AD 183.

177. Rule 13 of the Appellate Division Rules.
178. 1912 AD 392.
179. 1914 AD 179.
180. See note 58.
181. Wessels & Co v De Beer 1919 AD 172; Randfontein Estates v Robinson 1921 AD 515. Cf. West Rand Estates Ltd. v New Zealand Insurance Co Ltd. 1926 AD 173.
182. Kudo v Cape Law Society (note 130); cf. Law Society Transvaal v Behrman (note 30).
183. R. v Vlotman 1911 AD 632.
184. In re McKenzie 1933 AD 367.
- 184a. Taitz, "Are summary proceedings for contempt of court in facie curiae absolutely necessary in our Law?" (note 92) at 65.
185. See page 83 below, see also Gentiruco AG. v Firestone SA (Pty.) Ltd. 1972(1) SA 589 (AD) at 600 E et seq.
186. Cf. Minister of Labour and Another v Amalgamated Engineering Union 1950(3) SA 383 (AD) at 391.
187. S. 315 of the Criminal Procedure Act 1977.
188. Ss. 317 and 318.
189. S. 319.
190. 1951(1) SA 1 (AD).
191. At 6 A - B.

192. At 6 C - D.

193. At 6 E - F.

194. At 7 A

195. At 7 B - C

196. Ss. 103, 104, 105 and 106. The text of the first three was subsequently amended by the Appellate Division Further Jurisdiction Act No 1 of 1911.

197. S. 106 of the South Africa Act 1909, repeated by Act No 16 of 1950.

198. Nathalia v Principal Immigration Officer 1912 AD 23; Cassim and Others v Meman Mosque Trustees 1917 AD 154; Paruk and Others v Parker Wood & Co 1917 AD 163; Sheeley v The Taxing Master 1911 AD 292 and 450.

199. A third type of appeal in respect of matters specifically referred to the Privy Council by the Monarch, acting within his prerogative powers, is not relevant here. No such jurisdiction was conferred upon any State Official by the South Africa 1909. However beyond the scope of this study is the question now raised en passant by the writer, whether such prerogative power regarding the (possible) reference of matters to the Appellate Division has not been introduced by virtue of s 7 (4) of the Republic of South Africa Constitution Act No 32 of 1961, which provide that 'the State President shall in addition have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative'.

201. 1911 AD 432.

202. At 438 and 441 respectively.

203. 1910 AD 1.

204. Rule 18 of the Rules of the Appellate Division.
205. Geduld Proprietary Mines Ltd. v Briesch (note 201) at 438.
206. See page 493 et seq below.
207. Ss. 370 and 371 of the Criminal Procedure Act 1917.
208. S. 372.
209. R. v Smith 1912 AD 386; R v Didat 1913 AD 299.
210. R. v Didat (note 209); R. v Leo and Another 1914 AD 241; R. v Silber 1940 AD 187 at 193.
211. Notes 190 - 195 and the text relating thereto.
212. R. v Milne and Erleigh (note 190) at 6 C - D. Cf S. v Mofokeng 1962(1) SA 551 (AD).
213. Inter alia : Collier v Redler and Another 1923 AD 640 (regarding the voluntary winding up of a company); Dreyer and MacDuff v New Marsfield Collieries Ltd. 1935 AD 318 which concerned the rectification of a company's register of members.
214. Bibi v Immigration Officer (Natal) 1913 AD 495 in regard to a question of law reserved in terms of the Immigration Act 1913; Geduld Proprietary Mines Ltd. v Briesch (note 201) which concerned a special case state by a magistrate in terms of the Transvaal Workman's Compensation Act 1910; Crown Mines Ltd. v Johannesburg Municipality 1917 AD 577 regarding the decision of an appeal against a Municipal rating valuation in terms of the relevant Provincial Ordinance; Enyati Colliery Ltd. and Another v Alleson 1922 AD 24 being the decision of an appeal against the grant of a liquor licence in terms of the Natal Liquor Act 1896.
215. Enyati Colliery Ltd case (note 214) at 32; see also, pp 31 - 32; Collier v Redler and Another (note 213) at 645 - 646; Solomon v Law Society of the Cape of Good Hope 1934 AD 401; Dreyer and Mac-

Duff v New Marsfield Collieries Ltd. (note 213); cf. Nathalia v Principal Immigration Restriction Officer 1912 AD 23; cf. also Röhrs v Newmarch 1915 AD 108 and Collet v Priest 1931 AD 290.

216. Cf. Prince v Gagnon 8 AC 103.

217. Nathalia v Principal Immigration Restriction Officer (note 215); Röhrs v Newmarch (note 215); Collet v Priest (note 215); see also Klipriver Licensing Board v Ebrahim 1911 AD 458 in which case the Court held that a licensing board was an inferior court in terms of s 105 of the South Africa Act 1909.

218. Jones and Buckle, The Civil Practice of the Magistrates' Court in South Africa (7 ed) (hereafter referred to as Jones and Buckle) Vol 1 at p 30 and the cases cited therein.

219. 1909 TS 195.

220. Conolly v Ferguson (note 219) at 198; see also Hatfield Town Management Board v Mynfred Poultry Farm (Pty.) Ltd. 1963(1) SA 737 (SR) at 739E; Samuel v Pagadia 1963(3) SA 45 (D) at 48.

221. Santam Insurance Co Ltd. v Liebenburg and Another 1976(4) SA 312 (N) at 323 H.

222. AT 322 F.

223. S. 19 (i)(ii) read with s 24 of the Supreme Court Act 1959, referred to elsewhere in this work as s 24 review.

224. Liebenburg's case (note 221) at 323 H.

225. At 324 B.

226. (1884 - 1885) 3 SC 181 at 183 - 184.

227. (1886) 4 SC 72.

228. (1887) 5 SC 192 at 193.
229. The Supreme Court will exercise its inherent review powers in regard to an excess of jurisdiction and/or mala fides on the part of an administrative authority or other statutory body despite legislative ousting of its jurisdiction; see inter alia : Union Government v Fakir 1923 AD 466 at 469 - 470; Schermbucker v Klindt NO. 1965 (4) SA 606 (AD) at 623 F et seq; Nkondo v Minister of Police and Another 1980(1) SA 894(0) at 910 D - G; see also page 134 below.
230. See p 211, et seq, below and the cases cited thereto.
231. Steyn, Die Uitleg van Wette (5 ed), 208 et seq.
232. 1938 AD 195.
233. At 227.
234. Middelburg Municipality v Gertzen 1914 AD 544; Johannesburg Municipality v African Realty Trust 1927 AD 163 at 173; Swart NO. and Nicol NO. v Garner and Others 1951(3) SA 589 (AD) at 607.
235. See Jones and Buckle Vol 1 at 31 and the cases therein cited.
236. Tshayiviti v Tshayiviti 1907 EDC 153.
237. Leeuwen v Spalding 1912 TPD 202.
238. Graham v Graham 1950(1) SA 655 (T).
239. Jones and Buckle, Vol 1 at 31; see also, R. v Boon 1913 TPD 12 at 15; Hatfield Town Management Board v Mynfred Poultry Farm (Pty.) Ltd. (note 220) at 739 F - G.
240. See page 1 et seq above.
241. See page 5 et seq above.

- 242. See page 29 et seq above.
- 243. See page 9 et seq above.
- 244. See page 34 et seq above.
- 245. Taitz, "Are summary proceedings for contempt of court in facie curiae absolutely necessary in our Law?" (note 92).
- 246. Peacock v Bell and Kendal 1 Wm. Saund (1667) 69: See the text relating to notes 6 - 8 above.
- 247. Supra.
- 248. 4 Co Inst 71.
- 249. Stephen's Commentaries on the Laws of England (19 ed), Vol at 148 et seq.
- 250. Ibid.
- 251. See p 1 et seq above.
- 252. Jacob, "The Inherent Jurisdiction of the Court" (note 37), at 51-52.
- 253. Op. cit. 32.
- 254. Op. cit. 40.
- 255. Op. cit. 44.
- 256. Op. cit. 46.
- 257. Op. cit. 47 - 48.
- 258. Op. cit. 48 - 49.
- 259. Op. cit. 24 - 25.

260. Ibid.
261. Cf. para. (i) on p 36 above.
262. Cf. para. (iii) on pp 36 - 37 above.
263. Cf. para. (ii) on p 36 above.
264. Cf. para (v) on p 37 above; cf also Federated Trust Ltd v Botha (note 53a) at 654D, more particularly the statement by Van Winsen AJA on p 10 above.
265. See page 36 et seq.
266. See the text relating to note 252.
267. Jacob, (note 37), at 49.
268. Prescott v Law Society of British Columbia (1971) 19 DLR (3d) 446; Cf. Kudo v Cape Law Society 1977(4) SA 659 (AD).
269. These decisions are to be found in the Annual Survey of Commonwealth Law for the years 1970 - 1975 (inclusive). Due to many of these Commonwealth reports not being available to the writer, it has not been possible to confirm the citation of all cases referred to nor their contents.
270. See p 42 et seq below.
271. Inter alia : Thorpe v Alexander Fork Lift Trucks Ltd. [1975] 3 ALL ER 579 (CA); Rawal v Mombasa Hardware Ltd. (1968) EA 392.
272. Montreal Trust Co. v Churchill Forest Industries (Manitoba) Ltd. (note 37).
273. Inter alia : Tringali v Stewardson, Stubbs and Collett Ltd. (1966) 1 NSW 354; Taylor v Edwards (1967) 8 WN (PT 1) (NSW) 386.

274. Inter alia : Harroman v Harroman (1971) 18 WIR 34; Attobquarshie v Okpate (1973) 1 GLR 59; Shyain Thanki v New Palace Hotel Ltd. (1972) EA 199.
275. Talsky v Talsky (No 2) (1973) 39 DLR (3rd) 516.
276. Gleeson v Williams (1972 - 1973) ALR 136 T.
277. C W Morris and Co (Pty.) Ltd. v World Services and Construction (Pty.) Ltd. (1973) VR 753.
278. Rochfort v John Fairfax & Sons Ltd (1972) 1 NSWLR 16.
279. McCordie v Township of Bosenquet (1974) 5 OR (2nd) 53 this case concerned a land boundary dispute, the court stayed proceedings pending a survey of the disputed area; see also, Tringali v Stewardson Stubbs & Collett Ltd. (note 273); Eyre v Wilson & Horton Ltd. (1967) NZLR 769.
280. Sutler v Conwest Exploration Co Ltd (1970) 16 DLR (3d) 726.
281. Inter alia : Mulria v Dass (1971) EA 227; Adidas Sportschuh Fabriken Adi Dassler AE. v Kinnery Shoes of Canada Ltd. (1971) 19 DLR (3 rd) 680; Devendra Narain Singh v Shiva Kumar Prassed Singh 1971 AIR (Pat) 396; British Columbia Hydro Power Authority v Fox (1971) TWR 494; Abdul Rashid v Sitaramji 1974 AIR (ALL) 275.
282. Rose v Humbles (1972) 1 ALL ER 314 (CA).
283. Isaac v Collie (1967) 12 WIR, cited 1970 ASCL at 452.
284. Malacca Malay Guru Co-Operative v Fan Mei Hua (1971) 1 MLJ 107; Mawji v Arusha General Store (1970) EA 137.
285. Oktrooi van het Vereenigde Oostindische Compagnie gedat. 20 Maart 1602.

286. Visagie, Regspleging en Reg aan die Kaap van 1652 tot 1806 (1969), 24 et seq; Nadaraja (note 291), 11.
287. Visagie (note 286), at 120 - 121.
288. Burge, Commentaries on Colonial and Foreign Laws (1907 edition), Vol 1 at 110. The editor of this edition was a judge of the Supreme Court of Ceylon.
289. Including, Damhouder, Merula, Van Wassenauer. See Visagie (note 286), 120 - 122.
290. De Wet, "Nederlandse Reg in Suid-Afrika tot 1806", 21 THRHR (1958) 162 at 168.
291. The biographies of Judges of the Cape and Natal Supreme Courts clearly indicates their English legal training, see Roberts, Legal Bibliography of South Africa (1942), 347 - 384. The situation as regards judges in Ceylon would appear to be similar, if anything the judges had little or no training in Roman Dutch law. See Nadaraja, The Legal System of Ceylon in its Historical Setting (1972), 229 et seq.
292. See Proculus Redivivus, "South African Law at the Cross Roads", 82 SALJ (1965) 17; cf. Cameron, "Legal Chauvinism, Executive - Mindedness and Justice - L C Steyn's "Impact on South African Law", 99 SALJ (1982) 38.
293. The following factors inter alia which militated against the preservation of Roman-Dutch law were observed by the writer on a recent visit to Sri Lanka
 - (a) the inability of lawyers (save for a few academics) to read Roman-Dutch law in the original and

- (b) the difficulty in obtaining modern South African textbooks and material on substantial aspects of Roman-Dutch law.

This causes the Court to lean heavily on English and other Commonwealth law and decisions, particularly Indian authorities.

294. Ordinance No 2 of 1889.
295. S. 839 of Ordinance no 42 of 1921.
296. S. 151 of the Indian Civil Procedure Code 1908.
297. See inter alia : the 1868 Indian Supreme Court decision in Hurro Chunder Chowdry et al v Schoorodhonee Debia (1868) 9 WR 402 (33 CAL 927); cf. Narayan Chetty v Jusey Silva 8 NLR (Cey) 162 and Abeyaratna v Perera 15 NLR (Cey) 347 in which cases the Supreme Court of Ceylon provided relief where no provision existed in the Civil Procedure Code 1889.
298. Narayan Chetty v Jusey Silva (note 297).
299. Abeyaratna v Perera (note 297).
300. Olagappa Chettiar v Reith 43 NLR (Cey) 91.
301. Ratnayake v Fonseka et al 29 NLR (Cey) 397.
302. Parsons v Abdul Cader 42 NLR (Cey) 383.
303. Selvadurai v Rajah et al 41 NLR (Cey) 423.
304. Biyanwila v Amarasekere 67 NLR (Cey) 488.
305. 46 NLR (Cey) 109.
306. 1903 TS 111.

- 307. At 114.
- 308. At 115.
- 309. At 116.
- 310. S. 20 of Act 87 of 1977.
- 311. S. 151 of Act No 24 of 1936.
- 312. Taitz, "When is an Appeal not an Appeal? A Legal Conundrum", 42 THRHR (1979) 70 at 72; see page 333 below for a further consideration of the remedy.
- 313. S. 32 of the Charter of Justice 1834, for further consideration of the remedy see page 337 below.
- 314. Rule 190 of the Rules of the Cape Supreme Court.
- 315. Granet v Jansen and Others 3 Menz 458; Stephens v Anderson 3 Menz 511.
- 316. Queen v Nathanson (1887) 5 SC 109.
- 317. S. 19(1) (a)(ii) and s 19(2) of Act No 59 of 1959.
- 318. S. 24; see page 337 below.
- 319. Rule 53 of the Uniform Rules of Court; see page 86 below.
- 320. S. 105 of the South Africa Act 1909.
- 321. Ex parte Kommissaris van Kindersorg In re J.B. 1973(2) SA 699(T).
- 322. Ferreira v Sapiero 1913 AD 318.
- 323. Article 86 of the First Schedule to Act No 44 of 1957.

324. S. 9 of Act No 7 of 1958.
325. S. 1 of Act No 59 of 1959.
326. 1972(1) SA 589 (AD) at 601 D - H.
327. Klipriver Licensing Board v Ebrahim 1911 AD 458; Raboobee v Durban Borough Council 1912 AD 405; cf. Enyati Colliery Ltd. and Another v Alleson (note 214) at 24 et seq.
328. Nathalia v Principal Immigration Officer 1912 AD 23.
329. JCI case (note 306) at 115.
330. Loc. cit.
331. (1894) 11 SC 191.
332. (1895) 12 SC 366.
333. (1883) 2 Juta 356; see page 547 below.
334. (1890) 7 SC 293; see page 555 below.
335. For the analyses of Riddelsdell v Hall (note 333) and Van Ryn & Co v Licensing Court of Cape Town and Another (note 334) see pp 547 and 555 below respectively.
336. Riddelsdell's case (note 333) at 358; see also London and South Africa Exploration Co Ltd. v Kimberley Town Council (1884) 2 HCG 331 at 348 - 349.
- 336a. See page 556 below.
337. JCI case 1903 TS 111 at 115.
338. Van Zyl, Judicial Practice of South Africa (2 ed) at 570.

339. Op. Cit. 572. In fact, Van Zyl actually gives as a precedent 'a summons to review the proceedings of a licensing court', a copy of which is set out as Annexure 1 at page 49(i) above; cf. his precedent of a summons to review the proceedings of a Magistrate in a civil case (Annexure 2) at page 49(iii) above.
340. JCI case (note 337) at 115; cf. Riddelsdell's case (note 333) and the Van Ryn & Co case (note 334) and the unreported seminal case of Kannemeyer v Rivers (note 336a) considered below at page 556, in which cases the procedure was by way of motion and not summons as stated by Van Zyl (note 339).
341. 1911 AD 458 at 463 - 464.
342. Sir James Rose Innes was an original member of the first Appellate Division bench. He was the second Chief Justice of the Union of South Africa. He is considered to have been one of the ablest of South Africa judges, a much respected lawyer and personality. See Sir James Rose Innes, Autobiography (1941).
343. See cases cited on note 149.
344. Jacob (note 37), at 49.
345. Ibid.
346. See Chapter Ten page 579 below.
347. See Chapter Five particularly page 379 below.
348. See Chapter Eleven entitled "The remedy as it ought to be", at page 594 below.

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CHAPTER TWO

- AN EXAMINATION OF THE PRINCIPAL FEATURES OF THE REMEDY -

In order to examine the nature of the remedy twenty major features will be examined below. While these features are not exhaustive they reveal much of the nature of the remedy. These features will be considered under the following headings:

- (i) The remedy is concerned only with the legality or validity of the proceeding of the authority or tribunal a quo (2.1 below at p 79);
- (ii) Only a superior court of first instance has jurisdiction to entertain common law review proceedings (2.2 below at p 81);
- (iii) The remedy extends beyond the proceedings of public bodies (2.3 below at p 83);
- (iv) The various methods of invoking the inherent review jurisdiction of the court (2.4 below at p 84);
- (v) All but one of the features of common law review are unwritten and may be found, only in the case law (2.5 below at p 86);
- (vi) The necessary locus standi in judicio of the applicant, (1) concerning his status (2.6 below at p 88);

- (vii) The necessary locus standi of the applicant (2) regarding the question of a personal interest in the cause (2.7 below at p 90);
- (viii) The time period afforded to an aggrieved party within which to institute proceedings for relief (2.8 below at p 95);
- (ix) A record of the proceedings a quo is not essential to the grant of the remedy (2.9 below at p 97);
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- (xi) The availability of the remedy in respect of part heard or interlocutory matters (2.11 below at p 105);
- (xii) The degree of proof to be established by an applicant for review (2.12 below at p 110);
- (xiii) The possible judgments which are within the jurisdiction of the Court considering an application for common law review (2.13 below at p 113);
- (xiv) The attitude of the reviewing court towards orders for costs (2.14 below at p 117);
- (xv) The right of an applicant to institute review and appeal proceedings simultaneously (2.15 below at p 119);
- (xvi) The right of an unsuccessful party in review proceedings to appeal to an higher court (2.16 below at p 121);
- (xvii) The territorial jurisdiction of the reviewing court (2.17 below at p 126);

- (xviii) Legislative exclusion of the jurisdiction of the Court in relation to review proceedings (2.18 below at p 134);
- (xix) Temporary exclusion of the Court's jurisdiction by reason of available domestic remedies (2.19 below at p 137);
- (xx) The exclusionary effect on the jurisdiction of the Court by reason of the so-called functional approach (2.20 below at p 140).

Before examining the features, as set out above, certain basic aspects should be noted. First, the term common law review shall mean the proceedings by way of motion whereby the applicant directly requests the Court '... to review, correct or set aside' the offending act or decision.¹ Second, although common law review is the most direct and more usual method of invoking the inherent review jurisdiction of the Court, it is not exclusive. As will be observed below, the jurisdiction may be invoked by a number of other remedies e.g. interdict proceedings, a declaration of rights, an action for damages etc.,² Third, although many of the judicial decisions apply pertinently to common law review they are applied by the Court in all matters in which its review jurisdiction is invoked, save as to the actual method or procedure adopted by the applicant.^{2a} This will depend on the actual remedy sought by the applicant. Fourth, the term appeal, except where otherwise indicated, shall mean an ordinary judicial appeal i.e. an appeal stricto sensu which may be described as

"a redetermination of the case as set out on the record a quo and of the law relevant to the facts as contained in such record."³

It must be emphasised that when considering an appeal the Court is concerned with the substantive correctness of the decision a quo i.e. the merits of the case. Fifth, any reference to Section 24 review shall mean the statutory procedure whereby the Court is empowered by the Supreme Court Act 1959 to review the proceedings of inferior courts.⁴ Finally, statutory or public bodies, administrative authorities and tribunals shall be referred to as administrative authorities, or simply as an authority, except where otherwise indicated.

2.1 The remedy is concerned only with the legality or validity of the proceedings of the authority or tribunal a quo.

The court has repeatedly held that in exercising its inherent review jurisdiction it is concerned only with the validity or legality of the proceedings of the authority or tribunal a quo⁵. Under these circumstances the Court is not concerned with the correctness of the decision.⁶ This is a matter which may be decided only on appeal. This is perhaps the single most important aspect of the Courts inherent review powers and the most distinguishing aspect between appeal and (common law) review procedure.

The term proceedings enjoys a fairly wide interpretation. It may include events which have taken place before the authority has formally commenced proceedings e.g. a statement by a member of the authority indicating bias towards a party is a recognised irregularity. In fact such event may have taken place before the authority was constituted. Thus in Appel v Leo⁷ the Court set aside arbitration proceedings before an eminent Queens Counsel as he had previously acted for one of the parties to the arbitration. Proceedings may include events which took place after the authority has made its decision. For example an authority may not rescind its own decision and substitute another unless such powers have been conferred upon it by its enabling Act.⁸ The actual decision is included in the term proceedings as any decision founded on an irregularity e.g. an excess or lack of jurisdiction is reviewable. But a decision, incorrect on the facts,⁹ or inequitable or unreasonable¹⁰ and one based on an error of law¹¹ is generally not reviewable.

By virtue of its review jurisdiction the Court confines administrative authorities to the jurisdiction conferred upon them by their enabling Act. At the same time the Court ensures that such authorities comply with certain judicially accepted principles of behaviour. These principles include basic rules of law such as the audi alteram partem rule, the necessity for the authority to apply its mind to the matter before it, the necessity to act bona fide etc. In exercising its review powers the Court may be seen as acting in a supervisory capacity, or even in a position of controlling

or policing administrative authorities in order to ensure that such authorities comply with the power vested in them by statute and judicially accepted principles or norms in conducting their functions.

Any breach of such principles by an authority is considered by the Court to be a reviewable irregularity. An examination of the law reports will indicate that over the years a list of such irregularities has been compiled. In Harnaker v Minister of the Interior¹² Corbett J saw the situation in these terms:

"... Generally the Courts have sought to circumscribe and define review under the common law by reference to the grounds of review rather the types of matters to be reviewed".

This approach by the Court so essential to the understanding of the nature of the Court's inherent review jurisdiction has been referred to elsewhere as the irregularity doctrine.¹³ The basis of the doctrine is that the Court will not interfere with the decision of an authority unless such authority has committed a judicially recognised irregularity or illegality in arriving at such decision.¹⁴

Judicially recognised irregularities comprising the doctrine may be classified under the four major headings¹⁵:

- (i) irregularities which relate to the jurisdiction (including irregularities concerning jurisdictional facts)¹⁶;
- (ii) irregularities which are founded on a lack of good faith or ulterior motive on the part of the authority¹⁷;
- (iii) acts which offend the rules of natural justice. These rules may be seen as the audi alteram partem rule or the right of a party to be heard in his defence and the right of every person to a fair and unbiased hearing or trial¹⁸;

- (iv) irregularities caused by an abuse of discretion on the part of an authority (other than the irregularities which are, more correctly, classified under (i), (ii) and (iii) above).¹⁹

The content of the irregularity doctrine, in other words the judicially recognised grounds for review, will be examined fully below.²⁰

Substantive errors of fact and of law are the subject of appeal procedure. In exercising its appellate jurisdiction the Court considers the substantive correctness of the decision a quo i.e. the merits of the decision based on the facts of the case, as set out on the record a quo, and of the law relevant to those facts. It may substitute its decision for that of the court a quo. Appeal is clearly a much wider remedy than review. If an appeal is available, a party aggrieved by an irregularity committed by the court or authority a quo may raise such irregularity by way of appeal if it appears prima facie the record.²¹ If it does not, the aggrieved party may proceed only by way of common law review.

In respect of the proceedings of inferior courts the usual procedure is by way of s.24 review. Today both common law review and s.24 review must be instituted by way of motion²² and accordingly the applicant will raise any irregularity in his papers. Common law review and s.24 review are similar in many respects.²³ Both are concerned only with the validity or legality of the proceedings a quo. Whether s.24 is limited to the grounds set out in the Act is debateable.²⁴

2.2 Only a superior court of first instance has jurisdiction to entertain common law review proceedings.

As indicated above only a superior court enjoys an inherent jurisdiction²⁵ and accordingly enjoys inherent review powers. Although a superior court, the Appellate Division has no powers of review. It possesses only appellate and no original jurisdiction.²⁶ Thus inherent review powers may be enjoyed by a superior court of first instance only, i.e. a provincial or local division of the Supreme Court.

It is conceivable that the legislature may confer a jurisdiction similar to that of the Court's inherent review jurisdiction upon an administrative authority or tribunal. However such remedy would be nothing more than a form of statutory review. In the absence of clear and express intention by the legislature, the Court will not lightly acknowledge such jurisdiction.²⁷ The Court jealously guards its review jurisdiction.²⁸

In terms of the Supreme Court Act 1959 only a provincial division has been vested with the jurisdiction to determine appeals from inferior courts. The relevant section further provides that only such court may review the proceedings of inferior courts in terms of section 24 of the Act.²⁹ This limitation does not apply to common law review proceedings which may be entertained by a local division, nor does the Act exclude a local division from exercising review powers conferred under various statutes e.g. s 151 of the Insolvency Act 1936.³⁰ A circuit court, in terms of s 7 of the Supreme Court Act 1959, i.e. a circuit local division, is deemed to be a local division of the Supreme Court.³¹ None the less the Court in Pinkey v Race Classification Board³² held that a circuit court is only 'deemed to be a local division'. It is not a local division and therefore does not enjoy the jurisdiction to consider an appeal (or review proceedings) which the legislature intends should be heard by a provincial or local division only.

Before the promulgation of the Uniform Rules of Court, the essential distinction between common law review and the review of the proceedings of inferior courts (now section 24 review) was that the former was launched on motion whereas the latter was by way of summons.³³ The nature of the remedy sought by the applicant was apparent by the procedure adopted. In Parsons v Rustenburg Municipality³⁴ an ultra vires administrative decision by a magistrate was brought before the court by way of a summons for review. The Court dismissed the application on the ground that the decision was of an administrative nature and the proceedings should have been by way of motion³⁵. This situation could not occur today as the procedure for both species of review is by way of motion.³⁶

A judicial decision of the Supreme Court is not subject to any form of review.³⁷ An aggrieved party has only the right of appeal where this is applicable.³⁸ None the less there appears to be no reason why the decision of a Supreme Court, or that of a judge of the Supreme Court, which may be considered an administrative and not a judicial decision, should not be tested by way of common law review.³⁹

2.3 The remedy today extends beyond the proceedings of public bodies.

The inherent review jurisdiction of the Court today extends beyond the proceedings of public bodies, as was stated by Innes CJ in the JCI case.⁴⁰

Where cause exists the Court will review the proceedings of inter alia the following public bodies, administrative authorities, tribunals etc., including:

- (i) an administrative authority or tribunal (other than Parliament)⁴¹ one established by legislation for the purpose of carrying out any legislative,⁴² ministerial,⁴³ judicial,⁴⁴ quasi-judicial⁴⁵ or purely administrative function;⁴⁶ Included under this category are the Provincial Councils,⁴⁷ Group Areas Boards,⁴⁸ National Liquor Board and Local Liquor Licensing Boards;⁴⁹ National Transport Commission and Local Road Transportation Boards;⁵⁰ the various licensing and valuation boards, city and municipal councils and their duly appointed sub-committees etc.;
- (ii) statutory associations which are concerned with special groups or classes of persons but not the public generally, e.g. universities,⁵¹ statutory professional associations e.g. the Incorporated Law Societies,⁵² the Institute of Architects⁵³, the Johannesburg Stock Exchange;^{53a}
- (iii) voluntary associations which may or may not be registered or incorporated in terms of legislation and which include church organisations,⁵⁴ trade unions,⁵⁵ sporting bodies

and clubs⁵⁶ and professional bodies such as the Jockey Club of South Africa⁵⁷ and the Professional Golfers Association, etc;

- (iv) arbitration boards whether established by legislation e.g. arbitration of disputes between an employer and employee in terms of the Industrial Conciliation Act 1956⁵⁸ or by agreement between the parties i.e. a private arbitration;⁵⁹
- (v) inferior courts of law in the exercise of both judicial⁶⁰ and administrative functions;⁶¹
- (vi) all courts of law including superior courts in the exercise of administrative functions;⁶²
- (vii) state controlled corporations e.g. South African Railways, South African Broadcasting Corporation in the exercise of various functions including disciplinary proceedings;⁶³
- (viii) state interdepartmental relationships.^{63a}

The inherent review jurisdiction of the Court extends across the greatest part of the socio-economic and political spectrum in South Africa. As has been indicated elsewhere, through its review jurisdiction the Court confines the multi-various authorities to the terms of their respective enabling Acts or constitutions and ensures that such authorities will function in terms of judicially recognised norms of conduct.⁶⁴ One notable omission, which will be considered separately below,⁶⁵ is to be found in the proceedings of Companies registered in terms of the Companies Act 1973.⁶⁶

2.4 The various procedures or methods of invoking the inherent review jurisdiction of the Court.

While common law review may be seen as the most usual and direct method for invoking the Courts' inherent review jurisdiction it is not exclusive. It may become necessary for the court to exercise its inherent review juris-

diction in order to decide a matter, other than common law review. For example, when considering an application to restrain an administrative authority from carrying out the terms of a decision, alleged by the applicant to be ultra vires its enabling Act, the Court will be obliged inter alia to review the offending decision. The inherent review jurisdiction of the Court is not limited solely to common law review, nor to any other particular remedy. It should be seen as an overriding jurisdiction to which the Court may resort under appropriate circumstances. Although this essential feature will be considered more fully below, it is apposite to note the various remedies and procedures, other than common law review, the entertaining of which may oblige the Court to resort to its inherent review jurisdiction, more particularly:

- (i) a declaration of rights⁶⁷;
- (ii) a prohibitory interdict⁶⁸;
- (iii) a mandatory interdict (mandamus)⁶⁹;
- (iv) the interdictum de libero homine exhibendo⁷⁰;
- (v) a mandament van spolie⁷¹;
- (vi) an action for damages⁷²;
- (vii) an exception to a summons commencing action or to a defendant's plea⁷³;
- (viii) a criminal trial⁷⁴;
- (ix) an appeal (stricto sensu)⁷⁵;
- (x) statutory review⁷⁶;
- (xi) s. 24 review i.e. the review of the proceedings of inferior courts⁷⁷;

- (xii) the special review procedure relating to the proceedings of criminal trials before any regional or district magistrates' courts.⁷⁸

The fundamental nature of the Courts' inherent review jurisdiction, i.e. the review process, should be seen as being declaratory. There is no other similar remedy or jurisdiction available to the Court. It is unique, too, in that the Court may resort to such jurisdiction when entertaining many varied remedies or procedures.

2.5 All but one of the features of the remedy are unwritten and may be found only in the case law.

Save as to the peremptory rule obliging any applicant directly seeking the review of the decision or proceedings of any inferior court, administrative authority or tribunal, to proceed by way of motion in the manner described in the rule,⁷⁹ no other feature of the remedy is to be found in any statute or other legislative enactment. It is apposite that the rule regarding the method of proceeding by way of motion was promulgated as late as 1965.⁸⁰

In the classic JCI case⁸¹ Innes CJ stated that the remedy required:

"... no special machinery created by the legislature;
it is a right inherent in the Court."

Unlike an appeal, which is a statutory remedy, the inherent review jurisdiction of the Court may be said to exist not only in the absence of any legislative provision but prevails even in the face of legislative exclusion of the Courts' jurisdiction.⁸² Section 24 review is also a statutory remedy. Its origin may be traced to the Charter of Justice.⁸³ There is some authority that the legislative grounds for the grant of the remedy are not exhaustive. In The King v Higginson⁸⁴, the Court held that it is not limited to the grounds as set out in the relevant Ordinance.

It is significant that so important a remedy as the Courts' (inherent) review power is unwritten. More significant perhaps is the fact that the law regarding the many and various features of the remedy, the ground for its grant, and the fact that it may be invoked through a number of remedies and procedures, is contained only in the decisions of the Court.

Significant also is the fact that the features of the remedy are not static, when appropriate they may be changed or varied by the Court. For example, in a recent case Wolgroeiers Afslalers (Edms.) Bpk. v Munisipaliteit van Kaapstad⁸⁵ the Appellate Division held that despite earlier decisions to the contrary, in deciding whether an applicant had unreasonably delayed in bringing review proceedings, the question of whether the respondent has been prejudiced by such delay is no criterion.⁸⁶ In the same case the Court permitted the respondent to raise the applicant's delay for the first time at the appeal stage.⁸⁷ Shortly thereafter in a subsequent case the Appellate Division revised this aspect and held that the applicant's delay could be raised only after the applicant has had an opportunity of explaining his delay.⁸⁸ It is in this manner that the remedy and its judicially accepted rules have evolved.

In other words the inherent review jurisdiction is a dynamic remedy, its features have been and are being moulded by judicial creativity and usage. It is appropriate that in the Wolgroeiers case Miller JA could state:

"Die betrokke versuim-reël is niks meer as 'n proses regtelike reël nie ... By gebrek aan statutêre of ander wettige voorskrifte rakende die prosedure wat gevolg moet word, word die prosedure, wat tydsbeperking insluit, deur die Howe self voorgeskryf."⁸⁹

In Harnaker v Minister of the Interior Corbett J, after reciting the classic description of common law review as formulated by Innes CJ in the JCI case, added:

"... Although this description of what is often termed 'review under the common law' has long been regarded as authoritative, I do not think that it was intended as a precise and exhaustive definition of that procedure, nor do I think that it has generally been so regarded..."⁹⁰

2.6 The necessary locus standi in judicio of an applicant, (1) concerning his status.

The term locus standi in judicio may be traced to the following title in the Codex: 'qui legitimam personam standi in judiciis habeant vel non' (lit: who has the locus standi in judicio and who has not).⁹¹ The subject of the title concerned the right of persons, suffering legal disability, to institute and defend legal proceedings. As litiscontestatio provided a contractual basis for judicial action and subsequent judgment it follows that only persons possessing the capacity to contract could embark on litigation.⁹²

Today the term, with or without slight variations enjoys two meanings.⁹³ First, as in Roman times, it relates to the status of the parties before the court. In this context one sometimes comes across the negative term non locus standi in judicio.⁹⁴ The second meaning of the term concerns the necessary personal interest in the case on the part of the plaintiff. It is wider than the first meaning and was described in Malan v Van Rooyen in these terms:

"... the phrase non locus standi in judicio is wide enough to include not only the case where the plaintiff has not the personal capacity to appear in Court without "assistance", but also the case where the plaintiff, though having the necessary personal capacity, has not that right or title in the cause of action which is necessary to enable him to sue on it."⁹⁵

The second and wider meaning of the term (sometimes referred to as merely locus standi)⁹⁶ is separate and distinct from and should not be equated with the first meaning. The second meaning will be considered under a separate heading below.

As indicated above the first meaning of the term relates to the status of the parties before the court and may be described as the right to institute or defend any matter or to seek any relief before the courts without requiring any assistance.⁹⁷

In its first meaning the term has nothing to do with any party's prospects of success in regard to the matter, it relates only to his general standing. A want of locus standi in a party is fatally defective to any proceedings. In other words locus standi in judicio in this sense relates to form rather than the substance of the matter i.e. the merits of the case. Any issue regarding such locus standi will be decided by the court in limine i.e. before the merits are considered.⁹⁸

It follows that a party to any proceedings must establish his locus standi. This essential requirement applies equally to common law review. If the applicant fails to discharge this onus his application will ^{be} dismissed.⁹⁹ The general rule is that an applicant in motion proceedings is obliged to make out his case in his founding affidavit.¹⁰⁰ It is necessary for an applicant to establish his locus standi at this stage as the Court will not lightly permit an applicant to supplement the allegations therein contained. He is not permitted to include in his replying affidavits essential allegations which should have appeared in his founding affidavit. Should he attempt to do so the allegations will be struck out.¹⁰¹ This strict judicial approach may be relaxed where the matter is complex and the applicant cannot reasonably be expected to have known all the essential information when the proceedings were launched.¹⁰² But this could hardly apply to questions of locus standi. Where the respondent's answering affidavits reveal the existence of allegations, which should have been raised by the applicant or point to further grounds for relief, the Court has permitted an applicant to amplify his case in his replying affidavits.¹⁰³ An applicant who is permitted the indulgence of amplifying his launching affidavit will generally find himself ordered to pay the respondent's wasted costs.¹⁰⁴ Should a dispute of fact regarding the applicant's locus standi in judicio arise on the papers the Court may direct oral evidence be heard in order to resolve such preliminary dispute.¹⁰⁵

Procedurally the respondent should object to the applicant's want of locus standi in judicio by raising the matter in his answering affidavit.¹⁰⁶ A failure or unreasonable delay in raising the issue of locus standi may bring the Court to the conclusion that the respondent has waived the right to object.¹⁰⁷ If the respondent shows good cause for not having raised the issue timeously the Court may condone the delay¹⁰⁸ but will make an appropriate order of costs against the respondent.¹⁰⁹

The Court has no discretion regarding the applicant's lack of locus standi in judicio. If the applicant has not established the right to institute proceedings or if the respondent has shown that the applicant is not possessed of locus standi in judicio, that is the end of the matter. The application will be dismissed with costs.

2.7 The necessary locus standi of an applicant (2) regarding the question of a personal interest in the cause.

The second meaning of locus standi in judicio or locus standi,¹¹⁰ relates to the plaintiff's or applicant's actual personal interest in the matter before the court. If he enjoys no such interest his case will be dismissed. The fact that he possesses the necessary status enabling him to litigate is irrelevant. The criterion of locus standi in this sense was expressed in Rescue Committee, DRC v Martheze¹¹¹ in these terms:

"... has the person appearing a direct personal interest in the suit?"

The notion of an individual seeking to assert a right enjoyed by the public as a whole without his possessing a direct personal interest in the cause is unknown in our law. The actio popularis of Roman law was not recognised in Roman Dutch law¹¹² and is not part of our law^{112a}.^{cf Delh} Public interest litigation (third party actions) are equally unknown in our law as is the English relator action i.e. an action to prevent a breach of the law by the Attorney-General on behalf of the public. The Attorney-General acts on information filed 'at the relation of an informant', the latter being referred to as a "relator". In the well known case of Gouriet v Union of Post Office Workers¹¹³ the House of Lords checked a move by the Court of

Appeal towards permitting individuals to obtain relief on behalf of the public in cases where the Attorney-General declined to act.¹¹⁴ Public interest litigation is a barren area of law in South Africa resulting inter alia in the potential loss to the public as a whole of much of their incomparable environmental heritage.¹¹⁵

Save for the exceptional situation where the legislature has sought to protect the rights or interests of a particular group or class of persons of which the applicant is a member and which is considered below,¹¹⁶ an applicant in review proceedings can enjoy locus standi only where he has a direct personal (and substantial) interest in the cause.¹¹⁷

It would appear that the Court has experienced some difficulty in defining with any degree of precision the direct and personal interest expected of the applicant.¹¹⁸ Perhaps the most comprehensive description may be found in the decision by Diemont J, as he then was, in Von Moltke v Costa Areosa,¹¹⁹ more particularly:

"... the party seeking relief must show that he is suffering or will suffer some injury, prejudice, or damage or invasion of a right peculiar to himself and over and above that sustained by members of the public, in general."¹²⁰

No actual injury, prejudice or damages need be shown by the applicant, prospective or potential damages are sufficient.¹²¹ Further, the Court has held that the injury or damage is not necessarily 'measurable in money'.¹²² In Rajah & Rajah (Pty) Ltd v Ventersdorp Municipality¹²³ the Appellate Division, per Holmes JA, referred only to 'prejudice':

"... the Court will not interfere on review with the decision of a quasi-judicial tribunal where there has been an irregularity, if satisfied that the complaining party has suffered no prejudice ..."¹²⁴
(my italics)

The facts of the case were that an application was made to the respondent municipal council for a trading licence in the name of Rajah & Rajah (Pty.) Ltd., a private company subsequently registered in terms of the Companies

Act 1926.¹²⁵ Factually at the time of the application the company was not registered and the trading licence was accordingly granted to a 'non-existent' company. The Company was registered only some months later. A trading licence may not be granted to a non-existent persona.¹²⁶ There appears to have been no attempt by the directors of the company to mislead the licensing authorities. In the proceedings instituted by the municipality to have the licence set aside on the ground that applicant company was not registered at the time of the grant of the licence, the directors replied that they believed, albeit erroneously, that they were entitled to apply for a licence in the name of a company about to be registered.¹²⁷ The court found that no prejudice had been suffered by the municipality either on its own account or on behalf of the public interest which it represents. The application for the setting aside of licence was accordingly refused.

The Court in using the term prejudice appears to have intended nothing more nor less than a direct, personal and substantial interest. In a number of decisions the Court has used the term prejudice only.¹²⁸ These decisions do not deviate from the basic principle that an applicant is obliged to establish locus standi in both senses, first the status or right to litigate and secondly a direct and personal interest in the cause. The reason for the obligation to show a personal and direct interest in the form of 'injury, damage or prejudice',¹²⁹ may be seen in the explanation by Holmes JA in Rajah & Rajah (Pty.) Ltd. v Ventersdorp Municipality (above):

"In principle it seems to me that the Courts should likewise not interfere in the present case at the instance of the Council ... since it is clear that there has been no prejudice to the public interest which the Council represents. The underlying principle is that the Court is disinterested in academic situations."¹³⁰

The lack of precise definition regarding the matter of a direct and personal interest is seen by one author as being:

"... a flexible principle, based upon practice rather than substantive law, and therefore has the scope for application to the ever-varying circumstances of our social life ..."¹³¹

Wiechers, on the other hand, while not criticising the judicial approach, suggests that the Court should give the widest interpretation to the term locus standi. This, of course, would be to the advantage of the aggrieved party.¹³²

The major exception to the rule that the applicant is obliged to establish locus standi in the sense of a direct and personal interest lies in cases where the legislature has sought to protect the rights or interests of a group or class of persons. This is known as the rule in Patz v Green¹³³ which may be seen as an rebuttable presumption (of a direct and personal interest) in favour of an applicant belonging to the group or class whose interests the legislature seeks to protect.

"Everyone has the right ... to protect himself by appeal to a court of law against loss caused to him by the doing of an act by another, which is expressly prohibited by law. Where the act is expressly prohibited in the interests of a particular person, the Court will presume that he is damnified, but where the prohibition is in the public interest, then any member of the public who can prove that he has sustained damage is entitled to his remedy."¹³⁴

A recent application of this exception may be found in Bamford v Minister of Community Development and State Auxiliary Services.¹³⁵ In this case the applicant sought an interdict against the Minister restraining him from building residences for occupation by Deputy-Ministers of State on Groote Schuur Estate in Rondebosch. The applicant relied on a contravention, by the respondent Minister, of the terms of the Rhodes Will (Groote Schuur Devolution) Act 1910.¹³⁶ The question of the applicant's locus standi was raised. The Court, per Watermeyer JP, drew a distinction between the prohibition of acts by the legislature in the interests of any particular person or class of persons on the one hand and acts prohibited in the public interest on the other. The learned Judge-President then held:

"... In the former case any such person can enforce the prohibition without proof of damage, but in the latter a member of the public must show special damage or an apprehension of damage in order to have locus standi."¹³⁷

A further possible exception to an applicant having to establish a personal and direct interest would be where the legislature has conferred such right

on a class or group of persons of whom the applicant is a member. Although the Liquor Act 1977¹³⁸ provides that any person 'ordinarily resident' within the district in which licensed premises or proposed licensed premises are situated has the right to object to the Liquor Board against the grant, renewal or transfer etc., of a liquor licence, this does not confer an unequivocal right on any such person to institute review proceedings against the decision of the Liquor Board. First, the aggrieved party is obliged to have filed his objection with the Liquor Board timeously and in compliance with the Liquor Act.¹³⁹ Secondly, such aggrieved party is required to establish substantial prejudice either to himself or to another person.¹⁴⁰

Although locus standi, in this second sense, as opposed to locus standi in judicio in the sense of status or a right to be heard without the necessity of being assisted by a parent, guardian, curator etc., is a matter of substance and not form, there appears to be no reason why the objection should not be raised in limine, if the want of locus standi is patent on the papers before the Court. Where, however, the applicant's interest is provided by statute e.g., in terms of the Liquor Act 1977,¹⁴¹ the Court may refuse to permit the issue to be raised by way of a preliminary objection in limine.¹⁴²

The nature and extent of the applicant's interest necessary to establish locus standi may vary according to the remedy sought by the applicant.¹⁴³ The applicant's interest too may become blurred with one or more essential requirements for the grant of the relief sought. Thus an applicant seeking a final interdict is obliged to establish 'a clear right' which has been defined as 'a right clearly established'.¹⁴⁴ It would appear that 'a clear right' is something more than a direct and personal interest and proof of the former will include the latter. As indicated above an applicant seeking to review the decision of a Liquor Licensing board is required to show that 'substantial prejudice' has been caused to himself or another by the offending decision.¹⁴⁵ Substantial prejudice appears greater than, and would include, the direct and personal interest necessary for locus standi.¹⁴⁶

Where a right to appeal to a higher court exists, only the parties to the suit a quo enjoy such right. It may be said that they alone possess a di-

rect and personal interest in the judgment a quo. Even where such judgment may cause damage or prejudice to others in the sense that a precedent has been established which may be used against the latter, such persons have no right of intervention in order to appeal. Our law does not know the European procedure of tierce opposition which may be described as "... a procedural device by which persons who were not parties to the action may attack a judgment which causes them prejudice".¹⁴⁷ The position in regard to section 24 review is somewhat wider in that not only the parties to a matter before an inferior court, have the right to apply to the Supreme Court for the review of the proceedings, but also certain third persons who have been prejudiced. A witness who has been compelled by the court to give privileged evidence to his prejudice may himself have the locus standi to take the decision on review.¹⁴⁸ In Brinkuis v Rasoolsha¹⁴⁹ an order of costs wrongfully granted against a person who was not a party to an action was set aside by the Court on review. There is no doubt that the Court will set aside similar irregularities by administrative authorities which unlawfully affect the rights of third parties. From this viewpoint review proceedings may be seen to be wider than appeal proceedings.

2.8 The time period afforded to an aggrieved party within which to institute proceedings for relief.

Where no specific period to institute review proceedings¹⁵⁰ is provided by legislation such proceedings must be instituted within a reasonable time.¹⁵¹ If there has been an unreasonable delay in the institution of review proceedings the Court may either refuse to entertain the matter¹⁵² or it may condone the delay and allow the matter to proceed.¹⁵³

In the past the computation of an unreasonable delay presented some difficulty. However in Wolgroeiens Afslalers (Edms.) Bpk. v Munisipaliteit van Kaapstad¹⁵⁴ the Appellate Division sought to resolve the difficulty.¹⁵⁵ The majority of the Court ruled that prejudice to the respondent as a result of the applicant's delay is not the (sole) criterion in assessing whether the delay is unreasonable.¹⁵⁶ The Court held that an unreasonable

delay is a factual matter. An analysis of the decision indicates a two-stage enquiry. First, the respondent must show by objective factual proof that the applicant had delayed unreasonably in instituting review proceedings. If the respondent succeeds the second stage is reached where the burden of proof shifts to the applicant to set up a case for condonation. The Court has retained a wide discretion in deciding whether under the factual circumstances an unreasonable delay has occurred and whether or not it is prepared to condone the delay.¹⁵⁷ The Court has held that each case must be considered on its own merits and that the question of prejudice to the respondent would appear to relate to the question of condonation only.¹⁵⁸

The 'delay rule', as it is now referred to¹⁵⁹ may be summarised as follows:¹⁶⁰

- (i) In terms of the 'delay rule' once an applicant for review, has been shown by the respondent to have unduly or unreasonably delayed in instituting such proceedings, the Court, in its discretion, may either condone such delay or refuse to entertain the application.¹⁶¹
- (ii) What is an unreasonable delay depends on the facts of the particular case and must be established by objective factual proof.¹⁶²
- (iii) Once unreasonable delay has been established by the respondent the onus shifts to the applicant to set up a case for condonation.¹⁶³
- (iv) As with unreasonable delay there is no fixed criterion regarding the question of condonation. The latter is essentially within the discretion of the Court.¹⁶⁴
- (v) Prejudice to the respondent occasioned by the applicant's delay is not a criterion in establishing 'unreasonable delay'. It is, however, an aspect which the Court may take into account in deciding whether to condone the delay.¹⁶⁵

- (vi) An objection to an unreasonable delay in instituting review proceedings may be raised at any time during the proceedings, even at the appeal stage.¹⁶⁶ The raising of the issue at this late stage is subject to the applicant having had the opportunity of explaining such delay.¹⁶⁷
- (vii) The 'delay rule' is not exclusive to review proceedings but applies to all proceedings in which the inherent review jurisdiction of the Court is invoked. In Harnaker v Minister of Interior¹⁶⁸ the 'delay rule' was applied in declaration proceedings in which the Court's inherent review jurisdiction was invoked.¹⁶⁹

2.9 A record of the proceedings a quo is not essential to the grant of the remedy.

Under this heading one of the most important distinctions between an appeal and a review may be found. As indicated above an appeal is a redetermination by a higher court of the decision a quo.¹⁷⁰ As the appeal court does not hear the case de novo it is confined to the facts as set out in the record a quo and the law relevant to such facts. It follows that an appeal stricto sensu is not possible without a record. This means that as far as the facts of the case are concerned the parties to an appeal, and indeed the appeal court, are absolutely bound by the record beyond which they may not go.¹⁷¹ In the JCI case the Court ruled emphatically that the existence of a record is a condition precedent to an appeal.¹⁷² As no provision had been made for the valuation court to keep and maintain a record the Court, per Wessels J, rejected any argument that the relevant legislation could have intended an appeal stricto sensu. He stated:

"It is, however, customary, where the Legislature intends that a party shall have the right to lay the whole matter dealt with by a Lower Court before a higher Court (by way of appeal), to require the lower Court to keep a complete record of all that transpires there, so that the higher Court may have the same opportunity of judging of the whole matter which the lower Court had ... If the Legislature intended this (an appeal) it would not have left out the most essential requisite for an appeal - a complete record".¹⁷³

(my italics)

Review proceedings, on the other hand, do not require a record. The factual situation in respect of which the Court will make its decision is contained in the affidavits before it. Where an appeal is noted against irregularity in the proceedings a quo - unless such illegality appears ex facie the record, the appeal court cannot consider such grounds.¹⁷⁴ The appellant must either seek to have the record rectified by the court a quo so as to place the irregularity patently upon the record¹⁷⁵ or he must proceed by way of review.¹⁷⁶ Under these circumstances it generally would be more appropriate to proceed by way of review.

Where the legislature has not provided for an appeal the aggrieved party has no alternative but to invoke the Court's inherent review jurisdiction. Where the aggrieved party does so by way of any type of review proceedings, although he does not strictly require the record a quo to succeed, the respondent is obliged by legislation to furnish the Court with the record (if it kept one) within fourteen days of receipt of the application.¹⁷⁷ This sub-rule is for the benefit of the applicant who may waive his rights thereunder and proceed without the record.¹⁷⁸ The respondent may not delay the proceedings by failing or otherwise neglecting to furnish the record. In Moutang v Mukubela and Another NNO.¹⁷⁹ a defaulting respondent sought to frustrate the applicant's proceedings by claiming that the latter was not entitled to proceed until the sub-rule had been complied with, this argument did not commend itself to the Court, per Steyn J, who held that the sub-rule:

"... is primarily intended to operate in favour and to the benefit of an applicant ... who may be, or who is in fact, unaware of the full or true reasons for the decision he seeks to have corrected or set aside and who may, after a perusal of the record ... add to or vary the terms of his notice of motion and to supplement his supporting affidavits, in order to formulate his application in such manner as he deems necessary ..."

Regarding the attitude of the respondent, who appeared to have endeavoured to abuse the process of the Court, the learned judge stated:

"Should the respondent ... be permitted to delay the hearing ..(on account of).. his refusal or failure to perform the duties imposed upon him by ..(the sub-

rule).. the particular Rule of Court would thereby be rendered ineffective ... The existence of such a state of affairs cannot be tolerated ..."180

2.10 The necessary procedure to be adopted by an applicant in order to obtain relief by way of common law review.

As indicated elsewhere in this thesis the method or nature of the proceedings instituted by an applicant wishing to invoke the inherent review jurisdiction of the Court depends on the nature of the relief he requires. Thus an applicant wishing to restrain an authority from carrying out an offending decision has the alternative of applying for an interdict or instituting common law review proceedings. Apart from having to establish a case for the review of the proceedings of the authority¹⁸¹ an applicant seeking an interdict must satisfy the essential requirements for this remedy.¹⁸² In the majority of cases it is more appropriate for an applicant to simply apply for the review of the proceedings by way of common law review.

In terms of Rule 53(i) of the Uniform Rules of Court:¹⁸³

"... all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion ..."

It must be emphasised that this rule applies only in respect of proceedings in which the Court is required to review the proceedings of any inferior court or administrative authority. The inherent review jurisdiction of the Court is not limited to any particular procedure, and, as will be observed below,¹⁸⁴ it may be invoked by way of a number of procedures, including common law review. Rule 53 is unusual as it was the first and remains the only legislative enactment which provides any general principle regarding common law review.

Although motion procedure, relying as it does on documentary proof of facts, save where the Court permits oral evidence to resolve any dispute of fact,¹⁸⁵ may seem to be a product of continental civil procedure, it was unknown in Roman-Dutch law. It originates from English law where it has been followed for centuries.¹⁸⁶

Motion proceedings are a form of application procedure. The applicant causes a notice of motion which contains details of the relief sought and other formal particulars to be served on the respondent.¹⁸⁷ The notice of motion may be likened to a simple summons.¹⁸⁸ Attached to the notice of motion is the applicants' (founding, launching or supporting) affidavit.¹⁸⁹ In his affidavit/s the applicant is obliged to set out fully all the material facts which, if uncontroverted, would at a trial, place him in a position to obtain judgment for the relief sought.¹⁹⁰ The material allegations would include those necessary to establish locus standi in both senses of the term.¹⁹¹ In review proceedings it is incumbent on the applicant to set out fully the material facts and the grounds on which he relies for the relief sought. The applicant's launching affidavits should not be compared with a declaration or particulars to a combined summons, as first, all material facts in the former are deposed to under oath and, secondly, the Court will almost inevitably decide the issues on the papers.¹⁹² Only in rare cases does the Court permit the hearing of oral evidence to resolve any dispute of fact.¹⁹³

If the respondent intends opposing the application he is obliged to serve a notice of opposition¹⁹⁴ and within the time limits prescribed by the Rules of Court reply to the applicants affidavits by way of answering affidavit.¹⁹⁵

If he intends to raise a preliminary objection as to the jurisdiction of the court, e.g. a lack of locus standi in judicio on the part of the applicant or a failure by the applicant to establish a cause of action etc., the respondent should do so in his answering affidavit.¹⁹⁶ In regard to the merits, the respondent is obliged to answer each material allegation of fact raised by the applicant. A failure to put any material fact in issue may result in the Court regarding such omission as an admission thereof by the respondent.¹⁹⁷

The applicant is permitted, thereafter, to submit a further affidavit i.e. the replying affidavit.¹⁹⁸ In this affidavit he may answer any material allegation of fact raised by the respondent in order to refute any defence raised by the latter. As indicated above, an applicant is not permitted to

use the replying affidavit to include or supplement essential allegations which should have been included in his founding affidavit.¹⁹⁹ Such material may be struck out by the Court.²⁰⁰ The parties will not usually be permitted to lodge any further affidavits although a discretion has been conferred upon the Court to permit the filing of further affidavits.²⁰¹ The Court has permitted a respondent to file further affidavits where the applicant in his replying affidavit has raised new issues which the respondent could not reasonably have anticipated.²⁰² The Court may allow further affidavits by either of the parties where the necessity of raising an issue or defence which had not been possible earlier, for example, where the parties could not have been in possession of all the relevant facts at the time.²⁰³ Before permitting the filing of further affidavits by a party he must satisfy the Court as to the reason for not raising the matter in an earlier affidavit and that the other party will not be prejudiced thereby.²⁰⁴

In an adversary system of civil procedure disputes of fact are settled by the oral evidence of the parties which is tested by cross-examination.²⁰⁵ Thus, it is almost a general principle of our law of procedure that the Court will dismiss an application where the applicant should have been aware that a dispute of fact exists between himself and the respondent and that he could have proceeded by way of action.²⁰⁶ None the less the Court has a discretion to order that oral evidence be heard in regard to 'specified issues' with a view to resolving any dispute of fact,²⁰⁷ or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues etc.²⁰⁸ In a number of cases the Court has indicated that it will not lightly exercise its discretion in favour of an applicant who should have proceeded by way of action.²⁰⁹

An applicant for review would appear prima facie to have no alternative but to proceed by way of motion.²¹⁰ As a result he should not be regarded by the Court in the same light as a litigant who has the alternative of proceeding by way of action. In the event of a dispute of fact arising in review proceedings the Court should always lean towards the hearing of oral evidence in order to resolve the dispute of fact. Where the Court declines to do so any impasse created by a dispute of fact on the papers can only be

to the prejudice of the applicant.²¹¹ In any event by ordering the dispute to oral evidence the nature of the proceedings remains unchanged. The Court has merely provided a method of resolving a particular dispute of fact which appears on the papers.²¹²

It is doubtful whether the Court will refer an application for review to a full trial. Such order would seem to create the very situation which the legislature sought to avoid by introducing Rule 53. There appears to be no precedent for such order in regard to review proceedings. On the other hand, as will be observed below, under the appropriate circumstances, an aggrieved party is not excluded from seeking the review of the proceedings of an administrative authority by way of action.²¹³

As indicated above, an order that oral evidence be heard in order to resolve specific issues does not alter the nature of the proceedings.²¹⁴ The effect of such order may be that members comprising the administrative authority will be subjected to cross-examination. Whether it is proper for the Court to allow this situation will depend on the nature of the matter. While there is authority for such order²¹⁵ it will be granted in exceptional circumstances only.²¹⁶ It follows that in the first instance a real dispute of fact must exist. A bare denial by the respondent in answer to material allegations of fact does not necessarily constitute a dispute of fact²¹⁷ neither does a simple allegation by the respondent that a dispute of fact exists.²¹⁸ The Court, too, will not order the hearing of oral evidence where it appears that the party seeking the order is embarking on a 'fishing expedition' in order to establish a real dispute of fact.²¹⁹ The following statement by Kennedy J in Clairwood Motor Transport Co Ltd v Pillai & Others²²⁰ is perhaps illustrative of the attitude of the Court regarding the submission of evidence of members of an authority to an oral hearing and attendant cross-examination. In this case the applicant sought the review of the decision of the Local Road Transportation Board. At the hearing the applicant urged the Court to order certain members of the Board to submit themselves to cross-examination. The learned judge refused to grant such order stating:

"... My mind boggles somewhat at the thought that members of a quasi-judicial body ... should be liable to be brought before the reviewing Court to justify under cross-examination the facts to which they have deposed in their affidavits".²²¹

Further, there is the question whether an applicant for review is obliged to institute such proceedings by way of motion. As indicated elsewhere in this thesis the inherent review jurisdiction of the Court is not confined to proceedings by way of common law review.²²² The proceedings instituted by the applicant depend on the nature of the relief sought by the applicant. In turn the relief sought depends on the circumstances of the particular case. It must be emphasised that the terms of Rule 53 relate exclusively to an application for review i.e. where the applicant requires the Court "... to review, set aside or correct" the offending decision, etc., but not to cases in which the applicant seeks the grant of other relief which may be dependent directly or indirectly on the review of the proceedings of the authority concerned (the review process).

The only exception provided by Rule 53 relates to specific procedures stipulated by any other 'law'. Where a statute requires proceedings to be instituted in a particular manner the Court is bound by such enactment. Thus where a statute provides that particular proceedings are to be by way of application the Court will not permit proceeding by way of action.²²³ Although Rule 53 is not statutory it is a legislative enactment. Perhaps more correctly the Uniform Rules of Court may be described as delegated legislation.²²⁴ By way of analogy in Munro v Mostert²²⁵ the Appellate Division held that an application for a liquor licence that failed to comply with the peremptory rules of procedure as set out in the rules to the Liquor Act 1928 was invalid.²²⁶ Prima facie the Court when entertaining proceedings for the simple review of the proceedings of an administrative authority is bound by the terms of Rule 53. In other words the Court is not competent to consider review proceedings except where same has been instituted by way of motion. On closer analysis this conclusion is open to question.

First, the Rules of Court are no more than the convenient description of the methods of practise as required by the Court.²²⁷ The Court has clearly indicated that by virtue of its inherent jurisdiction it will regulate its own proceedings in accordance with the tenets of justice and good reason.²²⁸ On various occasions the Court has condoned the non-compliance of

its written peremptory rules.²²⁹ Rule 53 would appear to be no exception to other peremptory rules which the court, in the past, has seen fit to ignore.²³⁰

Second, there is precedent for the Court's reviewing the decisions of administrative authorities pursuant to procedure other than by way of motion. While it is readily conceded that these decisions took place before the promulgation of the Uniform Rules of Court the principle remains the same. In Union Government and Fisher v West²³¹ the applicant erroneously sought the review of the proceedings of a court-martial by way of summons for review instead of by way of motion. Since the JCI case it was acknowledged by the Court that the review of the proceedings of an administrative authority was to be by way of motion.²³² The Appellate Division in Union Government and Fisher v West found that as the facts and issues were before the Court,

"... we should stultify ourselves if we were to hold that the Provincial Division had no right to entertain the matter merely because it took the form of a proceeding under a rule which no doubt had in view only inferior courts of justice ..." ²³³

By way of analogy the Court has permitted an appeal against the decision of the Estate Agents Board to be launched by what may be considered motion proceedings. In Lek v Estate Agents²³⁴ Board Friedman J held:

"... All the relevant facts are before this Court and it accordingly makes no difference ... whether the application is called an appeal or a review..." ²³⁵

The criterion in all cases would appear to be whether all the facts and issues are sufficiently before the Court in order to allow it to grant the relief sought by the applicant, provided that the respondent is not prejudiced by the use of the erroneous procedure.

Finally, it would not be inappropriate to consider the procedure necessary to institute appeal proceedings. An appeal stricto sensu must be launched by way of a notice of appeal. Such notice must indicate whether the whole or only the part of the judgment is appealed against. Where only a part of the judgment is appealed against such part must be clearly stated.

The notice too is to contain the findings of fact or rulings of law appealed against and the grounds upon which the appeal is founded.²³⁷ An appellant is obliged to furnish security to cover the respondent's cost of appeal if the former is unsuccessful.²³⁸ An appellant is further obliged to lodge a power of attorney to note and prosecute an appeal in favour of his attorneys.²³⁹ In review proceedings at first instance it is not necessary for the applicant to furnish security for costs nor a power of attorney. In an appeal the duty to furnish certified copies of the record lies heavily on the appellant.²⁴⁰ In review proceedings the respondent is obliged to furnish the Registrar with a copy of the record, if one has been kept.²⁴¹ The Registrar in turn makes the record available to the applicant who is then entitled to add to or vary it in the terms of his notice of motion.²⁴² In both appeal and review proceedings the onus is upon the appellant and applicant respectively to have the matter enrolled for hearing.²⁴³ Attention is drawn to the fact that although both an appeal and a review may be seen as a redetermination or reconsideration of a decision or of proceedings by a higher court, a review for all purposes is considered as a first hearing.²⁴⁴ Until April 1983 an unsuccessful party did not require leave of the Court of first instance to appeal against its decision on review. This is no longer the position.

2.11 The availability of the remedy in respect of part-heard or interlocutory matters.

A judgment which is not final²⁴⁵ is not appealable²⁴⁶ nor is an interlocutory judgment or order unless it has the effect of a final judgment. On the subject of the appealability of an interlocutory order reference may be made to the well-known decision by Schreiner JA in Pretoria Garrison Institutes v Danish Variety Products (Pty.) Ltd.²⁴⁷ in which the learned Judge of Appeal held:

"... a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or ... unless 'it irreperably anticipates or precludes some of the relief which would or might be given at the hearing'." (my italics)

Consequently an appeal court will not entertain an appeal in respect of a part-heard case or an interlocutory order. The rationale for this approach, lies in "... the salutary general rule that appeals are not entertained piecemeal ...".²⁴⁸

While a court of review, entertaining either common law review or section 24 review proceedings, is reluctant to exercise its powers before the proceedings a quo are final and complete, it will do so if the administrative authority or inferior court has committed an irregularity in its proceedings that will cause irreparable prejudice or grave injustice to the applicant. As the Court appears not to have drawn any significant dichotomy between cases raised by way of common law review and those by section 24 review, in regard to the reviewing of part-heard cases and/ or interlocutory orders no distinction will be made in the cases cited below. The decisions are applicable to both types of review and to both the criminal and civil proceedings before inferior courts.

Two of the leading cases on the subject which clearly indicate the judicial approach are Ginsberg v Additional Magistrate Cape Town²⁴⁹ and Wahlhaus & Others v Additional Magistrate Johannesburg & Another.²⁵⁰ In Ginsberg's case the accused was charged before the magistrates court with publishing a defamatory libel contained in a letter written by him. He was charged alternatively with the crime of crimen injuriae literis.²⁵¹ Before pleading the accused objected to the alternative charge on the ground that the specific crime had been repealed by legislation and was no longer an offence in South African law. The magistrate overruled this objection. An application to the Supreme Court for an order compelling the magistrate to dismiss the alternative charge was refused. The Court, per Gardiner JP, held:

"... as a rule, the Court's power of review is exercised, only after termination of (the) case but I am not prepared to say that the Court would not exercise that power ... even before the termination of a case, if there were gross irregularity in the proceedings. For instance, supposing the magistrate tried a case in the absence of the accused ... where such trial is not permitted ... the Court would interfere even before conviction, or, supposing the magistrate refused to allow the accused legal assistance for his defence ... the court might interfere".²⁵²

In the Wahlhaus case²⁵³ the accused were charged on a number of counts of fraud before the Magistrates Court. They requested further particulars to the various charges.²⁵⁴ The accused were dissatisfied with the particulars furnished by the prosecution and applied to the magistrate for the quashing of the charges on the ground that such charges as amplified by the further particulars were calculated to prejudice or embarrass them in their defence.²⁵⁵ The application was refused and a subsequent appeal, relating to an application for a mandamus²⁵⁶ directing the quashing of the charges, was dismissed by the Appellate Division. The Court held that while it possessed the power to intervene while a case was proceeding, it would do so only where the offending act caused irreparable prejudice or grave injustice to the applicant. The Court, per Ogilvie Thompson JA, emphasised that it would not lightly exercise such power and that while:

"It is true that, by virtue of the inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief-by way of review, interdict or mandamus. This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend on its own circumstances... Reverting to the facts of the present case... nothing was put before us... to show that any grave injustice or failure of justice is likely to ensue if the criminal trial against the appellants proceed upon the charge sheet in its present form."²⁵⁷

The court did intervene in Van Rooyen v Dutch Reformed Church, Utrecht.²⁵⁸ The facts were that the Kerkraad had, in terms of the Church Regulations, put the applicant on trial. Despite his request the Kerkraad had refused to furnish him with the details of the charges against him. The Court held that it had the power:

"...to interfere in the proceedings of the voluntary associations ... where it is shown that a voluntary association has, either arrived at a decision which is, or ... which may be, prejudicial to the complainant, by methods which are contrary to its own constitution, and to the ordinary principles of justice ..."²⁵⁹

A similar decision was reached in a criminal trial where the particulars of the charge against the accused were insufficient and the court a quo had refused to order the prosecution to supplement such particulars.²⁶⁰ The Court has also held that it will intervene if an application for a postponement to enable cross-examination was denied where failure to conduct such cross-examination might irreparably prejudice the applicant in his case.²⁶¹ It would appear also that the Court will intervene while proceedings are still pending where the tribunal a quo had refused to allow a party to call relevant and necessary witnesses;²⁶² or where the tribunal or a member thereof is biased or may be biased against the applicant.²⁶³ The court will intervene, too, if the tribunal refuses to allow the applicant an opportunity of inspecting a document containing factual information, which the tribunal has in its possession and which is vital to the applicant's case.²⁶⁴ These examples are not exhaustive.

Although the general principles as expounded in the Ginsburg, Wahlhaus and other cases cited above remain the law, certain recent decisions warrant comment. These cases relate to the power of the Court to intervene by way of its inherent review powers in regard to part-heard criminal cases heard before inferior courts, more particularly Magistrates' Courts. These cases are unusual also in that, despite there being no irregularity in the proceedings, the Court intervened by way of its inherent jurisdiction.

The first of the cases is S. v Taylor.²⁶⁵ In this case after convicting the accused of theft the magistrate considered certain evidence in mitigation by the daughter of the accused. This evidence convinced the magistrate that the accused should not have been convicted. Instead of sentencing the accused the magistrate submitted the case to the relevant provincial division for review.^{265a} In a covering letter to the reviewing court he stated that 'he would not have convicted the accused if the evidence of (the daughter of the accused) had been led prior to the closing of the defence case.'²⁶⁶ The Court, per Human J, agreed that the conviction should be set aside but found that a procedural problem existed. The Court was unable to exercise its review powers in terms of the Magistrates Court Act 1944 as the relevant section provided only for review of cases after sentence had been passed.²⁶⁷ The Court, too, found that it was unable to

review the matter in terms of s 24 of the Supreme Court Act as the magistrate had committed no irregularity as provided in terms of the relevant enactment.²⁶⁸ In any event the matter was not before the Court by way of motion in terms of the peremptory rule of Court.^{268a} The learned judge considered that to remit the case merely for sentence, when it was clear that the conviction would ultimately be set aside, was senseless.²⁶⁹ Citing S. v Johannes Mashai²⁷⁰ with approval, the Court resorted to its inherent review jurisdiction and accordingly set aside the conviction.²⁷¹

Taylor's case was cited with approval in S. v Mametja.²⁷² In this case neither section 304 review²⁷³ nor section 24 review were available. The Court held that 'review proceedings are possible in terms of this Court's inherent power to restrain illegalities in inferior courts'.²⁷⁴ The effect of these decisions is that the Court has extended its inherent review powers to cases part-heard, before inferior courts, where neither section 304 review nor section 24 review is available to an aggrieved party and where:

- a) an irregularity has been committed in the proceedings a quo or
- b) although no irregularity has occurred it will be in the interests of justice for the Court to intervene

The far reaching consequences of these cases will be considered below.²⁷⁵ The principles regarding intervention by the Court in respect of part-heard proceedings before administrative authorities or tribunals and inferior courts may be summarised in the following terms.

The Court may intervene by way of its inherent review powers where irreparable prejudice or grave injustice has been caused to an aggrieved party:

- i) by a judicially recognised irregularity in the proceedings of an administrative authority or tribunal or
- ii) by a judicially recognised irregularity in the proceedings of an inferior court where no other remedy is available to such party or

- iii) in respect of part-heard cases before an inferior court in order to see justice done where there is no other remedy available to the aggrieved party, although no irregularity has been committed.

Finally it should be pointed out that the Court has adopted no criteria in order to assess the question of prejudice or injustice; this is a matter clearly within the discretion of the Court.²⁷⁶ It follows that each case must be considered on its own merits.²⁷⁷

2.12 The degree of proof to be established by an applicant for review.

The burden or onus of proof means the duty on a party to satisfy the Court if he is to succeed with his case.²⁷⁸ The criteria regarding the burden of proof is a question of substantive law and may be found either in judicial decisions or in various rules advocated by the Court. These rules were seen by the Appellate Division, per Davis AJA, in Pillay v Krishna^{278a} in the following terms:

"... all rules dealing with the subject of the burden of proof rest 'for their ultimate basis upon broad and undefined reasons of experience and fairness'."

In this case the learned Acting Judge of Appeal found it necessary to refer to Roman law. He held:

"The first principle in regard to the burden of proof is thus stated in the Corpus Juris: 'Semper necessitas probandi incumbit illi qui agit'. (D 22.3.21). If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: "Agere etiam is videtur, qui exceptione utitur: nam reus in exceptione actor est" (D 44.1.1) (Exceptio does not mean, of course, an exception in the sense in which the term is now used in our practice). Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it."²⁷⁹

In motion proceedings for review, as is the case with most types of proceedings in South African law, the burden of proof in the first instance

rests upon the party instituting the proceedings. The basic rule may be seen in the maxim "he who alleges must prove". This is in accordance with the first principle as propounded by Davis AJA in Pillay v Krishna (above). In so far as review proceedings are concerned it means that in the first instance the applicant is obliged to present sufficient material allegations of fact for the Court to find that there is a prima facie case for the respondent to answer. The applicant's success then depends on the respondent's ability to answer the applicant's allegations and thereby convince the Court that his case or defence is to be preferred. The degree of proof required of an applicant is whether he has established his case on a balance or preponderance of probabilities.

No less than three tests for the satisfying of the civil burden of proof have been accepted by the Court. First there is the criterion as stated by Lord Denning in Miller v Minister of Pensions²⁸⁰

"It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: "We think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not."

Secondly, there is the standard as formulated by Kotzé JA in West Rand Estates Ltd. v New Zealand Insurance Co Ltd.²⁸¹

"It is not a mere conjecture or slight probability that will suffice. The probability must be of sufficient force to raise a reasonable presumption in favour of the party who relies on it. It must be of sufficient weight to throw the onus on the other side to rebut it."

Thirdly, there is the standard as stated by Wessels JA in National Employers Mutual General Insurance Association v Gany²⁸²

"Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false."

It is beyond the scope of this work to analyse and consider which of the criteria is the most appropriate. The essential differences between the criteria are minimal and in practice are of little consequence.^{282a}

When it is considered that an applicant in review proceedings is obliged to establish his case by way of allegations contained in the supporting affidavits to his notice of motion, the onerous task of satisfying the civil burden of proof as set out above, is apparent. In cases where the respondent places the applicant's material allegations in issue, other than by way of a bare denial,²⁸³ a genuine dispute of fact arises. In such event it is hardly possible for the Court to make a decision on the papers. Unless the Court refers the dispute to oral evidence²⁸⁴ the applicant has few prospects of success. And as indicated above the Court will not lightly refer a dispute to evidence.²⁸⁵

The position of an applicant has been further aggravated by the adoption by the Court of a rule similar to the omnia praesumuntur rite esse acta rule, in regard to administrative acts. This may be seen in the Appellate Division decision in National Transport Commission v Chetty's Motor Transport (Pty.) Ltd.²⁸⁶ In regard to the burden of proof in review proceedings in which the applicant alleged gross unreasonableness on the part of an authority, the Court, per Holmes JA, found that:

"... The degree of proof required is a preponderance of probability; but this is less easily envisaged in that one does not readily impute dereliction of duty to a responsible body".²⁸⁷ (my italics)

The effect of this statement would appear to establish a presumption that an act by an administrative authority has been properly and validly performed. In relation to the burden of proof upon an applicant for review, it means that he is obliged to establish his case on a standard higher than 'the balance or preponderance of probabilities'. To suggest that on account of this presumption of due performance an applicant must prove his case "beyond a reasonable doubt" in order to succeed, may be placing more emphasis on the presumption than it warrants.²⁸⁸ None the less a presumption of due performance, which suggests innocence, competence and integrity on the part of the authority, must be prejudicial to the applicant's case.²⁸⁹ Although the presumption of due performance will be considered more fully below²⁹⁰ it should be pointed out at this stage that there appears to be no foundation in our law for the application of the presumption to administrative proceedings.

2.13 The possible judgments or orders which are within the jurisdiction of the Court considering an application for common law review.

This feature will relate to common law review exclusively. No good purpose will be served in considering judgments which are within the jurisdiction of the Court when exercising its inherent review jurisdiction in relation to any other remedy e.g. interdict or spoliation proceedings etc. In his notice of motion an applicant for review, i.e. common law review, requests the Court "... to review, correct or set aside" the offending decision.²⁹¹

In the event of the applicant successfully establishing his case the nature of the relief granted by the Court will depend on a number of factors. Although the Court enjoys a fairly wide discretion in regard to the order it may grant it will rarely substitute its decision for that of the authority. The Court will usually set aside the offending decision or act and remit the matter to the board or tribunal a quo with instructions or directions to rectify the irregularity and thereafter reconsider its decision. The following examples are illustrative. An authority which has failed to permit the hearing of, or has otherwise failed to consider, certain material evidence may be directed to reconsider its decision after hearing and considering such evidence.²⁹² An authority which has breached the audi alteram partem rule in not affording an applicant an opportunity to be heard in his defence may be ordered to hear the aggrieved party and thereafter make a fresh decision.²⁹³ A decision by an authority which is not final or is not clear and certain will be set aside and the authority ordered to reconsider and reframe its decision accordingly.²⁹⁴

The reluctance by the Court to substitute its decision for that of the authority is one of the principle features of the remedy. This does not mean that the Court does not have the power to impose its own decision. In Livestock & Meat Industries Control Board v Garda²⁹⁵ Holmes AJA, after considering the earlier authorities found that:

"... it seems...possible to state the basic principle as follows, namely that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that, although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides".

(my italics)

Where the facts are before the Court the necessity for remitting the matter to the authority a quo is questionable. The Court is capable of settling any irregularity or disputed act as justly and expeditiously as may the authority. On the other hand, if the function of the Court, when entertaining review proceedings, is merely supervisory i.e. ensuring that the authority complies with the terms of the enabling act, the rules of natural justice and such other norms of conduct established by the Court,²⁹⁶ then clearly the Court is not concerned with the substantive correctness or fairness of the decision.²⁹⁷ Some support for this judicial approach may be found in the doctrine of separation of powers, more particularly were the Court to substitute its decision for that of the administrative authority (a section of the executive) it would be usurping the latter's function. The Court has not explained its approach with reference to this doctrine and appears merely to have clung to the explanation that it may substitute its decision only when exercising an appellate jurisdiction.²⁹⁸

Despite this general approach where remittal will merely cause (unnecessary) prejudice to the applicant or where the result of remittal is a foregone conclusion no good purpose would be served in remitting the case.²⁹⁹ While many of the cases in which the Court has substituted its decision related to trade and other forms of licensing, the Court is not restricted to this type of matter.³⁰⁰

Certain factors which concern the membership of the authority a quo may complicate the question of remittal. The possibility also exists that the authority may not be constituted in its original form, due to the retirement, ill-health or death of a member or his being voted out of office. There is precedent for the Court ordering a matter to be remitted to a Board as originally constituted despite certain of the individuals having been voted out of office. This meant that for the purposes of the remitted case they were regarded by the Court as being 'proper' members of the Board.³⁰¹ This would appear to be an unsatisfactory manner of resolving the matter as the establishment of the board or tribunal is beyond the power of the Court. This problem may be seen in sharper perspective where the Court has set aside the decision on account of bias on the part of the authority or any of its members. A difficult situation may come about

where one or more members of the Board is disqualified from membership or is disqualified from hearing a specific matter.³⁰² In cases of this type where the court remits a case it restrains the disqualified or biased persons from sitting. But for the Court to reconstitute a board where the members are functus officio would appear to be irregular. In Rose v Johannesburg Local Road Transportation Board³⁰³ the Court found that three members of the Board should not have heard a particular application. The judgment per Lucas AJ is apposite:

"... The conclusion to which I have come is that the decision of the Board on the application of the applicant cannot stand and must be set aside. It follows from this that the whole of the amount deposited must also be refunded. The applicant is entitled to this being done forthwith. As to the remaining prayer which is for an order that the application be considered afresh by a board of which Huddle, Gordon and Herold are not members, I think it is not within my power to make an order in these terms. It is within the power of the Minister of Transport to fill vacancies on the board, to appoint temporary members in the place of members who for any reason are unable to act. He is required to make arrangements for applications to be heard under the Act but I cannot now order him, in these proceedings, to do so. I can, however, order that the present members of the respondent board be restrained from acting on any board which is to hear the applicant's application ... the order will be that Huddle, Gordon and Herold be restrained from sitting on any board which heard the applicant's application."³⁰⁴

Effectively the matter was remitted to be heard de novo before a newly constituted board.

As indicated above, where the Court is confronted with a dispute of fact on the papers before it, instead of dismissing the application, it may refer such dispute to oral evidence.³⁰⁵ The possibility of an application for review being referred to a full trial in terms of the Rules of Court is unlikely as this would be contrary to the tenor of Rule 53 which clearly indicates that review proceedings are to be launched by way of motion.³⁰⁶ Apart from referring a dispute of fact to oral evidence the Court has jurisdiction to order members of a tribunal to submit themselves to cross-examination.³⁰⁷ As indicated above the Court will make such order under the most exceptional circumstances only.³⁰⁸

In the light of recent decisions it would appear that the Court may intervene in cases part-heard before inferior courts.³⁰⁹ Although these decisions relate to criminal cases there would appear to be no reason for the Court not to intervene in part-heard civil cases before inferior courts. The criterion, as set out above, would appear to be that no other relief is available to the applicant.³¹⁰ In regard to criminal cases this means that convictions (and where appropriate acquittals) may be set aside by way of common law review.³¹¹

The following is a summary of the orders which a court may give when entertaining an application for review:

- (i) it may set aside the offending decision and remit the matter to the authority a quo with instructions to reconsider its decision, after complying with directions by the Court e.g. the hearing of a witness etc., if this be the case
- (ii) it may remit the matter to the authority a quo or to a newly constituted authority to be considered de novo with or without interim relief in the form of a rule nisi pending a re-determination by the authority.^{311a}
- (iii) it may, under the appropriate circumstances set aside the offending decision and substitute, in place thereof, its own decision.
- (iv) it may under appropriate circumstances refer a dispute of fact on the papers to oral evidence.
- (v) it may under exceptional circumstances order members of the authority a quo to submit themselves to cross-examination before the Court.
- (vi) it may set aside part-heard proceedings, or completed cases, before inferior courts, this may include convictions in criminal cases before sentence is imposed. The Court too under appropriate circumstances may set aside an acquittal³¹².
- (vii) it may refuse the application.
- (viii) it may make such order as to costs as it deems fit.

2.14 The award of costs in review proceedings.

The question of costs is an important factor in litigation. The right of access to the Court is often counter-balanced by the high cost of litigation, especially before the Supreme Court. It is no exaggeration that the costs of Supreme Court proceedings are beyond the pocket of the average citizen. While there is a growing state-assisted legal aid system in South Africa there are certain limitations to the grant of assistance. First, an applicant for legal aid is subject to a means test. A party may qualify for legal aid only if his monthly earnings are less than R340 per month if he is married, and R170 per month if unmarried.³¹³ Secondly, legal aid is not available in respect of certain specific causes of action.³¹⁴ Legal aid is available to an indigent applicant for review.

The term costs in regard to litigation means party and party costs unless the Court orders otherwise. Party and party costs are those fees and disbursements which the taxing master considers necessarily incurred in order to litigate successfully.³¹⁵ In regard to party and party costs granted in the Supreme Court although the taxing master is guided by the tariff as contained in the Rules³¹⁶ under special circumstances in his discretion he may depart from such tariff.³¹⁷ An order of costs is not effective until such costs have been taxed by the taxing master or the quantum thereof has been agreed by the parties. Generally the costs of any proceedings i.e. party and party costs are awarded to the successful party.³¹⁸

Irrespective of party and party costs a litigant is obliged to pay all professional services rendered and disbursements made by his attorney. These costs (attorney and client costs), include the party and party costs and such other additional costs which a taxing master may consider unnecessary for the litigation. These additional costs may have been caused by negligence, or by the client or attorney acting ex abundanti cautela etc.³¹⁹

Although the Court generally awards (party and party) costs to the successful party the question of costs is entirely within its discretion.³²⁰ Discretion in the sense means judicial discretion i.e. discretion based

upon the objective standard of a reasonable man. In Fripp v Gibbon & Co³²¹ the Appellate Division saw the judicial discretion regarding an award of costs as follows:

"... the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties. And if he (the judge) does this, and brings his unbiassed (sic) judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion".

Where a court finds that the unsuccessful party has behaved dishonestly or in a manner which it finds reprehensible, in its discretion the Court may show its displeasure by ordering such party to pay his opponent's attorney and client costs.³²²

The general principles regarding the award of costs by the Court may be seen as follows:

- (i) the successful party is generally entitled to be awarded costs.³²³ In determining who is the successful party the Court will look to the substance of the judgment.³²⁴ Thus in Molteno Bros v S A Railways³²⁵ an excipient who failed on the grounds as stated in his exception but succeeded on a completely different point was denied costs.³²⁶
- (ii) The Court may on good grounds deprive a successful party of all or portion of his costs.³²⁷
- (iii) The Court may order a successful party to pay the whole or part of the costs of the unsuccessful party³²⁸ or may otherwise apportion costs.³²⁹
- (iv) The Court may make no order as to costs, this the Court will do where a party recovers nominal damages.³³⁰ Such order may be equated to (ii) above.

- (v) To show its displeasure at the conduct of a party acting in a representative capacity e.g. a trustee in an insolvent estate or at the conduct of the attorney of one of the parties the Court may order representatives or the attorney to pay the costs de bonis propriis.³³¹

In his notice of motion an applicant for review usually asks for costs against a respondent authority only in the event of the latter opposing the application.³³² Should the respondent oppose the application unsuccessfully this does not mean that the Court must necessarily award costs against it. Generally costs will be granted in favour of a successful applicant subject to the principles set out above. Costs will not usually be granted against a public body which appears amicus curiae; likewise such respondent will normally not be awarded costs in his favour.³³³ Where the Court has ordered costs to be paid by an authority, the individuals making up such body are not personally liable, this is the responsibility of the relevant State department etc. There is, however, no reason why the Court should not order the individuals, who constitute the authority, to pay the costs de bonis propriis if the circumstances warrant such order.³³⁴ Under the appropriate circumstances too, there is no reason for the Court not to award attorney and client costs in favour of an applicant for review.

2.15 The right of an applicant to institute review and appeal proceedings simultaneously.

As indicated elsewhere in this work, the Court when considering an application for any statutory form of review may exercise its inherent review jurisdiction, e.g. when considering an application for review in terms of section 304 of the Criminal Procedure Act 1977³³⁵ or section 151 review in terms of the Insolvency Act 1936.³³⁶ There is authority for the Court exercising its review powers when seised of an appeal stricto sensu. In R. v Parmanand³³⁷ the Appellate Division, per Greenberg JA, held:

"... The question that I do propose to consider is whether it would have been competent to the Provincial Division to take into account, in the appeal proceedings the information placed before it by way of affida-

vit. There is a well-recognised distinction between an appeal against a decision in a magistrate's court and a review of the proceedings in such a court ... so far as it is relevant in the present case, apart from the difference in the form, in an appeal the Court ordinarily has regard only to the record of the proceedings in the inferior court, whereas in review proceedings other information can be placed before the Court. But in practice this distinction has not always been observed ... and it is open to the appeal Court in any case, if the circumstances warrant it, to grant relief in appeal proceedings where the proceedings ought to have been by way of review. Thus where there is only an appeal before the Court and it appears that there might be relief open to the appellant by way of review, it would not be proper for the Court to dismiss the appeal and consequently confirm the conviction, thus making it impossible for the appellant, in view of the law as laid down in R v D and Another, *supra*, to get relief thereafter by way of review. In such a case the Court should at least postpone its decision until the appellant has had an opportunity to bring review proceedings; and if all the material necessary for a decision on review is before the Court, it would be a waste of time and expense to postpone the appeal and not to decide the matter without further proceedings, unless of course these are circumstances in which to do so might cause prejudice to the Crown.³³⁸

Thus an appeal Court will review the proceedings a quo if the necessary facts are before it. Parmanand's case is important too, as it clearly distinguishes the purpose of appeal i.e. an attack on the merits of the decision a quo, based on the record as opposed to review which may be seen as an attack on the proceedings a quo.³³⁹ In the case of Coopers (South Africa) (Pty.) Ltd. v Deutsche Gesellschaft³⁴⁰ the Appellate Division considered that where the Court was placed in the position of having to decide a combination of an appeal as to the merits and a review of the proceedings a quo (albeit in the form of an appeal), the Court should consider the review first. If the procedure was reversed the appeal may be dismissed on the merits. The Court, per Wessels JA stated:

"... Therefore, in order to avoid the consequences of a possible dismissal of the appeal on the merits, it would be correct and convenient, and indeed logical, to follow the course adopted in Parmanand's case, i.e., first to consider the appeal aimed at a review of the proceedings and, thereafter, in the event of its dismissal, to consider the appeal on the merits."

The dismissal of an appeal on the merits is a final judgment and the Court may not, thereafter, review the proceedings.³⁴¹ A decision finally confirmed on appeal may be rescinded only under exceptional circumstances e.g. fraud, and this may be done only by way of the common law restitutio in integrum.³⁴²

The cases cited above indicate that there would be no objection to a party instituting appeal and review proceedings separately. The review, which would be directed at an irregularity in the proceedings, would be considered first and if dismissed the appeal against the merits would then be considered. There is precedent also for the proceedings in respect of both remedies to be instituted simultaneously.³⁴³

There is some suggestion that review procedure may not be permitted by the Court where the grounds of review could have raised by way of appeal and the time for lodging an appeal has expired.³⁴⁴ The better view would appeal to be that, subject to the 'delay rule'³⁴⁵ and to the Court not having previously dismissed an appeal on the merits, the Court will entertain review proceedings in the interests of justice.³⁴⁶

Finally it is apposite to point out that an applicant invoking the inherent review jurisdiction of the court frequently seeks a number of remedies simultaneously. For example in Fredericks & Others v Divisional Council of Stellenbosch³⁴⁷ an applicant sought a mandament van spolie and an interdict simultaneously. His cause of action was based on an irregularity in the proceedings of an administrative decision.

2.16 The right of an unsuccessful party in review proceedings to appeal to a higher court.

The general rule regarding an appeal stricto sensu is that a party to a judgment or order of a superior court of first instance is entitled to appeal against such judgment or order to a higher court only with leave of the court a quo³⁴⁹ or the Appellate Division. A litigant who fails in an appeal from a magistrates court may appeal further, but only with the leave of the first appeal court or with leave of the Appellate Division. There is of course no appeal from the decision of the Appellate Division, the highest court in South Africa.

In more specific terms a party to a final judgment in the magistrate's court enjoys a right of appeal to the relevant Provincial Division.³⁵⁰ If he wishes to appeal further, that is, to the Appellate Division, he may do so only with the leave of the Provincial Division or if that is refused with the approval of the Appellate Division.³⁵¹ A party to any civil proceedings before a Provincial or Local Division, as a court of first instance, may appeal only with leave of the court a quo.³⁵² Such court may refuse the application or it may grant leave, in its discretion, to appeal to either a full court (of three judges) of the same provincial division or it may grant leave to appeal to the Appellate Division.³⁵³ Where leave is refused by the court a quo (where the latter is a court of first instance) the applicant may seek leave to appeal from the Appellate Division in the manner set out below. The Appellate Division or Chief Justice or presiding judge of appeal may refuse or may grant the application. If the application is granted the Chief Justice etc., may order the appeal to be heard by a full court of the provincial division or by the Appellate Division.³⁵⁴

Where leave to appeal is sought from the Appellate Division the procedure is in the form of a petition addressed to the Chief Justice.³⁵⁵ The petition shall be considered by three judges of the Appellate Division designated by the Chief Justice.³⁵⁶ The presiding judges may order that the application be argued before them and in their discretion may:³⁵⁷

- (i) grant or refuse the application
- (ii) refer the application to the Appellate Division for decision.

Where the matter is referred to the Appellate Division for decision argument may be required by the Court. A decision of the majority of judges considering the application is final.³⁵⁸

Before the Appeals Amendment Act 1982 there was uncertainty whether all review proceedings were to be regarded as an appeal for purposes of obtaining leave to appeal to a higher court.³⁵⁹ This meant that an unsuccessful applicant for review was placed on the same footing as an unsuccessful appeal. A sharp distinction must be drawn between common law review directed at the proceedings of an administrative authority and section 24 review

of the proceedings of inferior courts. Common law review proceedings vis-a-vis the proceedings of an administrative authority was not regarded as an appeal but a hearing at first instance.³⁶⁰ An unsuccessful applicant for review, previously enjoyed the right of being able to appeal to the relevant higher court as of right. If the relevant higher court happened to be a full bench of the provincial division and the applicant desires to appeal further to the Appellate Division this he could do only with leave of the provincial division or the Appellate Division.³⁶¹ In terms of the 1982 Act leave of the Court a quo or the Appellate Division is required in order to appeal against any judgment or order a quo.

The situation in regard to the review of the proceedings of an inferior court by way of section 24 (or indeed common law review)³⁶² was previously complicated by the actual nature of the relief sought. If the relief sought had the effect of an appeal, an appeal could be noted only with leave of the provincial division or the Appellate Division. The case of Sita and Another v Olivier NO. and Another³⁶³ is the leading authority in this former problematic area. The appellants in this case were initially charged before the regional court with certain offences under the Group Areas Act. Refusing to plead before the regional court and relying on the Criminal Procedure Act 1955³⁶⁴ the appellants demanded that their case be tried before a supreme court having jurisdiction. The regional magistrate held that where the Attorney-General had directed the case be tried before the regional court the accused had no right in law to demand that the case be heard before a supreme court. The magistrate adjourned the case at the request of the appellants so as to enable them to approach the Transvaal Provincial Division for relief.³⁶⁵ The appellants did not institute section 24 review proceedings but applied to the Court on motion for orders -

- (a) declaring that they are entitled to demand a trial in the Transvaal Provincial Division of the Supreme Court of South Africa, in terms of s 190(1) of the Criminal Procedure and Evidence Act, 56 of 1955, upon a charge of contravening s 23(1) of the Group Areas Act, 77 of 1957;
- (b) restraining the first respondent from calling upon them to plead before him to the said charge;

- (c) directing the first respondent to act in terms of s.190(2) of the Criminal Procedure and Evidence Act, 56 of 1955;
- (d) directing the second respondent to act in terms of s.190(2) of the Criminal Procedure and Evidence Act, 56 of 1955;
- (e) directing the respondents in their said capacities to pay the costs of the application.³⁶⁶

A full court of the Transvaal Provincial Division refused the application whereupon the appellants, without obtaining leave to appeal, noted an appeal to the Appellate Division. Counsel for the respondents took the point that the decision of the Transvaal Provincial Division was in respect of "... appeal to it"³⁶⁷ and that the applicants were obliged to obtain leave to appeal in terms of the Supreme Court Act 1959.³⁶⁸ The Appellate Division, per Botha JA, found that:

"... the appellants by their petition to the Court a quo sought a correction of what they considered was a wrong decision by the regional magistrate on the question of law raised ... notwithstanding the procedure adopted by the appellants, it was, therefore, in effect, nothing but an appeal against the magistrate's decision on a question of law ..."³⁶⁹

The Court held that under the circumstances it was obligatory for the appellants to have obtained leave to appeal. The following comments by the learned judge of appeal regarding the nature of the procedure adopted is vital to the whole question, more particularly:

"It is in my view not the form of the procedure adopted but the subject matter of the proceedings which determines their character as either a civil or criminal matter. The fact that such proceedings, because of the form in which they are brought before the court of review, are fresh proceedings in the sense that it is in that form that they are first considered by the court of review, is in my view irrelevant to the question as to the forum in which those proceedings originated. What is relevant to that question seems to me to be the forum in which the subject matter in dispute in the subsequent proceedings first arose... Nor in my view does the fact that the relief was sought by way of a

declaratory order, interdict and mandamus make the proceedings before the Court a quo a civil matter originating in that Court. The relief sought was, despite the form in which it was sought, in effect an appeal against the regional magistrate's decision on a question of law given in criminal proceedings. The subject matter in dispute in the proceedings in the Court a quo unquestionably first arose in the regional court ..."³⁷⁰

It is interesting too to note that the learned judge of appeal questioned the correctness of the procedure adopted by the appellants before the provincial division. En passant it is difficult to accept the finding that the relief sought was in fact an appeal. Did the court not erroneously equate appellate and review procedure?³⁷¹

It would not be inappropriate at this stage to consider the progressive stages of review proceedings from the dismissal of the initial application for review by a single judge to the final judgment made by the Appellate Division. The case of Theron en Andere v Wellington Ring van die NG Sendingskerk in Suid-Afrika³⁷² is particularly illustrative. The applicants sought the review of certain proceedings of the respondent church alleging serious irregularities on the part of the latter. The application for review was heard by a single judge of the Cape Provincial Division who dismissed the application. The applicants then unsuccessfully appealed to the full bench of the Cape Provincial Division.³⁷³ The provincial division refused leave to appeal to the Appellate Division. An application to the Appellate Division for leave to appeal was referred to a full bench of that Court for their decision after the hearing of argument by the respective parties.³⁷⁴ The application was argued before a full bench, at the time being five judges of appeal. Leave to appeal was unanimously granted by the Court. While there is authority for the Court when considering an application for leave to appeal to enter into the merits and make a final decision³⁷⁵ the Court did not do so, the matter being set down for argument on the merits before the Court.³⁷⁶ Ultimately the appeal on the merits was heard by the Appellate Division. The appeal was upheld by a majority of three judges to two.³⁷⁷ The final judgment was handed down some two years after the first application to the full bench of the Cape Provincial Division for leave to appeal had been refused. In the final analysis this case presents the anomalous situation of 6 supreme court judges (the single judge a quo, the three judges of the full bench of the Cape Provincial Division and the two dissenting judges of

appeal) finding against the application. On the other hand only three judges of appeal who made up the majority of the Appellate Division decision ruled in favour of the review. The situation which occurred in Theron's case could now be repeated in a more anomalous manner. As the Appeals Amendment Act 1982 provides for a possible quorum of three judges of appeal to decide a civil appeal before the Appellate Division, the possibility exists for five judges (the Judge a quo, the three provincial judges (of appeal) and one dissenting judge of appeal before the Appellate Division) to be overruled by a majority of the Appellate Division bench, consisting of two judges of Appeal only.

Finally, it is apposite to note that the Appeals Amendment Act 1982 has done away with the notion of every litigant before a superior court enjoying one absolute right of appeal.

2.17 The territorial jurisdiction of the Court in review proceedings.

The territorial or geographic area of jurisdiction of each of the various provincial and local divisions is set out in a schedule to the Supreme Court Act 1959.³⁷⁸ While each division is deemed in terms of the Act to:

"... have jurisdiction over all persons residing or being in and in relation to all causes arising ... within its area of jurisdiction ..."³⁷⁹

the respective division (or court) is not limited to the terms of this enactment. The full territorial jurisdiction as opposed to its general jurisdiction i.e. its power to decide a matter, may be seen as comprising the following enactment and other rules of law, more particularly:

- (i) where jurisdiction has been specifically conferred upon the Court by legislation (2.17.1);
- (ii) jurisdiction in terms of the Supreme Court Act 1959 over all persons residing or being in the Courts' territorial area (2.17.2);

- (iii) under certain circumstances, jurisdiction over persons who have submitted to the jurisdiction of the Court (2.17.3);
- (iv) under certain circumstances where the cause of action arose wholly within the jurisdiction of the Court (2.17.4);
- (v) the causa continentia rule (2.17.5);
- (vi) the principle of forum conveniens (2.17.6);

The forms or principles of territorial jurisdiction described above, will not be considered exhaustively but only in so far as they may establish a foundation for the examination of the subject in relation to common law review procedure.

Before considering each of such forms of territorial jurisdiction it is important to consider the doctrine of effectiveness. The doctrine may be considered vital to the subject of territorial jurisdiction. It is nothing more than the ability of the Court to enforce its judgment. The doctrine was seen by De Villiers JA in Steytler v Fitzgerald as follows:³⁸⁰

"... A court can only be said to have jurisdiction in a matter if it has the power not only of taking cognizance of the suit, but also of giving effect to its judgment".

In effect the basis of the doctrine is that the Court is reluctant to entertain any matter where its judgment cannot be enforced. Pollak acknowledged that the doctrine is in accordance with Roman Dutch law³⁸¹ and the Roman law.³⁸² The learned writer further considered the doctrine of effectiveness to be the proper basis for deciding questions of jurisdiction.³⁸³

While the doctrine has been approved by the Appellate Division³⁸⁴ there is some dichotomy of opinion whether the doctrine is concerned with the nature of the relief exclusively³⁸⁵ or whether regard should be had solely to the nature of the proceedings.³⁸⁶ This division of opinion has largely been bridged by the judgment of Trollip J in Gulf Oil Corporation v Rembrandt Fabrikante & Handelaars³⁸⁷ who found that neither of the criteria were exclusive and the choice depended on the circumstances of the particular

case. This means too, that where Court A has jurisdiction on account of the relief sought (based on the principle of effectiveness) and Court B jurisdiction on account of the nature of the proceedings, both enjoy jurisdiction to entertain the matter. The doctrine of effectiveness is not applicable where legislation specifically confers jurisdiction of the Court, albeit extra-territorial jurisdiction.

2.17.1 Jurisdiction conferred by statute.

As indicated above the doctrine of effectiveness is of no consequence, where specific jurisdiction, even extra-territorial, is conferred upon the Court. It is obliged to consider the matter.

2.17.2 Jurisdiction in terms of s 19(1)(a) of the Supreme Court Act 1959.

This enactment was held by the Appellate Division to confer jurisdiction upon the Court to entertain any proceedings instituted before it in respect of any defendant residing or being within its territorial area of jurisdiction.³⁸⁸ In other words this form of jurisdiction is concerned with the physical presence of the defendant within the territorial jurisdiction of the Court. The enactment may be seen as a statutory form of the common law rule 'actor sequitur forum rei' which required the plaintiff to follow the defendant and sue the latter before his own court.³⁸⁹

2.17.3 Submission by the defendant to the jurisdiction of the Court.

A defendant who is not ordinarily subject to the jurisdiction of the Court may submit, expressly or impliedly, to such jurisdiction.³⁹⁰ Where a peregrinus submits to the jurisdiction of the Court an attachment ad fundandam jurisdictionem is unnecessary.³⁹¹ A defendant who is not subject to the jurisdiction of the Court is deemed to have submitted to the jurisdiction where he brings a counterclaim against the plaintiff.³⁹² In Du Preez v Philip-King³⁹³ the Court held that the test for submission to the jurisdiction of the Court is the presence of all the elements necessary for acquiescence by the defendant which point clearly to such submission.

The fact that the defendant submits to the jurisdiction of the court is not conclusive. Should the Court not possess jurisdiction to grant the necessary relief neither consent nor submission to the jurisdiction may supply the omission.³⁹⁴ Further, the doctrine of effectiveness is particularly relevant where the defendant is a peregrinus of the Republic³⁹⁵ or where the subject matter of the claim relates to land situated outside the Republic.³⁹⁶ Finally where both parties are peregrini of the Republic and particularly where the cause of action took place other than in the Republic, despite submission the Court may decline jurisdiction on the ground of effectiveness and/or forum non conveniens.³⁹⁷

2.17.4 The question of jurisdiction where the cause of action arose wholly within the jurisdiction of the Court and where the defendant is a peregrinus of the Court and/or Republic.

Where the defendant is a peregrinus of the Republic, but the plaintiff an incola of the Court and where the cause of action took place within the jurisdiction of the Court, the Court will exercise jurisdiction where the defendant is arrested or his property is attached to found jurisdiction.³⁹⁸ But where the defendant is an incola of the Republic but a peregrinus of the Court there is no necessity to arrest him or to attach his property.³⁹⁹ This means that subject to a ratio jurisdictionis being present e.g. where the cause of action arose within its territorial jurisdiction, the Court has jurisdiction over all incolae of the Republic including those who are peregrini of the Court.

Despite judicial dicta that sections 26⁴⁰⁰ and 28⁴⁰¹ do not extend the jurisdiction of any division⁴⁰² it would appear that the effect of these sections do extend the jurisdiction even if merely to limit the constraints of the doctrine of effectness in regard to incolae of the Republic who are peregrini of the Court.

2.17.5 The extention of the territorial jurisdiction of the Court by the causa continentia rule.

In Roberts Construction Co Ltd v Wilcox Bros⁴⁰³ the Appellate Division held that the causa continentia rule (lit: the principle of continuity or keeping together) of Roman Dutch law is part of our law. The rule may be seen as an extention of the territorial jurisdiction of the Court in order to avoid a multiplicity of proceedings and possible conflicting decisions in respect of the same subject matter. The rule too allows the Court to dispose of different claims in respect of the same subject matter more inexpensively and conveniently.

The Roberts Construction case related to a contract which had been entered into in the Transvaal for the removal of a bridge situated partly in the Orange Free State and partly in the Cape Province. The parties, although incolae of the Republic, were peregrini of the Free State Court. Although it was seised of an action for damages regarding the contract pertaining to the bridge within its territorial jurisdiction, the Free State Court found that by applying the causa continentia rule it possessed jurisdiction in regard to certain misrepresentations which were alleged to have occurred in Johannesburg in connection with the contract.

The causa continentia rule has been applied in a number of subsequent cases.⁴⁰⁴

2.17.6 The principle of forum conveniens.

The principle of forum conveniens in a South African context may be described as the choice of competing provincial courts being decided in the interests of justice and the balance of convenience between the parties.⁴⁰⁵ Although the principle appears to have been established in Estate Agents Board v Lek,⁴⁰⁶ considered more fully below, there are earlier cases in which a notion of the principle may be detected.⁴⁰⁷

It is apposite to consider the adoption of the principle of forum conveniens in Estate Agents Board v Lek.⁴⁰⁸ The facts of this seminal case were that Lek, an estate agent, had practised and resided in Cape Town for

some years. In terms of the Estate Agents Act 1976⁴⁰⁹ it became obligatory for every practising estate agent to be in possession of a fidelity certificate⁴¹⁰ issued by the Estate Agents Board, an authority established by the Act.⁴¹¹ The Act further provides that certain persons are disqualified from obtaining the necessary fidelity certificate, inter alia persons who have been convicted of crimes involving dishonesty.⁴¹² This prohibition is not absolute as the board is empowered to issue a certificate to persons previously convicted, if it is satisfied that under the particular circumstances the grant of the certificate would be in the interests of justice.⁴¹³ The Act further provides that any person aggrieved by the refusal of the board to issue a fidelity certificate has the right, inter alia, to appeal to the "court" against such decision.⁴¹⁴ The "court" is defined as

"a court of the provincial or local division of the Supreme Court of South Africa having jurisdiction"⁴¹⁵

Lek had previously been convicted of crimes involving dishonesty. He disclosed his previous convictions in an application to the board for a fidelity certificate. It is relevant that the board is situated in Johannesburg where it considers applications for fidelity certificates from estate agents throughout the Republic. In refusing Lek's application the board committed an irregularity in its proceedings; more particularly it failed to comply with the audi alteram partem rule.⁴¹⁶ Clearly the Transvaal Provincial and the Witwatersrand Local Division had jurisdiction to consider an appeal by Lek against the decision. However, Lek chose to institute proceedings in the Cape Provincial Division,⁴¹⁷ which court assumed jurisdiction and upheld his appeal. The Estate Agents Board appealed to the Appellate Division against the judgment. Effectively, the real argument before the Appellate Division was whether the Cape Provincial Division enjoyed jurisdiction. Mr Justice Trollip expressed the unanimous decision of the court in finding that the Cape court was seised with jurisdiction. The decision was based on four premises, more particularly:

1. That the nature of the relief sought by Lek was declaratory in nature.⁴¹⁸

2. Inexorably bound to the first premise is section 26(1) of the Supreme Court Act which provides that the judgment or order or all divisions "... runs throughout the Republic and, if necessary, can be effectively served on the Board at its residence in Johannesburg.⁴¹⁹
3. That the effect of the board's refusal to grant Lek the necessary fidelity certificate resulted in his inability to continue his business, which the judge of appeal saw as "a kind of capitis diminutio" (sic) affecting his legal capacity, status, et cetera.⁴²⁰

It was at this point of his reasoning that the judge held that the Cape Provincial Division had jurisdiction, albeit concurrently with the Transvaal Provincial and Witwatersrand Local Divisions. Once having arrived at this finding, he introduced the convenience factor,⁴²¹ the fourth premise.⁴²² On a balance of convenience to the parties, Trollip JA found in favour of the Cape Provincial Division.

It is the fourth premise, the convenience factor, which appears to be analogous; or so closely related to the doctrine of forum conveniens, that they appear synonymous.⁴²³

To summarise, the ratio decidendi in Lek's case may be seen in terms of this equation:

1. Nature of relief sought	+	
2. section 26(1) of the Supreme Court Act 1959	+	= JURISDICTION
3. nature of damages suffered by Lek	+	(CPD)
4. convenience factor	+	

This decision would appear to be authority for the extension of the territorial jurisdiction of the Court founded on the nature of the relief sought and the balance of convenience between the parties. Subject to an applicant being affected in his own place of residence (and/or business) by an administrative decision and the convenience factor leaning in his favour, it would appear that the Court (which normally would enjoy jurisdiction over him) were he the respondent,⁴²⁴ would be seised of the proceedings.

An appeal stricto sensu and section 24 review are not subject to the principle of forum conveniens, the cause continentia rule or any other principle extending the territorial jurisdiction of the Court. Save for the Witwatersrand Local Division, local divisions have been denied the power to hear and determine appeals or section 24 review proceedings by the Supreme Court Act.⁴²⁵ The relevant enactment does not affect the hearing of common law review proceedings by a local division and relates only to appeals and section 24⁴²⁶ review. Appeals stricto sensu against the decision of inferior courts lie only to the Provincial Division having jurisdiction over such inferior court.⁴²⁷ The position with section 24 review proceedings is similar.

Against this background of forms (or principles) of territorial jurisdiction the Court may entertain common law review proceedings:

- (i) where this is authorised by statute;
- (ii) where the respondent resides or may be seen by the Court as 'being within its territorial area of jurisdiction;
- (iii) where the respondent is an incola of the Republic but a peregrinus of the Court and submits to the jurisdiction of the Court. The acceptance of jurisdiction may depend on whether the Court is able in law to enforce its judgment.⁴²⁹ As a decision, in review proceedings, would appear to be 'declaratory'⁴³⁰ there should be little objection to the respondent submitting to the jurisdiction of the Court;⁴³¹
- (iv) where the respondent is an incola of the Republic, but a peregrinus of the Court, and the cause of action arose wholly within the jurisdiction of the Court;
- (v) where the causa continentia rule applies;
- (vi) where the principle of forum conveniens applies.

2.18 Legislative ousting of the Court's jurisdiction.

Parliament is the supreme law maker.⁴³² Theoretically it may make or un-make any law.⁴³³ Although the Supreme Court of South Africa is the judicial organ of the State, it is not competent to enquire into or pronounce upon the validity of any Act of Parliament, save an Act which repeals or amends or purports to amend the provisions of the so-called 'entrenched clauses'.⁴³⁴ This means that substantive due process in the sense that the Court has powers to test the reasonableness of parliamentary legislation does not exist in South Africa.⁴³⁵ It also means, at least prima facie, that the Court is subject to the whims of Parliament which may:

'... reorganise the judiciary. It can create a Court or Courts superior to the Appellate Division and confer upon them such jurisdiction as it thinks fit ..."⁴³⁶

Theoretically too, there is no constitutional bar preventing Parliament from abolishing the present judicial system and substituting some other system or even having no judicial system whatsoever. Parliament may, and does from time to time, prevent the Court from exercising its jurisdiction in regard to a particular situation e.g. in respect of claims for damages against the State.⁴³⁷ Parliament also, may prohibit the Court from exercising its jurisdiction in regard to certain administrative acts e.g. in terms of the Terrorism Act 1967,⁴³⁸ which provides for the arrest and indefinite detention of any person believed to be a terrorist and excludes the power of the Court to:

"... pronounce upon the validity of any action taken under this section (section 6), or order the release of any detainee".⁴³⁹

On the other hand the Court is said to jealously guard its jurisdiction. It will not lightly concede the ousting of its powers and any enactment purporting to do so must be clear and unambiguous before the Court submits. This judicial approach has taken the form of a presumption of interpretation and has been expressed by the Appellate Division in De Wet v Deetlefs⁴⁴⁰ in the following terms:

"It is a well recognised rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the Legislature ..."

And in Lentz Township Co (Pty.) Ltd. v Lorentz NO. & Andere⁴⁴¹ the same court held:

"Daar bestaan 'n sterk vermoede teen wetgewende inmening met die jurisdiksie van Howe, en 'n duidelike bepaling is nodig om daardie vermoede te weerlê"⁴⁴²

But even in cases where the legislative intention to oust or preclude the jurisdiction of the Court is clear from the enactment, the Court continues to exercise limited powers of review. In the leading case of Union Government v Fakir⁴⁴³ the Appellate Division was faced with a statute which inter alia provided that:

"No court of law in the Union shall, except upon a question of law reserved by a Board as in this section provided, have any jurisdiction to review, quash, reverse, interdict or otherwise interfere with any proceeding, act, order or warrant of the Minister, a Board, an immigration officer or a master, had, done or issued under this Act, and relating to the restriction or detention, or to the removal from the Union or any Province, of a person who is being dealt with as a prohibited immigrant."⁴⁴⁴ (my italics)

Despite this clear legislative attempt to exclude the jurisdiction of the Court, the Appellate Division, per Innes CJ, held:

"... The fact that an order purports to be done under the Act will not exclude the interference of the courts, where there was no jurisdiction to deal with the matter at all or where it was dealt with not bona fide but fraudulently. But to justify our interference fraud or absence of jurisdiction must be alleged and proved or must appear from the papers".⁴⁴⁵ (my italics)

This refusal by the Court to yield its review powers absolutely may be found in cases dealing with the most severe security legislation. Thus in Schermbrucker v Klindt NO⁴⁴⁶ the Appellate Division, per Trollip AJA found that the clause ousting the jurisdiction of the Court in regard to the rights of the detainee under security legislation, did not entirely preclude intervention by the Court and that it would intervene under the circumstances set out by the Court in Union Government v Fakir (above).

Further, any enactment purporting to exclude the jurisdiction of the Court should be interpreted restrictively in favour of the retention of jurisdiction by the Court. Thus, the legislative exclusion of the Court's jurisdiction in regard to a particular act does not preclude the Court from exercising its jurisdiction in regard to a matter incidental to such act. Thus, in Essop v Commissioner SAP,⁴⁴⁷ Margo J ordered the security police to refrain from unlawfully interrogating (i.e. refrain from using 'third-degree' methods of interrogation) a detainee held in terms of section 6 of the Terrorism Act 1967.⁴⁴⁸ The learned judge held that section 6 did not "... deprive the Court of its jurisdiction to enquire into the lawfulness of treatment which a detainee is receiving while in detention ..."⁴⁴⁹

It must be emphasised that the two grounds upon which the Court's review powers may be invoked, despite legislation to the contrary are absence of jurisdiction and fraud.⁴⁵⁰

The necessity of the Court retaining its review powers (albeit limited) becomes evident in cases where fraudulent acts would otherwise prevail. Illustrative is the case of Pillay v Licensing Officer Umkomaas.⁴⁵¹ In terms of the Natal Licensing Ordinance 1923⁴⁵² the decision of a licensing officer, while subject to an appeal to a domestic appellate tribunal, was specifically enacted to be "... not liable to review, reversal or alteration by any court of law". The applicant Pillay applied unsuccessfully to the relevant licensing officer for a trade licence. It transpired that a memorandum or petition signed by a number of objectors had been lodged with the licensing officer opposing the grant of the licence. Contained in the list of objectors were the five members of the (domestic) appellate tribunal. This action by the members of the tribunal frustrated any attempt on Pillay's part to appeal. Despite the ouster clause in the Ordinance the Court was prepared to consider the matter as the conduct of the members of the tribunal amounted to "... a similar element to fraud".⁴⁵³

It may be no exaggeration to suggest that the only manner in which Parliament may deprive the Court completely of its apparently immutable basic review powers would be to abolish the notion of a superior court as it is presently known in South Africa.⁴⁵⁴

2.19 The exclusion of, or the limiting effect on, the jurisdiction of the Court by reason of the functional approach.

The functional approach may be described as one based on the classification of administrative acts, functions, powers etc., (hereafter referred to as acts or functions) into categories which are illustrative of such act. There would appear to be five major recognised classifications viz. legislative, ministerial, judicial, quasi-judicial and 'purely administrative' acts.

A legislative act, as the title suggests, is the power conferred upon an administrative authority to make subordinate legislation in the nature of proclamations, by-laws, rules and regulations, etc. The review of subordinate legislation is sui generis and should not be confused with the review of other types of functions.⁴⁵⁵

The term ministerial act has two separate and distinct meanings. The first relates to functions performed in terms of enabling legislation by ministers of State. The second meaning concerns acts by administrative authorities which in terms of enabling legislation are to be performed on the happening of certain events. The exercising of the ministerial function may be seen as a mechanical process in respect of which the authority exercises no discretion.⁴⁵⁶ It is only the second meaning of the term which is relevant to the particular feature under consideration. Examples of ministerial acts are:

- (i) the issue of a liquor licence by the Receiver of Revenue in terms of the regulations to the now repealed Liquor Act 1928.⁴⁵⁷ An applicant whose application for a liquor licence has been approved by the relevant authorities⁴⁵⁸ received a written authority enabling him to obtain the necessary licence from the Receiver of Revenue. The latter was obliged on receipt of the authority together with the prescribed fee to issue the relevant licence. He had no discretion in the matter. If the authority had been properly issued and the fee tendered he was obliged to issue the licence. Thus his function under the Act was purely ministerial.

(ii) the Registrar of Births in registering the birth of child exercises a ministerial act. From the information supplied to him he records the birth. He has no discretion but acts solely in terms of the information supplied. His record is not proof of such facts.⁴⁵⁹ These examples are not exhaustive but illustrate the nature of the function.⁴⁶⁰ A ministerial act is reviewable by the Court where the authority:

- (a) has exceeded its jurisdiction;⁴⁶¹
- (b) has failed to comply with the rules of natural justice where the applicant's reply is necessary for the proper carrying out of the function;
- (c) has acted mala fide or has been motivated by an ulterior motive;⁴⁶²
- (d) has failed to perform its function in terms of the enabling legislation. Thus the failure by an authority to carry out its obligation by reason of an error of fact or law is reviewable.⁴⁶³

The functional approach particularly in regard to the classification of judicial, quasi-judicial and purely administrative acts, is an area of law fraught with problems. At this stage of the thesis only the prevailing judicial approach will be considered. The subject will be examined more critically below.⁴⁶⁴

Despite a timely judicial caution against the classification of administrative acts by Schreiner JA in Pretoria North Town Council v Al Electric Ice Cream Factory (Pty.) Ltd.,⁴⁶⁵ more particularly:

"One must be careful not to elevate what may be no more than convenient classification into a source of legal rules. What primarily has to be considered ... is the statutory provision in question read in its context",⁴⁶⁶

the Courts have adopted the functional approach.⁴⁶⁷ As accurate definitions of judicial, quasi-judicial and purely administrative acts would ap-

pear not to be possible, the Court has endeavoured to provide criteria in order to determine the nature of the relevant function. The essential requirements for a judicial act would appear to be a dispute, between two or more parties which is decided by an administrative authority or tribunal on the facts and the law relating to such facts. There are few if any administrative authorities which exercise a true judicial function.⁴⁶⁸ The proceedings of an administrative authority exercising a judicial function are reviewable on the grounds set out below.⁴⁶⁹ An error of fact and/or of law bringing about an unreasonable decision in its wake⁴⁷⁰ would appear to be grounds for the review of such proceedings. Review on such grounds is justified on account of the judicial nature of the function exercised by the authority.

The vast majority of administrative acts are either quasi-judicial or purely administrative. The real and vital difference in regard to the effect of these two functions lies in minimal grounds for the review of purely administrative acts. This begs the question of how these functions are to be determined. The criteria necessary to establish a quasi-judicial function is most comprehensively described by Friedman J in Roberts v Chairman Local Road Transportation Board and Others.⁴⁷¹ After considering many authorities on the subject the learned judge concluded:

"The determination of the question whether a statutory tribunal, in reaching a decision, is exercising a purely administrative function ... or whether it is exercising a quasi-judicial function depends on the construction on the relevant statutory provisions. This depends ... firstly, on whether, in the present case, the legislation properly construed envisaged an enquiry by the Commission into matters of fact or of fact and law, and, secondly, on whether the decision of the Commission can be said to be one which may affect the rights of or involve civil consequences to individuals".⁴⁷²

This means that where the authority does not conduct an enquiry into matters of fact or of fact and law or where the decision does not affect the rights of an individual or involve civil consequences to such individual, the function exercised by the authority is of a purely administrative nature.⁴⁷³ As will be indicated below a purely administrative function may be favourably compared with what has been described previously by the Court as an absolute discretion.⁴⁷⁴

The essential distinction between a purely administrative and a quasi-judicial function, in so far as the judicial review of proceedings relating to such functions is concerned, is that the review powers of the Court are considerably restricted in regard to the former function. The Court will intervene in regard to such function only where the authority has exceeded its jurisdiction or has acted mala fide.⁴⁷⁵ One of the most important characteristics of a purely administrative function is that the authority exercising same is not obliged to afford any interested party the opportunity of being heard.⁴⁷⁶ Thus the review jurisdiction of the court is excluded or limited by reason of the functional approach to the extent as set out above.

2.20 The exclusion of the jurisdiction of the Court by reason of an available domestic remedy.

The question arises whether resort to the review jurisdiction of the Court is excluded until any domestic remedies provided by legislation e.g. an appeal to the National Transport Commission from a decision of a Local Transportation Board⁴⁷⁷ or contained in the terms of the constitution of a voluntary association e.g. the Jockey Club of South Africa⁴⁷⁸ or a professional body or trade union⁴⁷⁹, has been exhausted.

A rule of statutory interpretation provides that the legislative introduction of a specific remedy excludes any other remedy. The rule is based on the maxim 'unius inclusio est alterius exclusio' (lit: the inclusion of the one (remedy) excludes all other (remedies)).⁴⁸⁰ This canon of interpretation would appear to exclude the Court's power of review, or at least until the domestic remedies have been exhausted. There is Appellate Division authority for this proposition. In Shames v S A Railways⁴⁸¹ Solomon JA saw the situation in these terms:

"But the question still remains at what stage of the proceedings is it competent for an aggrieved servant to have recourse to a court of law. Is he entitled to do so at the initial stage, so soon as a penalty has been inflicted upon him, or only at the final stage when he has exhausted all the remedies which under the Act are open to him? ... I am clearly of opinion that it is only if the irregularity or illegality has been persisted in up to the final stage that it is competent to

the servant to take legal proceedings. For non constat that, if he had appealed to the various tribunals which under the Act are open to him, the irregularity complained of may not have set right, and justice done to him ...⁴⁸²

On the other hand, if the review jurisdiction of the court is beyond legislative exclusion, at least as far as irregularities concerning jurisdiction and mala fides are concerned⁴⁸³ the exclusion or deferment of the Court's review powers, merely on account of the inclusion of a domestic remedy appears illogical. In a number of cases the Court has shown reluctance to be bound by the rule that domestic remedies are to be exhausted before its review jurisdiction may be invoked.⁴⁸⁴

These conflicting judicial approaches may be reconciled when it is considered, first, that before the review jurisdiction of the Court is ousted or deferred in favour of domestic remedy, the Court must be convinced that the legislature (or the constitution of the voluntary association) intended to create this situation. As stated above the Court jealously guards its jurisdiction.⁴⁸⁵ This restriction on the rule may be found in Welkom Village Management Board v Leteno,⁴⁸⁶ where Ogilvie Thompson AJA, expressed the view of the Appellate Division, more particularly:

"Whenever domestic remedies are provided by the terms of a Statute, regulation or conventional association, it is necessary to examine the relevant provisions in order to ascertain in how far, if at all, the ordinary jurisdiction⁴⁸⁷ of the courts is thereby excluded or deferred ..."⁴⁸⁸

Secondly, an examination of the decisions on point will reveal no less than six specific exceptions to the rule.

- (i) It is unnecessary to exhaust domestic remedies if the offending situation cannot be rectified by such remedy e.g. where the authority a quo has committed an irregularity which a domestic appellate tribunal is unable to correct on account of not having the power to do so,⁴⁸⁹ or where the nature of the relief sought is beyond the jurisdiction of a domestic appellate tribunal.⁴⁹⁰ Whether a decision which is void ab initio is appealable is controversial and an issue which the court appears to have avoided.⁴⁹¹

- (ii) Where the situation cannot be rectified on account of the attitude of the domestic appellate tribunal e.g. where it has prejudged the issue, the Court will entertain review proceedings despite the domestic remedy not having been invoked.⁴⁹²
- (iii) No administrative authority enjoys the power to decide its own jurisdiction. Where the jurisdiction of an authority is in dispute the Court will intervene by virtue of a rule that may be compared with the English doctrine of jurisdictional facts.⁴⁹³ The Court alone possesses the power to decide jurisdiction and retains this power despite legislative exclusion thereof.⁴⁹⁴ The establishment of a domestic appellate tribunal does not vitiate or in any way exclude the intervention by the Court in the exercise of its inherent review jurisdiction.
- (iv) Where the domestic remedy is beyond the reach of the aggrieved party, in the sense that while there is such remedy it is beyond the power of the aggrieved party to set it into operation. The leading case regarding this exception is Bindura Town Management Board v Desai & Co⁴⁹⁶ the facts of which were that the relevant legislation provided that in the event of the refusal of a trading licence by a local authority, the matter was to be considered by the Governor of the Colony without reference to the aggrieved party. The latter had no right of appearance nor any right to present his case or even submit any argument written or otherwise. The Court held that under these circumstances an aggrieved party is not required to await the decision of the Governor before instituting review proceedings.
- (v) Where a domestic remedy has been provided but the legislation or terms of the constitution do not indicate clearly that it is obligatory on an aggrieved party to pursue such remedy the Court will assume that the party has a choice of pursuing such remedy or approaching the Court for relief.⁴⁹⁷ This exception would appear to be in keeping with the presumption against legislative ousting of the jurisdiction of the Court.⁴⁹⁸

- (vi) Where the domestic appellate tribunal has waived its power to grant relief to an aggrieved party by consenting to or permitting such party to approach the Court. Precedent for this exception is Slade v Pretoria Rent Board.⁴⁹⁹ At the hearing before the domestic tribunal S sought the recusal of certain of its members, alleging bias on their part. After refusing this application the tribunal granted an adjournment at the request of S to enable him to apply to Court for an interdict restraining the particular members of the tribunal from adjudicating in this matter. Subsequently when the application was heard before the Court the respondent tribunal opposed the application on the grounds that the application was premature and that in terms of the relevant statute S was obliged to exhaust the domestic remedies. The Court dismissed the objection as the Board had itself:

"... decided upon an adjournment of its proceedings for the specific purpose of enabling the applicant to move this Court, it does not seem ... to be competent for it to now depart from this attitude and claim by its counsel that the review proceedings are premature".⁵⁰⁰

It would appear from an analysis of the cases that the Court endeavours to retain its review jurisdiction. Where the Court has insisted that domestic remedies be exhausted initially, it retains the power to come to the assistance of an aggrieved party should the domestic remedy not provide the necessary relief.⁵⁰¹ In other words the Court has merely deferred its powers pending the exhausting of domestic remedies. There is however an essential condition attached to such deferment, more particularly when the Court is ultimately seised of the matter it will not consider any ground or objection raised by the applicant which he had not previously advanced before the domestic appellate tribunal.⁵⁰²

Finally only Parliament has the power to exclude the jurisdiction of the Court or "... to prescribe the procedure to be followed by an aggrieved person in his approach to a Court of law ...".⁵⁰³ A subordinate legislative authority does not have the power so to do.^{503a}

FOOTNOTES TO CHAPTER TWO

1. Johannesburg Consolidated Investment Co v Johannesburg Municipality (hereafter referred to the JCI case) 1903 TS 111 at 114 et seq.
2. See page 84 above; see also Chapter 4 page 284 et seq below.
- 2a. Ibid.
3. Taitz, "When is an Appeal not an Appeal? - A Legal Conundrum", 42 THRHR (1979) 70 at 71.
4. S. 19(i)(ii) read with s. 24 of Act No 59 of 1959.
5. JCI case (note 1) at 115; Shidiack v Union Government 1912 AD 642 at 651-652; National Transport Commission and Another v Chetty's Motor Transport (Pty.) Ltd. 1972(3) SA 726 (AD) at 735.
6. Changuion and Another v Secretary for the Interior 1971(1) SA 1 (AD) at 5A.
7. 1947(4) SA 766 (W) at 774.
8. Minister of Agricultural Economics and Marketing v Virginian Cheese and Food Co (1941) (Pty.) Ltd. 1961(4) SA 415 (T) at 422-424; Theron en Andere v Wellington Ring van die NG Sendingskerk in Suid-Afrika 1976(2) SA 1 (AD) at 31.
9. See page 238 below.
10. See page 240 below.
11. See page 239 below.

12. 1965(1) SA 372 (C) at 3775.
13. Taitz, Unreasonable Acts of Administrative Authorities, exercising Adjudicatory Functions as a Ground for Judicial Intervention (unpublished LLM Thesis UNISA 1977) 34 et seq.
14. Taitz, 'But 'twas a Famous Victory', 1978 Acta Juridica 108 at 111.
15. See Chapter 3 'The Grounds of Review' page 483 et seq below.
16. See page 185 below.
17. See page 222 below.
18. See page 223 below.
19. See page 237 below.
20. See note 13.
21. R. v Parmanand 1954(3) SA 833 (AD) at 838C.
22. Rule 53 of the Uniform Rules of Court.
23. JCI case at 115.
24. S. v Mametja 1979(1) SA 767(T) at 768C; cf. The King v Higginson 1 Menz 533.
25. See page 6 above.
26. See page 24 et seq above.
27. Hager v Windhoek Municipal Council 1961(3) SA 808 (AD) at 812; L & B Holdings v Mashonaland Rent Appeal Board 1959(3) SA 466 (SR) at 468G-469A; Le Roux v Grigg-Spall 1946 AD 244 at 253.

28. See inter alia : Monticello (Pvt.) Ltd. v Edgerton 1982(1) SA 762 (R) at 765F.
29. Ss. 19(1) (i) and (ii) read with s 19(2) of Act No 59 of 1959.
30. See inter alia : Kruger v The Master and Another NO. 1982(1) SA 754 (W); cf. Lowenthal v Hill NO. 1908 TH 152.
31. Ex parte Lang 1963(2) SA 388 (E).
32. 1966(2) SA 73 (E).
33. Herbstein and Diemont, A Handbook of Superior Court Practice (2ed), 207-210.
34. 53 SALJ (1936) 248 sv Practice; see note 232.
35. Cf Union Government and Fisher v West 1918 AD 556 at 573.
36. Kruger v The Master and Another NO. (note 30); cf. S v Mametja (note 24); see also S v Lubisi 1980(1) 187 (T).
37. Gentiruco AG v Firestone SA (Pty.) Ltd. 1972(1) SA 589 (AD) at 600 E-F; Ex parte Scott (1909) 26 SC 520; Junker v The Queen (1884) 3 SC 46; R. v Mans (1867) 5 Searle 285.
38. R. v Milne and Erleigh(6) 1951(1) SA 1 (AD) at 5H - 7c; Gentiruco AG. v Firestone SA (Pty.) Ltd. (note 37) at 600 D-F.
39. See Federation of Master Builders v Minister of Labour 1947(1) SA 692(T) at 698-699; cf. Ex parte Zelter 1951(2) SA 54(SR) at 55A-G and 59G et seq.
40. JCI case (note 1) at 115.

41. S. 59(2) of the Republic of South Africa Constitution Act No 32 of 1961; cf. Harris and Others v Minister of Interior and Another 1952(2) SA 428 (AD) and Minister and Interior and Another v Harris and Others 1952(4) SA 769 (AD).
42. Harnaker v Minister of Interior 1965(1) SA 372 (C).
43. Ex parte Montague 1936 NPD 144; Read v SA Medical & Dental Council 1949(3) SA 997(T).
44. Although an administrative authority exercising a judicial function would appear to be a contradiction in terms such body is conceivable e.g. a military court-martial may be considered to be an administrative tribunal exercising a judicial function.
45. Cassem en 'n Ander v Oos-Kaapse Komitee van die Greopgebiederaad (note 48) at 659-660; SA Defence and Aid Fund and Another v Minister of Justice 1967(1) SA 263 (AD) at 270 A-E.
46. Laubscher v Native Commissioner Piet Retief 1958(1) SA 546 (AD) at 553 C-554H.
47. Inter alia : Johannesburg City Council v Administrator Transvaal and Mayofis 1971(1) SA 87 (AD); Administrator Cape v Associated Buildings Ltd. 1957(2) SA 317 (AD).
48. Cassem en 'n Ander v Oos-Kaapse Komitee Groepesgebiederaad 1959(3) SA 651 (AD).
49. Loxton v Kenhardt Liquor Licensing Board 1942 AD 315.
50. National Transport Commission v Chetty's Motor Transport (note 5).
51. Jacob and Another v The Council of the University of Durban-Westville 1974(3) SA 552 (AD).
52. Kudo v Cape Law Society 1977(4) SA 659 (AD).

53. Glicksman v Transvaal Institute of Architects 1951(4) SA 56(W).
- 53a. Herbert Porter & Co. Ltd. and Another v Johannesburg Stock Exchange 1974(4) SA 781 (W) at 791 D.
54. Theron en Andere v Wellington Ring van die NG Sendingskerk in Suid-Afrika (note 8).
55. Crisp v SA Council of the Amalgamated Engineering Union 1930 AD 225.
56. Goldman v Johannesburg Club 1904 TH 251.
57. Turner v Jockey Club of South Africa 1974(3) SA 633 (AD).
58. S. 46 of Act No 28 of 1956.
59. Adshell v Horwitz 1916 WLD 65; Allied Mineral Development Corpn. (Pty.) Ltd. v Gemsbok Vlei Kwartsiet (Edms.) Bpk. 1968(1) SA 7 (C); Stuart Nixon Estate Agency (Pty) Ltd v Brigadoon (Pty.) Ltd. 1970(1) SA 97 (N).
60. S v Taylor 1976(4) SA 185 (T); S v Mametja 1979(1) SA 767 (T); S v Lubisi 1980(1) SA 187 (T); see page 336 below.
61. Parsons v Rustenburg Municipality (note 34); cf. Jack v Vermeulen NO. 1979(1) SA 659 (C); see also Gentiruco AG. v Firestone SA (Pty.) Ltd. (note 37) at 601 D-E.
62. See cases cited in note 39.
63. Dabner v SA Railways and Harbours 1920 AD 583.
- 63a. Government of Kwa Zulu v Government of the Republic of South Africa and Another 1982(4) SA 387 (D).
64. See p 79 above.

65. See page 603 below.
66. Cf. Herbert Porter & Co Ltd. and Another v Johannesburg Stock Exchange (note 53a); see Dawnlawn Beleggings (Edms.) Bpk. v Johannesburg Stock Exchange and Others 1982(4) SA 327 (W).
67. See page 288 below.
68. See page 293 below.
69. See page 299 below.
70. See page 308 below.
71. See page 304 below.
72. See page 312 below.
73. See page 316 below.
74. See page 319 below.
75. See page 325 below.
76. See page 333 below.
77. See page 337 below.
78. See page 338 below.
79. Rule 53 of the Uniform Rules of Court. Although the Rule provides that the Chairman of the Board, Presiding Officer, etc., is to be cited as respondent, in the absence of prejudice the citing of the authority a quo may be condoned. See Safcor Forwarding (Johannesburg) (Pty.) Ltd. v National Transport Commission 1982(3) SA 654 (AD) at 672 E et seq.

80. Cf. Minister of Native Affairs v Sekukuni 1958(4) SA 99 (T) in which case the Court permitted an applicant for review to proceed by way of action.
81. JCI case (note 1) at 115.
82. See inter alia : Union Government v Fakir 1923 AD 466 at 469-470; Schermbrucker v Klindt NO. 1965(4) SA 606 (AD) at 623 F; Barday v Passport Control Officer 1967(2) SA 346 (AD) at 358 A-B; Nkondo v Minister of Prisons and Another 1980(2) SA 894(0) at 910 C-4; see further, page 134 below.
83. Article 32 of the Charter of Justice 1834.
84. Note 24.
85. 1978(1) SA 13 (AD).
86. At 42 A-D, see page 95 et seq below.
87. At 44 E-F.
88. Municipality of Cape Town v Belletuin (Pty.) Ltd. 1978(2) SA 861 (AD) at 884H-885B.
89. Wolgroeiers case (note 85) at 41G et seq.
90. Harnaker's case 1965(1) SA 372 (C) at 377B.
91. C 3.6.
92. See also, Engelmann, A History of Continental Civil Procedure (1969) 227, 337.
93. Malan v Van Rooyen 1929 OPD 25 at 27.

94. Bell's South African Legal Dictionary (3ed) S.V. non locus standi in judicio at p 527; cf., sv. locus standi at p 461.
95. Note 93 at 27.
96. See Bell's South African Legal Dictionary (note 94) at 461 sv. locus standi and Claassen's, Dictionary of Legal Words and Phrases (1976) Vol 2 sv., locus standi 365, cf; non locus standi in judicio (Vol 3) at 34.
97. Van der Vyver en Van Zyl, Inleiding tot die Regswetenskap (1972) at 159; Bell's South African Legal Dictionary (note 94) sv non locus standi in judicio; Boberg, The Law of Persons (1977) for the subject generally 530, 532; regarding the locus standi in judicio of mentally ill persons (139) married woman (196) insolvents (240) minors (681) and other persons suffering under legal disability (164); cf. De Smith, Judicial Review of Administrative Action (4ed) at 409 et seq.
98. Kahn v Stuart and Others 1942 CPD 386 at 392; cf. Kuter v Pharmacy Board and Others 1953(2) SA 307 (T) at 313.
99. Langeberg Ko-Operasie Bpk. v Folscher & Another 1950(2) SA 618(C); cf Shell Company of South Africa v Vivier Motors (Pty) Ltd 1959(3) SA 971 (W).
100. Enter Centre Enterprise (Pty) Ltd v Brogneri 1972(1) SA 117 (C); Roelou Barry (Edms.) Bpk. v Bosch 1967(1) SA 54 (C); John Roderick's Motors Ltd. v Viljoen 1958(3) SA 575 (O); Pountas Trustee v Lahanas 1924 WLD 67.
101. Titty's Bar & Bottle Store v ABC Garage and Others 1974(4) SA 362 (T); Lebenya v District Commandant of Police and Another 1950(1) SA 867 (O) at 877; Mauerberger v Mauerberger 1948(3) SA 731 (C).
102. Registrar of Insurance v Johannesburg Insurance Company (1) 1962 SA 546 (W).

103. Shakot Investments (Pty.) Ltd. v Stanger Town Council 1976(2) SA 701 (D); Driefontein Mines v Schlochau 1902 TS 33. Cf. Milne NO. v Jockey Club of SA 1958(3) SA 599 (W); Kleynhans v Van der Westhuizen NO. 1970(1) SA 565 (O) at 568 E.
104. Shell Company of South Africa v Vivier Motors (note 99).
105. Rule 6(5) (g) of the Uniform Rules of Court; cf. Arenstein and Fehler v Peters 1962(4) SA 122 (D).
106. Rule 6 (5) (d) of the Uniform Rules of Court; Ehler (Pty) Ltd. v Silver 1947(4) SA 173(W); Abromowitz v Jacquet 1950(2) SA 247(W); cf. Turkstra v Friis 1952(2) SA 342 (T).
107. Reuben v Myers 1957(4) SA 57(SR); Ex parte Varvarian; In re Constantia Pure Foods (Pty) Ltd 1965 (4) SA 306 (W) at 309 H-310A.
108. Reuben v Myers (note 107) at 60; Stolz v Pretoria North Town Council 1953(3) SA 884 (T) at 885 C-E.
109. Ex parte Varvarian (note 107) at 310; Stolz v Pretoria North Town Council (note 108) at 886 H-887C.
110. Notes 95, 96.
111. 1926 CPD 298 at 300.
112. Voet 47.23; Groenewegen, De Legibus Abrogatis, ad D 47.23.
- 112a. Director of Education v McCagie 1918 AD 616 at 621 and 627; Roodepoort Maraisburg Town Council v Eastern Properties (Pty.) Ltd. 1933 AD 87 at 101 and 104; Wood and Others v Ondangwa Tribal Authority and Another 1975(2) SA 294 (AD) at 310-311; cf. Dell v Town Council of Cape Town 1879 Buch 2.
113. [1977] 3 ALL ER 70 (HL).

114. Cf. Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority [1973] 1 ALL ER 689; see also, the Court of Appeal decision in Gouriet's case [1977] 1 ALL ER 696 (CA).
115. Rabie and Eckhard, "Locus Standi : The Administration's Shield and the Environmentalists' Shackle", 1976 CILSA 141.
116. See the text relating to note 133.
117. Director of Education v McCagie (note 112a) at 627; Roodepoort-Maraaisburg Town Council v Eastern Properties (Pty.) Ltd. (note 112a) at 95, 103; Kruger v Heiman & Sacks Ltd. & Another 1963(3) SA 372 (T) at 376B.
118. McCagie's case (note 112a) at 627; Roodepoort-Maraaisburg case (note 112a) at 107.
119. 1975(1) SA 255 (C) at 258 D.
120. Although the applicant in this case did not proceed by way of common law review, his application for an interdict effectively invoked the inherent review jurisdiction of the Court (referred to below as the review process).
121. Kuter v SA Pharmacy Board 1953(2) SA 307 (T) at 313 B; Patz v Green 1907 TS 427 at 436.
122. McCagie's case (note 112a) 628; Johannesburg City Council v Administrator Transvaal 1969(2) SA 72 (T) at 72 G et seq.
123. 1961(4) SA 402 (AD) at 407H-408A.
124. Eckhard, Die Locus Standi van Aansoekers by die Geregtelike Hersiening van Administratiewe Handelinge (unpublished LLD Thesis UNISA 1975) at 200 et seq., Eckhard sees prejudice as a basis for locus standi where it accompanies an invasion of the applicant's rights.

125. S. 104 read with S. 58 of the Companies Act No 46 of 1926.
126. Note 123 at 406.
127. S. 73 of the then Companies Act, permitted contracts to be entered into by a company about to be registered, if certain procedures were followed. This pre-incorporation procedure did not apply to an application for a trading licence which is not a contract as envisaged by the Companies Act.
128. Ablansky v Bulman 1915 TPD 71 at 75; Myers v S A Railways 1924 AD 83 at 93; Larson and others v Feldman 1942 AD 340 at 359; Harnaker v Minister of Interior (note 90) at 382.
129. See the text relating to notes 110-111.
130. Note 123 at 408A.
131. Rose-Innes, "Judicial Review of Administrative Tribunals in South Africa" (1963) at 27.
132. Wiechers, Administratiefreg at 288; see also Eckhard, (note 124) at 201.
133. Patz v Green (note 121) at 433.
134. Madrassa Anjuman Islamia v Johannesburg Municipality 1917 AD 718 at 726; Roodepoort-Maraiburg Town Council case (note 112a) at 95-96; Kuter's case (note 121) at 310H - 312A.
135. 1981(3) SA 1054 (C).
136. Ss. 1 and 2 of Act No 9 of 1910.
137. Bamford's case (note 135) at 1059H - 1060A.
138. S. 48(i) of the Liquor Act No 87 of 1977.

139. S. 20(i)(a).
140. S. 20(2).
141. Ibid; cf. s. 29(2)(b) of the (previous) Liquor Act No 30 of 1928.
142. Barnes v Port Elizabeth Liquor Licensing Board, Prinsloo and Another 1948(1) SA 149 (AD) at 155.
143. McCagie's case (note 112a) 621.
144. Jones and Buckle, The Civil Practice of the Magistrates' Court in South Africa (7ed) (hereafter referred to as Jones and Buckle) VOL 1 at 71 and the cases cited therein.
145. Note 140.
146. In Minnaar v Oberholzer Liquor Licensing Board 1955(2) SA 607(T) at 612 D the Court held that an applicant for review under the Liquor Act '... must prove something substantial in the nature of prejudice; see also, Montagu Liquor Board and Others v Idelson and Others 1957(1) 262 (AD); Luyt and Others v Caledon LLB and Another 1957(2) SA 340 (C); Lion Wine & Spirit Co Ltd. (in Liquidation) v Bloemfontein LLB and Others 1960(1) SA 661 (O).
147. Herzog, Civil Procedure in France (1967) 470 et seq; see also Cappelletti & Perillo, Civil Procedure in Italy (1965) 293 et seq (Third Party Opposition).
148. Le Roux v Montgomery 1918 TPD 467.
149. (1908) 25 SC 56.
150. for the purpose of this section the term review proceedings shall include all types of review i.e. common law review, section 24 review and the various forms of statutory review.

151. Chesterfield House (Pty.) Ltd. v Administrator, Transvaal 1951(4) SA 421 (T) at 424, Harnaker v Minister of Interior (note 90) at 380 C - E.
152. Harnaker v Minister of Interior 1965(1) SA 372 (C) at 380 C - E.
153. Hassan & Co v Potchefstroom Municipality 1928 TPD 827 at 828; cf Shepherd v Mossel Bay LLB 1954(3) SA 852 (C) at 857.
154. 1978 (1) SA 13 (AD).
155. See Taitz, 'The Delay Rule and Review Procedure', 97 SALJ (1980) 393.
156. Wolgroeier's case (note 154) at 42B.
157. At 42 A - D.
158. At 42 B.
159. Harnaker v Minister of Interior (note 152) at 376 D.
160. Taitz (note 155), at 399 et seq.
161. Wolgroeier's case (note 154) at 42 A.
162. At 42 A.
163. At 43 E.
164. At 42 C - D.
165. At 42 - 43.
166. At 44 F and 45 A - B.

167. Municipality of Cape Town v Belletuin (Pty.) Ltd. 1979(2) SA 861 (AD) at 884 H - 885 A.
168. See note 41 and cases referred to therein.
169. See also, Kalil and Another NNO. v Minister of the Interior 1962(4) SA 755 (T).
170. See page 325 below.
171. Dhlamini v Mayne (1916) 37 NLR 175 at 176 - 177; cf. R v Dhlumayo 1948(2) SA 677 (AD) at 705 - 706.
172. JCI case 117, 124.
173. JCI case at 124; see also, R. v Bates & Reidy 1902 TS 199 at 200.
174. Cf. R. v Parmanand 1954(3) SA 833 (AD).
175. R. v Bates & Reidy (note 173); Brickman's Trustee v Tvl Warehouse 1904 TS 548.
176. R. v Venter 1944 AD 359 at 365 - 366; Schwartz v Goldsmit 1914 TPD 122 at 126 - 127.
177. Rule 53(1) (6) of the Uniform Rules of Court.
178. Motaung v Mukubela and Another NNO 1975(1) SA 618(0) at 625 E.
179. Note 184.
180. Motaung's case (note 178) at 625 G - 626.
181. See page 110 below.
182. See pages 284 et seq and 293 below.

183. See page 86 above.
184. See Chapter 4 at page 284, et seq
185. Rule 6(5)(g) of the Uniform Rules of Court.
186. Van Zyl, The Judicial Practice of South Africa, (2ed) at 349; motion proceedings would appear to give common law review (i.e. review by motion) an English origin.
187. Rule 6(1) read with Form 2(a) of the First Schedule to the Uniform Rules of Court.
188. Rule 17 (viewed with Form 9).
189. Rule 6(1).
190. Cf. SA Diamond Workers Union v Master Cutters Association of SA 1948(2) PH A 83 at 282.
191. See page 88 and 90 above.
192. Cf. Hart v Pinetown Drive-In Cinema (Pty.) Ltd. 1972(1) SA 464 (D) at 469, although it should be observed that this case concerns an ex parte application.
193. Rule 6 (5) (g) of the Uniform Rules of Court; see Hopf v Pretoria City Council 1947 (2) SA 753 (T); Benade v Bloemfontein Stadraad 1962(3) SA 152 (O); Arenstein & Fehler v Peters 1962(4) SA 122 (D); cf. Johannesburg City Council v Administrator Transvaal & Another 1970(2) SA 89 (T) at 93 A - 94.
194. Rule 6 (5) (d) of the Uniform Rules of Court.
195. Rule 6.

196. Ehler (Pty.) Ltd. v Silver 1947(4) SA 173 (N); Abromowitz v Jacquet 1950(2) SA 247 (W); Turkstra v Friis 1952(2) SA 342 (T); Du Toit v Fourie 1965(4) SA 122 (O); Bader & Another v Weston & Another 1967(1) SA 134 (C); Pearson v Magrep Investments (Pty.) Ltd. & Others 1975(1) SA 186 (D).

197. Taylor v Budd 1932 AD 326 at 333; Nyandeni v Natal Motor Industries Ltd. 1974(2) SA 274 (D); see also, Michau v Argus Co 10 CTR 465.

198. Rule 6 (5) (e) of the Uniform Rules of Court.

199. See notes 99 - 102 and the text related thereto.

200. See cases relating to note 101; see also Kleynhans v Van der Westhuizen NO. 1970(1) SA 565(0); Meyer v Kritzinger 1968(2) SA 749(0); Schreuder v Viljoen 1965(2) SA 88 (0).

201. Rule 6 (5) (e).

202. Joseph & Jeans v Spitz 1931 WLD 48, Morgendaal v Ferreira 1956(4) SA 625 (T); Cohen NO. v Nel 1975(3) SA 963 (W).

203. Registrar of Insurance v Johannesburg Insurance Co Ltd. (1) 1962(4) SA 546.

204. Milne NO. v Fabric House (Pty.) Ltd. 1957(3) SA 63 (N); Transvaal Racing Club v Jockey Club of SA 1958(3) SA 599 (W); Zarug v Parvathie NO. 1962(3) SA 782 (N).

205. See inter alia : Hamson, "Civil Procedure in France and England" 10 CLJ (1950) 411; see also, Amos, "A Day in Court at Home and Abroad" 3 CLJ (1926) 340.

206. Inter alia : Room Hire Co (Pty.) Ltd. v Jeppe Street Mansions (Pty.) Ltd. 1949(3) SA 1155 (T) at 1162; Abro Investments Co Ltd. v Minister of Interior 1956(3) SA 345 (AD) at 350 and 352.

207. Rule 6 (5) (g).
208. Ibid.
209. Room Hire case note (206) at 1162; Bhura v Lalla 1974(2) SA 336 (RAD); Garment Worker's Union v De Vries & Others 1949(1) SA 1110 (W) at 1133.
210. See page 99 below.
211. See for example, Chetty's Motor Transport (Pty.) Ltd. v National Transport Commission 1972(1) SA 156(N) and National Transport Commission v Chetty's Motor Transport (Pty.) Ltd. 1972(3) SA 736 (AD).
212. Wepener v Norton 1949(1) SA 657 (W) at 658 - 659.
213. See page 312 below.
214. Wepener v Norton (note 212).
215. Swart v Van-der Merwe 1943 AD 629 at 647.
216. Daitsh & Another v Osrin & Another 1950(2) SA 343 (C) at 345 - 346.
217. Room Hire case (note 206) at 1162.
218. Metallurgical & Commercial Consultants (Pty.) Ltd. v Metal Sales Co (Pty.) Ltd. 1971(2) SA 388 (W).
219. Van der Merwe v Meyer 1971(3) SA 22 (AD).
220. 1958(1) SA 245 (N).
221. At 251 D.

222. See page 184 above and also Chapter 4 The Procedures by which the Inherent Review Jurisdiction of the Court may be Invoked.
223. Madrasa Anjuman Islamia v Johannesburg Municipality 1917 AD 718; Liquidators, Durban Roodepoort Mynpacht Syndicate v Blankfield 1922 TPD 173, Rembrandt Fabrikante v Gulf Oil Corporation 1962(3) SA 158 (T).
224. The Uniform Rules were made pursuant to ss 43(1) and (2) (a) of the Supreme Court Act No 59 of 1959.
225. 1965(1) SA 193 (AD).
226. Regulations 33(3) and 33(4) to Act No 30 of 1928.
227. Federated Trust Ltd. v Botha 1978(3) SA 645 (AD) at 654 D.
228. See page 11 et seq above.
229. See page 10 above.
230. Ibid.
231. 1918 AD 556.
232. Parsons v Rustenburg Municipality 1936 TPD reported in SALJ (1936) at 248 and referred to in Wesselbron Town Council v Magistrate of Hoopstad and Another 1940 OPD 6 at 7, this latter case is also relevant.
233. Union Government and Fisher v West (note 231) at 573; see also Minister of Native Affairs v Sekukuni 1958(4) SA 99 (T).
234. 1978(3) SA 160 (C) at 165 H.

235. See also, Hanley v Estate Agents Board 1978(3) SA 281 (T) at 286 F - G; cf. SA Pharmacy Board v Nowitz 1980(1) SA 243 (C); see also Taitz, 'When is an Appeal not an Appeal?', 42 THRHR (1979) 70 at 74.
236. Rule 51(4) of the Rules to the Magistrates' Court Act 1944; Rule 49 of the Uniform Rules of Court; Rule 5 of the Rules of the Appellate Division.
237. Rule 51(7) of the Rules of the Magistrates' Court Act; Rules 49(4) of the Uniform Rules of Court; Rule 5(2) of the Rules of the Appellate Division.
238. Rule 50(4) of the Rules to the Magistrates' Court Act; Rule 49(12) of the Uniform Rules of Court; Rule 6 of the Rules of the Appellate Division.
239. Rule 3(a) & (b) of the Uniform Rules of Court; Rule 5(3) bis (a-c) of the Rules of the Appellate Division.
240. Rule 49(8) and 50(7) of the Uniform Rules of Court regarding an appeal from the Magistrates' Court and from the decision of a single judge respectively; Rule 5(4) of the Rules of the Appellate Division.
241. Rule 53(1) (b).
242. Rule 53(3) and (4) see Secretary for Interior v Scholtz 1971(1) SA 633 (C) at 636; Motaung v Mukubela (note 178) at 625 - 626.
243. Rule 51(a) of the Rules of the Magistrates' Court Act; Rule 49(b) (a) of the Uniform Rules of Court; cf Rule 7 of the Rules of the Appellate Division.
244. S. 21(2) of the Supreme Court Act No. 59 of 1959; see further, Sheeley v Taxing Master TPD 1911 AD 292; Maske v Aberdeen Licensing Court 1930 AD 30 Maclean v Haasbroek NO. 1956(3) SA 325 (O); see page 121 below.

245. Dickinson & Another v Fishers Executors 1914 AD 424 at 427; Heyman v Yorkshire Insurance Co Ltd 1964(1) SA 487 (AD) at 493.
246. S. 83 read with s 48 of the Magistrates' Court Act 1944; ss 20 and 21 of the Supreme Court Act 1959.
247. 1948(1) SA 839 (AD) at 870.
248. Wahlhaus & Others v Additional Magistrate Johannesburg & Another 1959(3) SA 113 (AD) 120 E.
249. 1933 CPD 357.
250. Note 248.
251. Burchell and Hunt, South African Criminal Law and Procedure (1970), VOL II (Common Law Crimes) at 486.
252. Ginsberg's case (note 249) at 360.
253. Note 248.
254. S. 179 of the Criminal Procedure Act No 56 of 1955 since repealed and re-enacted as s. 87 of the present Criminal Procedure Act No 51 of 1977.
255. S. 167 of Criminal Procedure Act 1955 repealed and partly re-enacted in s 85 of the Criminal Procedure Act 1977.
256. See page 304 below for the grant of a mandamus.
257. Wahlhaus case (note 248) at 119H - 120G.
258. (1915) 36 NLR 323.
259. At 330.

260. Behrman v Regional Magistrate 1956(1) SA 318 (T); see too, Weber v Regional Magistrate Windhoek 1969(4) 394 (SWA).
261. Wessels v General Court Martial & Another 1954(1) SA 220 (E) 222 D - E.
262. District Commandant S A Police v Murray 1924 AD 13.
263. Rose v Johannesburg Local Road Transportation Board 1947(4) SA 272.
264. Administrator SWA v Jooste Lithium Myne (Edms) Bpk. 1955(1) SA 555 (AD) at 567.
265. 1976(4) SA 185 (T).
- 265a. The magistrate sought the review in terms of the now-repeated s 98 of the Magistrates' Court Act 1944 (presently re-enacted with significant amendments as s 304 of the Criminal Procedure Act 1977); see annexure 4 at page 343 (ii) below.
266. Taylor's case (note 265) at 185 F.
277. At 188 H.
268. At 188 A et seq; see page 337 below.
- 268a. Rule 53 of the Uniform Rules of Court; see page 99 above.
269. Taylor's case (note 265) at 188 G.
270. An unreported Transvaal decision dated the 14 September 1974; see Taylor's case at 188 C - F.
271. Taylor's case 188 H.
272. 1979(1) SA 767 (T) at 768 D - E.

- 273. S. 304 (4) of the Criminal Procedure Act 1977; see page 338 below.
- 274. Note 272.
- 275. See page 338 below.
- 276. See for example, S. v Mametja (note 272) in which case the Court refused to exercise its inherent review powers despite the defects in the State case; cf. S. v Taylor (note 265).
- 277. Wahlhaus case (note 248) at 120 A.
- 278. Pillay v Krishna 1946 AD 946 at 952.
- 278a. Note 278 at 954.
- 279. At 951 - 952.
- 280. This test, which was formulated by Lord Denning in Miller v Minister of Pensions [1947] 2 ALL ER 372 at 374 - 5, was adopted by Ogilvie Thompson JA, in Ocean Accident and Guarantee Corporation Ltd. v Kock 1963(4) SA 147 (AD) at 157 (AD).
- 281. 1925 AD 245 at 263.
- 282. 1931 AD 187 at 199.
- 282a. See Hoffmann and Zeffertt South African Law of Evidence, (3ed) 410 et seq; Schmidt, Bewysreg, (1972) at 58 et seq.
- 283. Room Hire case (note 206) at 1163 et seq.
- 284. Rule 6 (5) (g) of the Uniform Rules of Court; see page 101 et seq above.
- 285. See page 101 et seq above; Ibid.

286. 1972(3) SA 726 (AD) at 735.
287. Ibid; see also Johannesburg Local Road Transportation Board v David Morton Transport Ltd. 1976(1) SA 887 (AD) at 895; Goldberg and Others v Minister of Prisons 1979(1) SA 14 (AD) 38.
288. Cf. Taitz, 'Unreasonable Acts of Administrative Authorities etc., unpublished LLM Thesis UNISA 1977 (note 13) at 30 et seq.
289. Taitz, 'Symptomatic Unreasonableness and the Notion of True Justice', 3 SACC (1978) 63 at 66.
290. See page 240 et seq below.
291. The prayer is identical to that used in section 24 review proceedings.
292. Chetty's Motor Transport (Pty.) Ltd. v National Transport Commission & Another (note 211) at 167.
293. Lek v Estate Agents Board 1978(3) SA 160 (C) at 173D.
294. Delport v Kopjes Irrigation Management Board 1948(1) SA 258 (O) at 272; Douglas v Pim 1903 TH 306 at 310.
295. 1961(1) SA 342 (AD) at 349 G.
296. See page 79 above.
297. See Shidiack's case (note 5) at 651 - 652.
298. Ibid.
299. Maske v The Aberdeen Licensing Court 1930 AD 30 at 45; Tayob v Ermelo Local Road Transportation Board 1951(4) SA 440 (AD) at 449 e et seq; Livestock & Meat Industries Control Board v Garda (note

295) at 349A - 350A; Adam's Stores (Pty.) Ltd. v Charlestown Town Board and Others 1951(2) SA 508 (N) at 517F - 518D; Bonnievale Wine and Brandy Co. v Gordonias L.L.B. 1953(3) SA 500 (C) at 503D - F; Essack v Durban City Council 1953(4) SA 17 (N) at 23 F et seq; Gildenhuys v Pary's Liquor Licensing Board and Another 1957(4) SA 142 (O) at 151 A - F; Johannesburg City Council v Administrator, Tvl 1969(2) SA 72 (T) at 75H - 77H.

300. See inter alia; Essack v Durban City Council (note 299) which relates to the passing of building plans; Kruger v The Master 1982(1) SA 754 (W) which relates to the approval of the Master of the Supreme Court to an application for rehabilitation of an insolvent; Johannesburg City Council v Administration, Tvl (note 306) concerns the supply of electricity.

301. Jacobs & Another v Kimberley Licensing Board 1937 GWL 4.

302. For example, Hack v Venterspost Municipality 1950(1) SA 172 (W).

303. 1947(4) SA 272 (W).

304. At 290 - 291.

305. Rule 6 (5) (g) of the Uniform Rules of Court, see page 101 et seq above.

306. See page 86 above.

307. Swart v Van der Merwe 1943 AD 629 at 647.

308. Daitsh & Another v Osrin & Another (note 216) at 345 - 346; Clairwood Motor Transport Co Ltd. v Pillai & Others (note 220) the judgment of Kennedy J on this point is cited at page 102 above.

309. See page 105 above.

310. Ibid.
311. See S. v Taylor (note 265) and S v Lubisi (note 36).
- 311a Safcor Forwarding (Johannesburg) (Pty.) Ltd v National Transport Commission 1982(3) SA 654 (AD) at 673 H et seq.
312. S. v Lubisi (note 36) and see page 338 et seq below.
313. Taitz, 'The Administration of Justice and Due Process', being Chapter One of 'South Africa - Public Policy Perspectives' (ed. R Schire 1982) 1 at 22; see also Annexure D to the Consolidated Legal Aid Guide (1st Revision) 'The Means Test'.
314. Taitz (note 313), at 22 - 23.
315. Rule 70(3) of the Uniform Rules of Court; see Barnett v Isomonger 1942 CPD 325 at 326; City Deep Ltd v Johannesburg City Council 1973(2) SA 109 (W) at 120 (C); Jandrell v Stanley 1967(3) SA 24 (T) at 25.
316. Rule 70 (1) of the Uniform Rules of Court read with the tariff of fees appended thereto.
317. Rule 70 (5).
318. Sackville-West v Nourse & Another 1925 AD at 516.
319. See, inter alia : Herzfelder v McArthur & Co 1908 TS 408; cf. Estate Aswegen v Steytler 1931 CPD 470 Rule 70(1) of the Uniform Rules of Court provides for the taxation of attorney and client costs as does section 80(2) of the Magistrates Court Act 1944, see Jones and Buckle, VOL 1 at 280.
320. Fripp v Gibbon & Co 1913 AD 354; Merber v Merber 1948(1) SA 453 (AD) Merber v Merber 1948(1) SA 446 (AD) at 453.

321. Note 320 at 363.
322. Ward v Sulzer 1973(3) SA 701 (AD); Phase Electrical Co (Pty.) Ltd. v Zinmans Electrical Sales (Pty.) Ltd. 1973(3) SA 914 (W).
323. Fripp v Gibbon & Co. (note 320) at 357; Sackville-West v Nourse (note 318) at 529 et seq; Union Government v Gass 1959(4) SA 401 (AD) at 413.
324. Rubin, The Law of Costs in South Africa, at 34 - 36.
325. 1936 AD 408.
326. Cf. Rabie v Stewart 1927 OPD 74 in which case a plaintiff obtained judgment for a sum considerably less than the amount claimed in his summons; SA Printing Co. v Redfern 9 CTR 582.
327. Fripp v Gibbon & Co (note 320) at 357; Merber v Merber (note 320) at 452; Molteno v S A Railways (note 325); Algoa Milling Co Ltd. v Arkwell & Douglas 1918 AD 145; United Building Society & Another v Lennon Ltd. 1934 AD 149; cf Rabie v Stewart (note 326); Loubser v Cashel 17 SC 555; Jacobsohn & Woolf v Johannesburg Municipality 1906 TH 99.
328. Cohen v Engelbrecht (1898) 15 SC 40; De Wet v Brink 1910 TPD 336; Tsosane and Others v Minister of Prisons 1982(2) SA 55 (C).
329. Clarke v Bethal Co-Operative Society 1911 TPD 1152; Ohlssons's Cape Breweries Ltd. v Artesian Well Boring Co Ltd. 1919 CPD 125; East London Municipality v SAR&H. 1953(1) SA 433 (E); Giuliani v Diesel Pump Injector Services (Pty.) Ltd. 1966(3) SA 451 (R); cf. Penny v Walker 1936 AD 241.
330. Solomon v The Alfred Lodge 1917 CPD 117.

331. Blou v Lampert & Chipkin NNO. 1972(2) SA 501 (T); Grobbelaar v Grobbelaar 1959(4) SA 719 (AD) at 725; Nkosi v Caledonian Insurance Co. 1961(4) SA 649 (N) at 663.
332. MacLean v Haasbroek NO. and Others 1957(1) SA 464 (AD) at 468 - 471; cf. Kruger v The Master (note 30) in which case despite finding that the Master had committed a judicially recognised irregularity, the Court made no order as to costs.
333. Ex parte Montague 1946 NPD 144 at 148.
334. Cf. Regional Magistrate Du Preez v Walker 1976(4) SA 849 (AD).
335. Inter alia : S. v Taylor 1976(4) SA 185 (T); S. v Mametja 1979(1) SA 767 (T).
336. Kruger v The Master 1982(1) SA 754 (W).
337. 1954(3) SA 834 (AD) at 838 A - F; Lischetty v Worcester Municipality (1897) 14 SC 334.
338. The citation of R v D and Another referred to in the judgment is 1953(4) SA 384 (AD); Parmanand's case has been cited with approval and followed in a number of Appellate Division and Provincial judgments, inter alia : Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingbekämpfung MBH 1976(3) SA 352 (AD) at 369 A - C.
339. See page 79 above; cf. Simaan v South African Pharmacy Board 1982(4) SA 62 (AD) 79E et seq
340. Note 338 at 369 E
341. R. v D and Another (note 338) at 390 D - G; see also, Sita and Another v Olivier NO. and Another (note 363) considered below at page 123 below.

342. Makings v Makings 1958(1) SA 318 (AD); cf. Mokoena v Minister of Justice 1968(4) SA 708 (AD).
343. Bonnievale Munisipaliteit v Direkteur van Skattings en Andere 1964(4) SA 792 (C); In the unreported Cape Provincial Division case of S. v Ethne Khati (case no. A273/78 dated 26 February 1979), after noting an appeal against a conviction of contempt of court the applicant instituted review proceedings. In her notice of motion the applicant requested the Registrar to place the appeal on the roll simultaneously with the application for review. No objection was taken to this procedure (see Taitz, 'Are Summary Proceedings for Contempt of Court in facie curiae absolutely necessary in our Law?' 4 SACC (1980) 60).
344. Sacchi v Conway and Another 1929 SR 41 referred to by Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa (3ed) at 752.
345. See page 95 above.
346. Ghislin v Syster 1874 Buch 57
347. 1977(3) SA 113 (C).
348. S. 7 of the Appeals amendment Act No 105 of 1982.
349. Ss. 20 and 21 of the Supreme Court Act 1959; s 83 of the Magistrates' Court Act 1944, as amended by the Appeals Amendment Act 1982 which commenced on 1 April 1983.
350. S. 83 of the Magistrates' Court Act 1944.
351. S. 21 (2) (a) of the Supreme Court Act 1959 as amended by S. 8 of the Appeals Amendment Act 105 of 1982.

- 352. See ss. 7 and 8 of the Appeals Amendment Act 1982.
- 353. S. 8 read with s. 3 of the Appeals Amendment Act 1982.
- 354. S. 8.
- 355. S. 21 (3) (a) of the Supreme Court Act 1959 as amended by S.8 (b) 3 (a) and (b) of the Appeals Amendment Act 1982.
- 356. Ibid.
- 357. S. 8 (b) 3(a) and (b) of the Appeals Amendment Act 1982.
- 358. S. 8 (b) 3 (c).
- 359. R v Keeves 1926 AD 410 at 412.
- 360. Jordaan v Evans NO. and Another 1953(1) SA 75 (N).
- 361. See the text relating to note 355 below.
- 362. See page 105 below.
- 363. 1967(2) SA 442 (AD).
- 364. S. 190 (1) of Act No 56 of 1955.
- 365. Sita's case (note 363) at 446 C - F.
- 366. At 446 F - H; the reference in the decision to the Criminal Procedure and Evidence Act is erroneous - see p 446 G.
- 367. At 447 A - B.
- 368. See s.21 (2) (a) of Act No 59 of 1959.

369. Sita's case (note 363) at 448 F - G.
370. At. 449 B - F.
371. Cf. S. v Mohammed 1977(2) SA 531 (AD).
372. 1976(2) SA 1 (AD).
373. S. 20 (1) (a) of the Supreme Court Act 1959: see Theron's case 1974(2) SA 505 (C).
374. S. 21 (3) C of the Supreme Court Act 1959.
375. See S. v Mohammed (note 371).
376. Taitz, 'But t'was a Famous Victory' (note 14), at 110.
377. Theron's case (note 372).
- 377a. S. 4 of the Appeals Amendment Act 1982.
378. First Schedule to Act No 59 of 1959.
379. S. 19(1) (a) of the Supreme Court Act 1959.
380. 1911 AD 295 at 346
381. See Voet, 44.7.9 for the classifications of actions, viz. in personam, in re and mixed. The classifications are essential to Pollak's theory of effectiveness. See Pollak, The South African Law of Jurisdiction (1937), 14 et seq.
382. Gaius, 4.1 - 5; Institutes 4.6.1 and 4.6.20: D 44.7.25; see Pollak, 14 and 20.
383. Pollak South African Law of Jurisdiction (1937) 14 and 20.
384. Sonia (Pty.) Ltd. v Wheeler 1958(1) SA 555 (AD) at 563 G - F.

385. Steytler NO. v Fitzgerald (note 380) at 346 - 347, per De Villiers JA.
386. At 315, per Innes JA.
387. 1963(2) SA 10 (T) at 18D, and approved by the Appellate Division in the same matter on appeal, reported 1963(3) SA 341 (AD) at 348-349.
388. Steytler NO. v Fitzgerald (note) at 330 - 331; Beckett & Co Ltd v Krooner Ltd. 1912 AD 324 at 332.
389. Sciacero v CSAR 1910 TS 119 at 121; Pollak, (note 383) at 16.
390. Ueckerman v Feinstein (1909) TS 913 at 920 - 9822; Clifton v Colonial Government (1893) 10 SC 251 at 253; Pollak, (note 383) at 19.
391. Kopelowitz v Auerbach 24 SC (1907) 567 at 569; Center NO. v Griffin NO. 1964(4) SA 798 (W) at 799B et seq; Pollak (note 383) at 85.
392. Clarke v Klosser 1917 CPD 75; Salkinder v Van Zyl & Businessine 1922 CPD 59; Frenkel & Co v Hewitt (1926) 47 NLR 265 at 266 - 267.
393. 1963(1) SA 801 (W) at 806; cf. Ros v Koehorst 1912 AD 587 803-804.
394. See inter alia : Riversdale Divisional Council v Pienaar (1885) 3 SC 252 at 255; Negro v SA Railways 1911 TPD 979 at 981 Towers v Paisley 1963(1) SA 92 at 93 F et seq.
395. Towers v Paisley (note 394) at 95A.
396. Eilon v Eilon 1965(1) SA 703 (AD) at 726 - 727 B; Pollak (note 383) at 112 et seq.

397. Cf. South Atlantic Islands Development Corporation Ltd. v Buchan 1971(1) SA 234 (C); Stateline Clothing (Pty) Ltd. v Cheeseman 1967(1) SA 337 (W) at 338.
398. Halse v Warwick 1931 CPD 233 at 239; Cf. Einwald v The German West Company (1887) 5 SC 86 at 91; cf Ex parte Masters 1935 CPD 438 at 439.
399. S. 28(1) of the Supreme Court Act 1959.
400. S. 26 of the Supreme Court Act 1959 provides that the civil process of any division shall run throughout the Republic and may be served or executed within the jurisdiction of any (other) division.
401. S. 28(1) provides that no attachment of person or property to found jurisdiction shall be ordered by a court of any division against an incola of the Republic.
402. Ex parte Boshoff 1972(1) SA 521(E); Cf. Curbera v SA Pesquara Industrial Gallega 1969(3) SA 296 (C); see also Annual Survey of SA Law (1969) at 420; (1971) at 460; (1972) at 415 et seq.
403. 1962 (4) SA 326 (AD).
404. Inter alia : Berger & Others v Aiken & Others 1964(2) SA 296(W) New York Shipping Co Ltd. v EMMI Equipment Ltd. 1968(1) SA 355 (SWA); Gronow v Estate Maletzi 1968(3) SA 35 (SWA).
405. Taitz, "Jurisdiction and Forum Conveniens - A New Approach?" 43 THRHR 372 and "Jurisdiction and Forum Conveniens - A Reply." 44 THRHR (1981) 187
406. 1979(3) SA 1048 (AD).
407. Sonia v Wheeler (Pty.) Ltd. (note 384) at s64A; see Ogilvie v Bettini & Co 1905 TS 747 at 748; cf. McBride & Thompson v Vause (1889) 3SAR 3 at 5.

408. Note 406; the following commentary on the case including the statements and equation regarding the ratio decidendi of the Appellate Division decision by Trollip JA is taken from an article by the present writer, "Jurisdiction and Forum Conveniens - a new approach?" 405), at 373 - 374.
409. Act 112 of 1976.
410. S. 26A.
411. S. 7.
412. S. 27.
413. Ibid.
414. S. 31.
415. S. 1.
416. Lek's case (note 406) 1058 D - E.
417. 1978 3 SA 160 (C).
418. Lek's case (note 406) at 1066 G - H.
419. At 1066 H.
420. At 1067 C.
421. At 1067 D - H.
422. At 1069 E.
423. Taitz 'Jurisdiction and Forum Conveniens' (note 408) at 383 et seq.
424. See s. 19(1) of the Supreme Court Act 1959.

425. S. 19(2).
426. Kemmis - Betty v Druion's Trustee and Presiding Officer Johannesburg 1936 WLD 16; Kruger v The Master (note 30); This jurisdiction was conferred on the Witwatersrand Local Division by s. 6 of Act 105 of 1982.
427. S. 83 of the Magistrates' Court Act 1944 read with s 19(1)(i) of the Supreme Court Act 1959.
428. S. 19(1)(i) read with s 19(1)(i) of the Supreme Court Act 1959.
429. S. 26(1).
430. Lek's case (note 406) at 1066 F.
431. Kruger v The Master 1981(1) SA 754 (W).
432. Minister of Interior v Harris 1952(4) SA 769 (AD) at 791.
433. S. 59(1) of the Republic of South Africa Constitution Act No 32 of 1961.
434. Ss. 94(1) and 94(2).
435. Taitz, "The Administration of Justice and Due Process" (note 313), at 10 - 15.
436. Minister of Interior v Harris (note 432) at 791 H.
437. S. 1(1) of the Indemnity Act No 13 of 1977.
438. S. 6 of Act No 83 of 1967.
439. S. 6(5).
440. 1928 AD 286 at 290.
441. 1961(2) SA 450 (AD) at 455.

442. See also Benning v Union Government 1914 AD 180 at 188; Local Road Transport Board v Durban City Council 1965(1) SA 586 (AD) at 593; Schermbrucker v Klindt NO. 1965(4) SA 606 (AD) at 618; also Steyn Die Uitleg van Wette (5 th Edition) 78 - 79 and the cases referred to therein.
443. 1923 AD 466 at 469.
444. The enactment referred to in the quotation is s 3(1) of the Immigration Regulation Act No 22 of 1913.
445. Union Government v Fakir (note 443) at 470; Narrainsamy v Principal Immigration Officer 1923 AD 673 at 675; Barday v Passport Control Officer 1967(2) SA 346 (AD) at 358 A - B; Schermbrucker v Klindt NO. (note 442) at 623 F; Nkondo v Minister of Prisons and Another 1980(2) SA 896 (O) at 910 C et seq.
446. Note 442 at 623 F; Nkondo's case (note 445) at 910 C et seq.
447. 1972(1) PH H(S) 4 (T).
448. See text relating to note 439.
449. Essop's case (note 447) at 9 - 10; Nxasana v Minister of Justice 1976(3) SA 745 (D).
450. For absence of jurisdiction see page 187 below, and for fraud see page 222 below.
451. 1930 NPD 111.
452. Ordinance No 4 of 1923.
453. Pillay's case (note 451) at 117; see also Lutchman v Umzinto Rural Licensing Board 1936 NPD 613; Niven v Rural Licensing Board, Southern Zululand 1948(4) SA 871 (N) at 875; Red Hill Garage v Buchan's Garage 1954(4) SA 777(N) at 779 et seq; cf. Winter and Others v Administrator-in-Executive Committee and Another 1973(1) SA 873 (AD) at 887 C.

454. The judicial approach in this section may be compared with the English doctrine of jurisdictional facts. See inter alia : Rubinstein Jurisdiction and Illegality (1965), 214, cf. Taitz, 'But t'was a Famous Victory', 1978 Acta Juridica 109 at 115 et seq.
455. See page 243 below.
456. Cf. Wiechers, Administratiefreg., at 142 - 147.
457. Act No 30 of 1928.
458. Regulation 27 of the Regulations (under s 273) of the Liquor Act 1928.
459. Ex parte Montague 1946 NPD 144 at 147.
460. See inter alia : Martin v Kiesbeampste Newcastle Afdeling en 'n Ander 1958(2) SA 649(D) at 653; Botha v Stadsklerk van Middelburg NO. en 'n Ander 1975(4) SA 241 (T) at 249 et seq.; cf. Naidoo and Others v Johannesburg City Council and Others 1979(4) SA 893(W) at 899 E et seq.
461. Inter alia : Union Government v Fakir (note 443).
462. Ibid.
463. HNP v Sekretaris van Binnelandse Sake 1979(4) SA 274(T).
464. See pages 399 and 597 et seq below.
465. 1953(3) SA 1 (AD) at 11.
466. See also Nchabeling v Director of Education (Tvl) and Another 1954(1) SA 432 (T) at 440 B - G.
467. Inter alia : Laubscher v Native Commissioner, Piet Retief 1958(1) SA 546 (AD) at 553; Peri-Urban Arrears Health Board v Administrator, Transvaal 1961(3) SA 669 (T) at 674 D - H.

468. Wiechers informed the writer that he is of the opinion that there are few administrative authorities exercising a true judicial function. He gave a military court-martial in terms of the Defence Act, certain disciplinary tribunals exercising as a quasi-criminal court e.g. the disciplinary committee of the South African Medical Council and the industrial court established in terms of s. 17 of the Labour Relations Act 28 of 1956 as examples.
469. See Chapter Three The Grounds of Review from page 183.
470. Theron en Andere v Wellington Ring van die NG Sendingskerk in SA (note 372) at 17 - 19; see also SA Medical and Dental Council v McLoughlin 1948(2) SA 355 (AD); Van Duyker v District Court Martial & Others 1948(4) SA 691 (AD); SA Medical and Dental Council v Lipron 1949(3) SA 277 (AD).
471. 1980(2) SA 480 at 490 E - G.
472. See inter alia : Hack v Venterspost Municipality and Others 1950(1) SA 172 (W) at 190; Minister of Interior and Another v Mariam 1961(4) SA 740 (AD) at 751; Administrateur van Suidwes-Afrika en 'n Ander v Pieters 1973(1) SA 850 (AD) at 860; Publications Control Board v Central News Agency Ltd 1970(3) SA 479 (AD) at 488 - 489.
473. Cf. Wiechers Administratiefreg 120 et seq and 127 et seq.
474. See page 399 below.
475. Union Government v Fakir (note 443) at 469; see also Registrar of Mining Rights 1907 TS 1046 at 1051.
476. Laubscher v Native Commissioner Piet Retief (note 467) at 553 - 554; Minister of the Interior v Mariam (note 472) at 751; Administrateur van Suidwes-Afrika v Pieters (note 472) at 860; Le Roux v Minister van Bantoe Administrasie en Ontwikkeling 1966(1) SA 481 (AD) at 490 - 491; South African Aid and Defence Fund and Another v Minister of Justice 1967(1) SA 263 (AD) at 270; see also,

Taitz, "The Application of the Audi Alteram Partem Rule in South African Administrative Law", 45 THRHR (1982) 254 annexed hereto at page 246 (i).

477. S.8 of the Road Transportation Act No 74 of 1977.
478. Jockey Club of South Africa & Others v Feldman 1942 AD 340 at 363.
479. Crisp v SA Council of the Amalgamated Engineering Union 1930 AD 225 at 237.
480. Steyn, Die Uitleg van Wette (5ed) at 50, 166 and 207; cf. Madrassa Anjuman Islamia v Johannesburg Municipality (note 134); Consolidated Diamond Mines of South West Africa Ltd. v Administrator, SWA 1958(4) SA 572 (AD) at 648.
481. 1922 AD 228 at 235.
482. See also, Jockey Club of South Africa and Others v Feldman (note 478) at 360 - 364; Turner v Jockey Club of South Africa (note 57) at 657 H.
483. Union Government v Fakir (note 443); see page 134 above.
484. Crisp v SA Council of Amalgamated Engineering Union (note 479) at 256; Bindura Town Management Board v Desai & Co 1953(1) SA 358 (AD) at 362; Long v Bishop of Cape Town (1863) 4 Searle 162 at 179; Geluke v Oosthuizen 1955(3) SA 1(T) at 4; Durban City Council v Local Road Transportation Board 1964(3) SA 244 (D) at 251; Jamile and Others v African Congregational Church 1971(3) SA 836 (D) at 843.
485. See page 134 above.
486. 1958(1) SA 490 (AD) at 502 D.
487. While the use of the term 'ordinary jurisdiction' by the learned Judge of Appeal may be no more than co-incidental the term would

normally exclude the review powers of the Court which can hardly be considered as part of the Court's 'ordinary jurisdiction'.

488. See also, Bindura Town Management Board v Desai (note 484) at 362 and 367; cf. Moodley & Others v Shri Siva Subramanier Aulayam 1979(2) SA 696 (E) at 699 H - 700 A.
489. Hager v Windhoek Municipal Council 1964(3) SA 806 (AD) at 814; Cape Town Municipality v Minister of Labour and Another 1965(1) SA 770 (C); Durban City Council v Local Road Transportation Board 1964(3) SA 244 (D).
490. Welkom Village Management Board v Leteno (note 486) at 502.
491. Taitz, 'The Audi Alteram Partem Rule and the Obligation to Exhaust Domestic Remedies', 95 SALJ (1978) 472 at 476 et seq.
492. Crisp's case (note 484) at 238; Lenz Township (Pty.) Ltd. v Lorentz NO. 1961(2) SA 450 (AD) at 466-467; Semena v De Wet 1951(2) SA 444 (T) at 447 B - E.
493. See page 134 above.
494. Union Government v Fakir 1923 AD 466.
495. For an application of this principle in regard to the decision of an arbitrator see Johannesburg Municipality v Transvaal Cold Storage 1904 TS 730 and Durban Corporation v Durban Municipal Employees Society 1937 NPD 338.
496. Note 484.
497. Golube v Oosthuizen and Another 1955(3) SA 1 (T) at 4F - 5B.
498. See page 134 above.
499. 1943 TPD 131 at 138 - 139.
500. Ibid.

501. Shames v S A Railways (note 481) at 235; Moodley and Others v Shri Siva Subramanier Aulayan (note 488) at 700 B - D.
502. Jockey Club of South Africa v Feldman 1942 AD 340 at 356.
503. Golube v Oosthuizen & Another (note 497) at 5; Bignaar v Municipal Council of Rustenberg 1927 TPD 615 at 620; Germiston Municipality v Angehrn and Piel 1913 TPD 135 at 138 - 139.
- 503a. See Golube's case (note 497) at 5A.

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CHAPTER THREE

THE GROUNDS OF REVIEW

As has been indicated elsewhere in this work¹ the Court will not exercise its review jurisdiction unless a judicially recognised irregularity has been established. This judicial approach may be described as the 'irregularity doctrine', a critical area in the analysis of the Court's review jurisdiction.²

If the development of the doctrine is examined early references will be found to be couched in general terms. Thus in the JCI case³ Innes CJ held:

"Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside and correct them".

In Shidiack v Union Government,⁴ an important and much cited decision of the Appellate Division, the Court, per Innes ACJ extended the description of the irregularity doctrine in these terms:

"Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal (or review in the ordinary sense) would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own There are circumstances in which interference would be possible and right. If, for instance, such an officer had acted mala fide or

from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong".

From this decision it will be observed that the classification of irregularities, while in sharp contrast to descriptions in earlier cases, were still in embryonic form. The decision in Shidiack's case is important also as it concerns an early judicial approach to, what today may be referred to, as a jurisdictional condition precedent couched in objective terms,⁵ more particularly, the right of an authority to act if a certain given situation "is to its satisfaction".⁶

From this time the judicial review of administrative action, ie. the exercise of the court's inherent review jurisdiction, tended to develop in a conceptual manner and a list of irregularities was established by the Court. This was recognised by Corbett J, in Harnaker v Minister of Interior,⁷ who stated:

"Generally the Courts have sought to circumscribe and define review under the common law by reference to the grounds of review rather than the types of matter to be reviewed".

An analysis of the cases indicate that irregularities may be classified conveniently under four separate and distinct categories:

- (i) irregularities which relate to or are concerned with the jurisdiction of the authority (3.1 below);
- (ii) irregularities which are founded on a lack of good faith or ulterior motive on the part of the authority (3.2 below);
- (iii) irregularities which offend the rules of natural justice (3.3 below);

- (iv) irregularities caused by an abuse of discretion on the part of the authority (other than irregularities classified under (i) (ii) or (iii) above) (3.4 below).

Depending on the particular factual situation, certain irregularities, e.g. the failure of an authority to apply its mind, may be classified under each of the above categories. Further, some specific irregularities may be seen to straddle more than one category e.g. an (unlawful) delegation of authority which inevitably goes to the question of jurisdiction would appear to be an abuse of the powers conferred etc. Although a lack of good faith (mala fides) and ulterior motive may logically be classified under an abuse of discretion such actions have been classified separately. This is on account of a dichotomy drawn by the Court which immutably maintains its review powers in respect of (a) a lack of jurisdiction, and (b), a lack of good faith etc.,⁸ irrespective of the function exercised by the authority⁹ or the legislative ousting of its jurisdiction.

Before considering each of the four categories it should be observed that the ultra vires doctrine (of English law) is not the basis of judicial review in South Africa.¹⁰ This is largely due to historical reasons, particularly the development of prerogative writs, remedies which are unknown in South African law. The inherent review jurisdiction of the Court is the one essential remedy. It is therefore unnecessary to single out or emphasise any particular irregularity as the touchstone to the development of judicial review in South Africa. The irregularity doctrine was developed simultaneously with the remedy, of which it is an integral part. Although the prerogative writs (orders) more particularly, certiorari, will be considered, below, as a possible source or origin of the Court's inherent review jurisdiction this interesting subject is beyond the scope of this work.¹¹

3.1 Irregularities which relate to the jurisdiction of the authority.

The terms 'jurisdiction' and 'jurisdictional facts' are basic to the judicial review of administrative action. 'Jurisdiction' may best be described as 'the authority to decide'¹² and any question pertaining to such

'authority to decide' may be seen as a jurisdictional fact. As will be observed below all jurisdictional facts are justiciable before the Court.¹³ The following may be classified as irregularities which concern or relate to jurisdiction each of which will be considered separately below:

- (i) a decision which is ultra vires in the narrow sense, i.e. a decision which is founded on an excess of jurisdiction;
- (ii) the refusal or neglect by an authority to exercise its jurisdiction;
- (iii) the failure of an authority to appreciate the extent of its power;
- (iv) the failure by an authority to comply with a condition precedent to the exercise of its powers;
- (v) the failure or neglect by an authority to comply with peremptory procedures;
- (vi) the self-limiting of jurisdiction by reason of
 - a) a policy decision;
 - b) advice or directions of a third party;
 - c) contract;
 - d) estoppel;
- (vii) an act performed by an authority after it has become functus officio;
- (viii) the failure by an authority to apply its mind.
- (ix) the failure to make a decision which is clear and certain.

An authority is obliged to perform its functions in terms of the enabling Act. It may fail to do so in a positive manner, ie. by exceeding the actual powers conferred. For example, a rent board which purports to fix the rent of a property which is not subject to the Rents Act has clearly exceeded or overreached its powers.¹⁴ Such acts or decisions are seen as being ultra vires in the narrow sense and may be described as being founded

on a lack or excess of jurisdiction. For the sake of convenience such acts will be further classified under the sub-headings of rationes personae, materiae, loci and temporis.¹⁵

On the other hand an authority may fail to comply with the terms of its enabling act in a negative manner ie. by refusing or otherwise neglecting to exercise its jurisdiction or by failing to appreciate the nature and extent of the powers conferred upon it. These irregularities will be dealt with separately and not under the heading of ultra vires in the narrow sense. The other irregularities which go to jurisdiction will be considered separately thereafter.

3.1.1 A decision or act which is ultra vires in the narrow sense.

An administrative authority which acts beyond its power acts unlawfully. Such acts may be said to be founded on an excess or lack of jurisdiction and are traditionally described as being ultra vires.¹⁶ The ultra vires decision or act may concern any number of situations and for that reason the apt subclassification designated by Wiechers is appropriate.

(a) Ratione personae.

Such (ultra vires) acts relate to any condition or objects contained in the enabling statute concerning persons. Thus an unlawful delegation of its powers to an unauthorised person is classified under this section as is a decision regarding the admission of unqualified persons to a professional society, the unlawful appointment of persons to a decision-making authority, etc.

First, it is an essential requirement for the validity of an administrative act that the decision is made by the proper authority.¹⁷ Subject to the following exceptions set out below the general rule is delegatus delegare non potest,¹⁸ viz:

- (i) Where the legislature has specifically authorised a delegation of powers. For example, in terms of the Exchange Control Regulations¹⁹ published in terms of the Currency and Exchange Act 1933²⁰ the State President may by regulation designate a person with authority to issue orders and rules regarding currency, banking and foreign exchange.²¹
 - (ii) An implied authority to delegate flowing from the terms of the enabling Act.²²
 - (iii) A delegation to a tribunal or body merely to investigate and ascertain a factual situation but not to make a decision in regard thereto.²³
- This exception is however not applicable where the nature of the function conferred upon the original tribunal is judicial.²⁴
- (iv) A delegation to an authority merely to implement a decision already taken by the authority upon whom the decision making power had been conferred.²⁵
 - (v) The delegation of powers to an authority specifically qualified to discharge such duties. This exception may appear similar to (ii) above, viz. an implied authority to delegate flowing from the terms of the enabling Act.²⁶
 - (vi) An authority exercising a ministerial function, one which does not involve the exercise of a discretion²⁷ may delegate such function.²⁸

In the final analysis the validity of delegation is largely a question of statutory interpretation. Where the enabling Act confers powers on a particular tribunal the maxim expressio unius est exclusio alterius will apply and a respondent will be hard pressed to convince the Court that implied delegation is permissible.²⁹ The same situation applies where the powers

conferred are of a judicial³⁰ or discretionary³¹ nature and also where the power is conferred upon an authority which possesses particular expertise or knowledge.

Closely related to wrongful delegation is the appointment of a person to an authority or tribunal who does not qualify in terms of the enabling Act. Any decision made by such authority or tribunal is ultra vires ratione personae.³²

Finally certain rights or duties may be conferred by the authority upon specific persons only. For example, only persons with certain qualifications may be permitted by the Law Society to become articled to (certain) attorneys.³³ Further only persons with certain qualifications may be admitted as advocates or attorneys by the Court.³⁴ The failure by the Law Society or the Court to comply with the law regarding the registration of articled clerks and the admission of advocates and attorneys respectively will render ultra vires (ratione personae) any act or decision founded on such irregularity.³⁵ A similar situation occurs in regard to the grant of certain trading or commercial licences where the enabling Act requires an applicant to be possessed of certain qualifications. The statutory requirements may be couched in negative terms as for example the Liquor Act 1977 which provides that certain persons, e.g. persons holding an office of profit under the Republic, may not hold any form of liquor licence, etc.³⁶

b) Ratione materiae.

An act which concerns the content or extent of the power conferred may be said to fall within the ratio materiae of the enabling statute.³⁷ Many and varied acts and decisions may give rise to an act which is ultra vires ratione materiae, eg. an authority may not impose conditions which are not authorised by the enabling Act;³⁸ nor may it impose a criminal sentence where its duties are solely to protect the public health;³⁹ a transportation board whose powers are to refuse or grant applications 'in full or in part' may not grant a motor carrier's licence subject to a truncated route and amended time-table;⁴⁰ in Nkomo v Lardner-Burke NO. & Another⁴¹ the Rhodesian Appellate Division set aside the seizure of a

vehicle purportedly under a particular section of the Unlawful Organisations Act 1959 without a warrant in terms of that section. The examples given above merely illustrate the nature of the sub-classification and are hardly exhaustive.

The following three rules are relevant to the content of the powers conferred and a breach of such rules will render an administrative act ultra vires, more particularly:

- (i) where the power to regulate and control a situation (te reël en te beheer) is conferred upon an authority such power is not to be exercised in such manner as totally to prohibit such situations⁴²
- (ii) in the exercise of its powers an authority may not oust the jurisdiction of the Court⁴³ nor may it restrict or otherwise interfere with such power unless authorised by statute⁴⁴
- (iii) an authority may not legislate by means of powers conferred for other purposes in other words it may not make general rules which are in effect subordinate legislation unless the specific power to legislate has been conferred by the enabling Act.

c) Ratione loci.⁴⁵

An enabling Act may provide that an authority confine its powers or exercise such powers in relation to defined or fixed geographic areas. Thus a local road transportation board may grant licences and exemptions in respect of its defined territorial area only.⁴⁶ The grant of trading licences in a particular area in excess of a restricted maximum is ultra vires ratione loci,⁴⁷ as is the rating of particular sites which are exempt from rates and taxes.⁴⁸ Further, any administrative act relating specifically to a place or defined geographic area may be described under this heading.⁴⁹

d) Ratione temporis.⁵⁰

An enabling Act may require an authority to exercise its powers or otherwise perform its duties within certain time limits. Thus where a legislative enactment required an application for a liquor licence to be lodged 'on or before the thirty first day of August', an application lodged on the 1 September, in a year in which the 31 August fell on a Sunday, was held by the Court to have been rightly rejected by the local magistrate.⁵¹ Similarly, where the enabling Act permits an authority to defer payments of local taxes until a fixed date the authority may not grant an extension beyond such date.⁵² Where no time limit for the compliance of its terms are fixed by an enabling Act, or where a time limit may not be fixed accurately, the terms must be complied with within a reasonable time depending on the circumstances of the particular case.⁵³ Wiechers places the exercise of powers by administrative authorities having a retrospective effect on the rights and privileges of persons under this sub-heading.⁵⁴ Unless an authority has been specifically empowered to bring about this situation, an act having such effect is ultra vires (ratione temporis).⁵⁵

3.1.2 The refusal or neglect by an authority to exercise its jurisdiction.

This classification is concerned only with situations in which the authority has refused to exercise its jurisdiction or may be said to have neglected to carry out its duties. It should not be confused with the following heading which relates to cases in which the authority has failed to exercise its powers wholly or partially resulting from its failure to appreciate the nature and extent of its powers. The refusal or neglect by an authority to exercise its jurisdiction will be met with a mandamus, i.e. a mandatory interdict or order by the Court compelling it to do so.⁵⁶ An example of an outright refusal to carry out its duties may be seen in Veeramiah v Pietermaritzburg Licensing Board⁵⁷ in which case a licensing authority refusal to consider the application of an Asian trader on the ground that sufficient Asians held licences in the area.⁵⁸ It is under such circumstances that the Court will order the authority to carry out its duties. The suffering of damages by the applicant as a result of an

authority failing to make a decision is not per se sufficient grounds for the granting of an order. There must be a duty on the authority to make the decision in terms of the enabling Act.⁵⁹ The Court, too, will not grant an order where the authority has not refused to exercise its powers but has merely delayed and such delay is neither mala fide nor unreasonable. In Wronsky en 'n Ander v Prokureur-Generaal⁶⁰ the Court refused to order the Attorney-General to decide forthwith whether or not he intended to prosecute certain suspected persons and if he decided not, to issue a certificate of nolle prosequi. In his replying affidavits the Attorney-General had intimated that he was not in a position to make such decision immediately as he wished to study additional statements of witnesses. The Court, per Hoexter J, held:

"Die respondent sê dat hy nog nie besluit het om te vervolg al dan nie, en dat hy nog verdere verklarings wil bestudeer alvorens hy besluit ... daar word nie mala fides teen die respondent beweer nie. Daar word nie aangevoer dat die respondent geweier het om sy oordeel te laat geld nie ... Waar mala fides nóg beweer nóg bewys is, het hierdie Hof geen rede om die bewerings van die respondent dat hy nog nie daartoe in staat was om te besluit in twyfel te trek ... Hierdie Hof kan ook nouliks op die stukke bevind dat die respondent onredelik handel wanneer by verdere verklarings wil bestudeer ..."⁶¹

3.1.3 The failure by an authority to appreciate the nature and extent of its powers.

This irregularity occurs where an authority erroneously decides that it does not have the power to make a decision or otherwise grant the relief sought. In other words it has failed to appreciate the nature or extent of its jurisdiction. Such irregularity may be contrasted with an act ultra vires in the narrow sense. The latter may be seen as an exercise of jurisdiction by the authority which it does not have while an irregularity under this heading is a failure to appreciate (and accordingly exercise) the power which it possesses. Unlike a refusal or neglect to exercise its power, a failure by an authority to appreciate the extent of its power is based on an error of law and not on any wilful, dilatory or negligent act.

Thus an authority which fails to appreciate the nature and extent of its powers commits an error of law regarding its jurisdiction.

The general rule⁶² is that an erroneous decision regarding the merits is not justiciable as the jurisdiction of an authority or its 'power to decide' (above) includes the power to decide correctly as well as erroneously.⁶³ There are certain exceptions to the rule, more particularly errors of law which go to the jurisdiction of the authority. This was seen by Stratford JA in Union Government v Union Steel Corporation (South Africa) Ltd⁶⁴ in the following terms:

"If a discretion is conferred by statute upon an individual and he fails to appreciate the nature of that discretion through misreading of the Act which confers it, he cannot and does not properly exercise that discretion. In such a case a court of law will correct him and order him to direct his mind to the true question which has been left to his discretion".⁶⁵

The Court has set aside numerous decisions relating to a wide range of subjects on account of the decision making authority failing to appreciate the nature of its discretion a fortiori its jurisdiction, inter alia; the refusal by the relevant authority to remove a 50 mile radius restriction on certain road service permits;⁶⁶ the grant of orders restricting persons to remain within certain defined areas in terms of the Law and Order (Maintenance) Act 1960 (Southern Rhodesia);⁶⁷ the refusal by the Chief Inspector, Land Tenure to approve a purchase of property affected by the Group Areas Act 1950;⁶⁸ the refusal by a magistrate to grant a licence in terms of the Second Hand Goods Act 1955;⁶⁹ the refusal or failure by the Minister to list a new variety of seed in terms of the Seeds Act 1961,⁷⁰ etc. An unusual case regarding the failure of an authority to appreciate the nature and extent of its jurisdiction is Granville Estates (Pty.) Ltd. v Ladysmith Town Council and Another.⁷¹ The authority in this case, the Natal Arbitration Board, was engaged in deciding compensation in respect of land expropriated by a local authority. The latter had sought an order from the Board directing the claimant to furnish certain particulars regarding its claim. The Board held that it did not have the jurisdiction to make such order. The Appellate Division, per Wessels AJA, found that the Board had

such power and that its failure to make the order was a reviewable irregularity calculated to cause irreparable damage to the local authority. The learned Judge of Appeal, inter alia, held that:

"... While a "mere mistake of law" resulting in an incorrect decision ... is not a reviewable irregularity, a failure by reason of a mistake of law to exercise jurisdiction is ..."72

3.1.4 The failure by an authority to comply with a condition precedent to the exercise of its powers.

A condition precedent, under these circumstances, may be described as a necessary prerequisite to the exercise of its powers by an authority. In other words until the fulfilment of the condition the authority possesses no jurisdiction and any act resulting from such premature exercise of powers is unlawful and will be set aside by the Court.⁷³ *R v. [unclear]* Judicial testing of the proper fulfilment of a simple condition precedent which is subject to objective factual proof presents few problems. For example, where an official is empowered to authorise the deporting of an immigrant convicted of certain criminal offences proof of the necessary conviction, or otherwise, may be established easily.⁷⁴

The subject becomes more complicated where the condition precedent is couched in subjective terms, ie. conditions precedent which are dependent of the exercise of a subjective discretionary decision as for example the exercise of power subject 'to the satisfaction' of the relevant authority that a certain factual situation exists.⁷⁵ The wording of subjective conditions precedent vary and may be expressed in various ways including: '... if in the opinion of ...' '... if it appears that ...' Perhaps the most conventional subjective condition precedent relates to the authority being satisfied as to a certain situation, e.g. an immigrant being able to write out and sign an application 'to the satisfaction of the Minister',⁷⁶ an African 'who satisfies the local authority that his income during any one year ... did not exceed £180' would have been entitled to pay special sub-economic rental, etc.⁷⁷

Subjective conditions precedent are jurisdictional facts in no less a degree than are the objective. The courts have ruled that where the fulfilment of such is capable of objective factual proof the matter is justiciable in spite of the condition being couched in subjective terms. In Shangase v Minister of Nature Affairs & Others⁷⁸ a matter relating to the rental of houses in Bantu locations, the issue was inter alia whether the fulfilment of a condition precedent expressed in classic subjective terms was reviewable by the Court. The relevant regulations, cited above, provided that any Bantu "... who satisfies the urban local authority concerned that his income during any one year ... did not exceed £180 ..." would qualify to pay a special sub-economic rental for a house in a location.

The Court per Caney J, held:

"That the determination qualifies within the group "any native who satisfies the urban local authority concerned", with the emphasis on the word "satisfies" ... means no more than that he is to produce proof to the local authority. It does not have the effect of making the local authority the sole arbiter of the question. Even where by-laws require citizens to do something "to the satisfaction of the council" these words are to be regarded as surplusage where the question whether the citizen has complied is a question of fact capable of being decided apart from the opinion of the local authority; the matter then is not committed to the decision of the Council in accordance with its opinion and the Council is not the sole arbiter. The ultimate judge of the question is the Court ..."⁷⁹ (my italics)

On the other hand a subjective condition precedent may be so worded as to be beyond any objective factual proof. Such condition may be seen as nothing more than the exercise of an opinion. An authority vested with such power e.g. the Minister, who in terms of the Immigration Act 1906 (Cape) was personally to be satisfied that an immigrant was able to complete the necessary application in the characters of a European language, had merely to apply his mind to the matter and exercise his discretion in a bona fide manner.⁸⁰ Such subjective condition was seen by the Appellate Division in Minister of the Interior v Bechler⁸¹ as being proved only '... after full enquiry and even then would be a matter of opinion or degree ...' and the fulfilment of such condition found not to be justiciable, subject to the

authority bona fide applying its mind to the exercise of its discretion. The relevant facts of Bechler's case were that a special commission was appointed inter alia to recommend the deportation of enemy aliens who in the opinion of the Commission had acted in a manner that could be classified under certain categories and whose presence in South Africa was incompatible with the Commission's terms of reference. The deportation of a number of persons was recommended by the Commission. The deportees argued that the classification of their actions by the Commission were jurisdictional facts which required objective factual proof and were thus justiciable. The Court, per Tindal ACJ, found that the categories were not capable of accurate definition which the Court would have expected if the findings by the Commission were to constitute jurisdictional facts. It was in support of this finding that he stated that the categories into which the deportees were classified were:

"... not capable of application on a hard and fast, clean cut basis, such as one would expect if they went to jurisdiction. They are groups of facts which could only be found after full enquiry and even then would be a matter of opinion or degree. It is clear that the tribunal to decide on these issues was intended to be the Commission and not a court of law".⁸² (my italics)

Delegated legislation, e.g. municipal regulations and bylaws which confer a discretion upon an official, the exercise of which is dependent on a subjective condition precedent, will be declared ultra vires by the Court if the regulation does not clearly indicate the criteria necessary for the fulfilment of such condition.⁸³ A subjective condition precedent not subject to objective factual proof⁸⁴ places an affected party in the invidious position of his being ignorant of the criteria to which he must conform.⁸⁵ Delegated legislation which:

"purports to regulate the conduct of persons must not be vague, it must offer guidance to those to whom it applies so that they may know what they must do to avoid contravening it".⁸⁶

otherwise such legislation will be set aside by the Court. On the other hand the Court leans towards rendering (subordinate) legislation valid rather than invalid, useful rather than nugatory, sensible rather than absurd, i.e. the so-called 'benevolent interpretation'.⁸⁷ In order to render

an enactment valid it is sometimes necessary to sever the offending part. In a number of cases subjective conditions precedent have been regarded by the Court as mere surplusage and omitted from the legislation in order to retain its validity.⁸⁸ There is no purpose in omitting a condition precedent or other section of an enactment if it will be left meaningless and incapable of compliance. Under these circumstances the court will set aside the whole enactment.⁸⁹ Perhaps the essential criterion for striking out portions of an enactment is whether the legislature would have passed it in the truncated form.⁹⁰

An example of an invalid condition precedent may be found in Benoni Town Council v Mallela.⁹¹ A location regulation which provided that no person could occupy a stand unless he was in possession of a current site permit signed by the superintendent or otherwise permitted in writing by the superintendent was held to be invalid. The regulation gave no indication to the superintendent as to the criteria he was to apply nor was any guidance offered to those who wished to apply for residence. This case may be contrasted to Molife v Potchefstroom Municipality⁹² in which the Court held that a regulation which provided that no person other than the holder of a site on residential permit was permitted to reside in a location:

"unless he shall first have obtained a lodger's permit which shall be granted by the superintendent if he is satisfied that the applicant is a fit and proper person therefor ..." (my italics)

was valid as the regulation indicated the criteria which an applicant was obliged to fulfil and by which the superintendent was obliged to adjudicate him, viz. 'fit and proper as to good order, health and sanitation.' In Benoni Town Council v Mallela (above) the Court held that:

"It would be oppressive and unjust to make their continued occupation of their homes dependent purely upon the will of the superintendent".⁹³

The most important exceptions to the rule against opinion-type conditions precedent are:

- a) where the fulfilment of the condition precedent to the exercise of discretion is conferred upon an expert in a particular field whose judgment is founded on his expertise;⁹⁴
- b) where on account of an emergency the decision has to be made forthwith, here as in the case of (a) it is hardly possible to set out terms of reference or guide lines for the fulfilment of any such condition precedent;⁹⁵
- c) a third possible exception occurs in cases where a local authority has the power to prohibit a particular situation and authorises an official to relax the prohibition subject to his discretion.⁹⁶

The interpretation of the relevant enactment is critical. In certain cases an authority has sought to raise an opinion-type condition precedent in order to oust the jurisdiction of the Court. As indicated above a decision founded on such condition precedent may be seen as an absolute discretion and has the effect of ousting the jurisdiction of the Court as far as the factual correctness of any condition precedent is concerned.⁹⁷ One such case was Kellermann v Minister of the Interior.⁹⁸ In terms of the Union Naturalisation and Status of Aliens Act 1926⁹⁹, the Minister was empowered to revoke a certificate of naturalisation if the person concerned had conducted himself in such a manner 'that it may reasonably be concluded' that he is prepared to serve the interests of a foreign state at war with His Majesty (the King). The applicant applied for an order setting aside the revocation of his certificate. The Minister in opposing the application argued inter alia : that a true reading of the relevant enactment indicates that the discretion was conferred solely upon the Minister and accordingly he is the sole arbiter of the conduct giving rise to the revocative order.¹⁰⁰ The Court, per Millin J, rejected this argument holding:

"... The respondent does not point to any words capable of this construction. He wishes to supply words. This he cannot do unless he demonstrates that they are present by necessary implication. The most he succeeds in showing is that it would be more convenient for the Minister, and perhaps better in the public interest if, in the revoking of certificates of naturalisation it were left to the Minister to decide, without intervention by the Court, whether the naturalised person has made himself guilty of the conduct described. This is not enough to justify a Court in reading into a statute words which are not there ..."101

To conclude this section, the well-known case of Tefu v Minister of Justice & Another¹⁰² in which the respondent Minister endeavoured to raise an implied opinion-type condition precedent, will be considered briefly. The applicant's name had been included in a list of persons who were, or had been inter alia, members or active supporters of the Communist party. The list was compiled in terms of the then Suppression of Communism Act 1950¹⁰³ by an official designated the 'liquidator of the Communist party'.¹⁰⁴ The relevant enactment provided inter alia:

"If directed by the Minister to do so, the liquidator shall compile a list of persons who are or have been office bearers, officers, members or active supporters of the organisation ..."

In reply to an application for a declaratory order by the applicant, that the inclusion of his name on the list was wrongful and unlawful, and for certain other relief, the respondent contended that the liquidator was the final arbiter as to the correctness of the list. Although no opinion-type discretion or condition precedent was expressly conferred on the liquidator, the respondent claimed that it was to be implied on account of the wording of the statute. The Court, per Murray J, analysed the Act, indicating that subjective conditions precedent were contained in a number of sections but not in the enactment in question.¹⁰⁵ The Court held that where the legislature intended to entrust such determination to an individual it would have employed language that would leave no doubt as to its intention.¹⁰⁶ In regard to the argument that such subjective condition precedent must be implied on account of wording of the statute and the very nature of things, the learned Judge held:

"... the questions of past and present membership or active support are clear cut and relatively simple questions of fact. In themselves they involve no questions of opinion or degree such as 'necessity to exercise control' (Liversedge v Anderson) or 'has come to be recognised as a protagonist of ideology' or 'has conducted himself in such a manner that it may reasonably be concluded that he is prepared to serve or promote the interest of a foreign state'. (Minister of the Interior v Bechler & Others, supra at 437) ..."107

3.1.5 The failure by an authority to comply with prescribed procedure.

While procedure in legislative enactments is generally prescribed in a 'peremptory' or 'imperative' form on the one hand and 'directory' on the other, this is not necessarily so. The necessary degree of compliance with prescribed procedure may be implied from the particular enactment or the statute as a whole. It would appear from the following statement by Trollip JA in Nkisimane and Others v Santam Insurance Co Ltd.¹⁰⁸ that any definitive formula is inadvisable as each case should be considered on its own merits in the light of guidelines (rather than rules) of interpretation adopted by the Court.¹⁰⁹

"... statutory requirements are often categorized as "peremptory" or "directory". They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non- or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular... Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity ... On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes

not be necessary at all, and non or defective compliance therewith may not have any legal consequence ... In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective ... It is unnecessary to say anything about the correctness or otherwise of this trend in such decisions. Then, of course, there is also the common kind of directory requirement which need only be substantially complied with to have full legal effect ..."110

The four possible situations, as set out in the judgments, are repeated:

- (a) a peremptory requirement must be complied with failing which the administrative act is null and void¹¹¹;
- (b) non-compliance with, or avoidance, of a statutory requirement which is directory may under certain circumstances not be fatal or affect the administrative act in any way¹¹²;
- (c) certain requirements, couched in peremptory terms and which are regarded as peremptory, require only substantial compliance in order to render the act valid¹¹³;
- (d) certain directory requirements require only substantial compliance to be fully effective¹¹⁴.

While there are no clear cut rules regarding the classification of peremptory and directory provisions, the Court in Sutter v Scheepers¹¹⁵ set out the following guidelines:

- 1) if a provision is couched in a negative form it is to be regarded as peremptory rather than directory. To say that no power of attorney shall be accepted by the Deeds Office unless it complies with certain conditions discloses an intention to make the conditions peremptory. Such language, however, is not per se conclusive of a peremptory condition;¹¹⁶

- 2) If a provision is couched in positive language and no sanction is added in the event of the terms not being carried out, then the presumption is in favour of an intention to make the provision directory only¹¹⁷;
- 3) If the terms of a provision, when strictly carried out, lead to 'injustice and even fraud' and there is no explicit statement that the act is to be void should the conditions not be complied with, or if no sanction is added, 'the presumption is rather in favour of the provision being directory'.¹¹⁸ It should be noted that a sanction or penalty solely for the purpose of protecting revenue does not, for that reason alone, indicate that the requirement is peremptory¹¹⁹;
- 4) The Court should consider the history of the legislation which may 'afford a clue ...' to the intention of the legislation in some cases¹²⁰.

Although Wiechers does not fault the guidelines established in Sutter's case he considers them as rules of interpretation and indicates that sometimes they contradict themselves.¹²¹ He considers the following rules which he has extracted from the case law as being more appropriate:¹²²

- (a) All statutory provisions are inherently binding, therefore the distinction between 'peremptory' and 'directory' provisions should not (logically) be applicable;
- (b) Formal and procedural provisions are generally regarded as peremptory a fortiori if non-compliance will lead to the non-fulfilment or frustration of other legal requirements;
- (c) Requirements relating to time, language to be used and notification of intention are for the most part peremptory;

- (d) Where non-compliance will lead to injustice or will prejudice individuals, such provisions will generally be considered peremptory and vice versa;
- (e) Where the provision has been substantially complied with, although not literally, the Court may condone such degree of non-compliance. Also, where the failure to comply literally has come about as a result of a bona fide mistake and no prejudice has been caused, the Court may condone the non-compliance;
- (f) Where strict compliance will lead to prejudice the Court may condone any irregularity;
- (g) Where the formal or procedural requirements are merely to assist the authority in its own proceedings, strict compliance would appear to be unnecessary;
- (h) Where the formal or procedural requirements regulate the conduct of individuals inter se the Court will permit non-compliance if no prejudice results to any other party. Under these circumstances or where the requirements are for the benefit of particular individuals they may condone non-compliance.

In conclusion, it is submitted that where administrative acts are suspended pending the compliance of procedural or formal requirements, the latter may be equated with conditions precedent and accordingly the validity of the act depends on their fulfilment. It is further submitted that procedural requirements are jurisdictional facts and accordingly justiciable before the Court.

3.1.6 The self-limiting of jurisdiction.

(a) By reason of a policy decision.

A policy decision may be described as 'the adoption of some general lines of policy or some uniform basis of treatment'.¹²³ A policy decision per se

is not necessarily an irregularity. In Britten v Pope,¹²⁴ Innes CJ considered that under certain circumstances the formulation of a policy decision becomes inevitable and that:

"... a committee may quite properly ... exercise their discretion along uniform lines of policy founded upon considerations relating to the business or occupation of those who apply".¹²⁵

The adoption of a policy decision becomes an irregularity only where such policy prevents or in any way fetters or limits the exercise of discretion within the terms of the enabling Act. Such irregularity is a jurisdictional fact where the authority concerned has failed to exercise its jurisdiction, i.e. its power to decide in terms of its enabling Act. Further, by limiting its discretion in terms of the policy decision the authority may be said to have failed to appreciate the extent of its jurisdiction and/or have failed to apply its mind to the matter before it. In Richardson and Others v Administrator Transvaal¹²⁶ a case involving the disestablishment of a parallel medium school, i.e. a school in which the medium of instruction is in both official languages, and to convert it to a single medium institution i.e. where the medium of instruction is in one official language only, the Court, per Marais J, saw the question of a policy decision in the following terms:

"A person who has a statutory duty to exercise his discretion in matters affecting the interests of others, may use as a guide principles of policy which assist him in attaining uniformity where uniformity is desirable. The Administration is in a position where it has to exercise its discretion in regard to conflicts between the wishes of the parents on the one hand and the demands of economical and efficient tuition on the other ... it may evolve general, guiding principles to assist it in speedily, fairly and wisely deciding each conflict ... those guides must not develop into hard and fast rules which preclude the person exercising the discretion from bringing his mind to bear in a real sense on the particular circumstances of each and every individual case coming up for decision ... As it is usually put, he must not fetter his discretion with inflexible, preconceived ideas.¹²⁷ (my italics)

If the policy decision is not contrary to the terms of the enabling Act or to the common law and is not intrinsically unreasonable the Court is not concerned with the content of such policy. In Pietermaritzburg City Council v Local Road Transportation Board¹²⁸ Fanin J stated that there was nothing unlawful in the grant of transportation certificates by the respondent subject to the condition that separate vehicles be used for the conveyance of 'European' and 'non-European' passengers based on the governmental 'policy of segregation'. To this finding the learned judge added the proviso that such policy was valid as long as it did not involve partial or unequal discrimination based solely upon class or race.¹²⁹ But where the authority had allowed such policy decision '... to develop into hard and fast rules' preventing it from applying its mind to the merits of an individual case the authority had failed in its duty to exercise its discretion.¹³⁰

In practice establishing (in motion proceedings) that an authority applied a hard and fast policy decision, a fortiori where it is not obliged to furnish reasons for its decision, may present an insurmountable difficulty. Should an authority e.g. a liquor board, refuse all applications for a restaurant liquor licence where the applicant's premises seat less than 60 persons at one sitting, an applicant would find it virtually impossible to prove such allegation. A further difficulty in regard to this irregularity is that the Court has distinguished between a policy which fetters the exercise of discretion and one which merely influences (a somewhat blurred distinction!). In Britten v Pope¹³¹ a licensing authority refused an application for the transfer of a wholesale and retail bottle liquor licence to a limited liability company which carried on a major wholesale trade in liquor. The effect of such transfer would have furthered a 'tied-house' system which the full licensing court (board) had previously resolved to avoid. The members of the relevant licensing authority admitted, in their papers, that they had been influenced in their decision by the resolution of the full licencing court, but alleged that they "... gave the applicant a fair hearing and after a careful, unfettered and unbiased consideration of the application and the merits thereof, and in the exercise of their statutory discretion, unanimously and in good faith ..." decided

not to grant the application.¹³² Despite the admission by the Board members that they had been influenced by the earlier resolution, the majority of the Court, per Innes CJ, found that:

"If they (the Board) considered that the application was substantially covered by a binding decision which they did not question; if they decided the matter by applying not their own judgment, but the judgment of the Court (the full Licencing Board) to the facts before them, then there was no exercise of discretion. But if they approved of and adopted a principle laid down by the full (Licencing) Court, applying it not because they were bound to, but because they agreed with it, then they did exercise their own discretion ..."¹³³

The distinction becomes more tenuous when it is noted that the members of the relevant Licencing Board who at that meeting "... resolved to be guided by [such policy against the tied-house system] subject to the consideration of any special circumstances which might arise ..."¹³⁴

- b) By reason of influence in the form of directions from or advice by a third party.
-

Where a discretion is conferred upon an authority, subject to the terms of its enabling Act, the authority must itself exercise its discretion. Any irregular limitation of the free exercise of such discretion, being a jurisdictional fact, is reviewable. Thus the Court will set aside any decision which results from any undue influence, whether by way of directions or advice by an unauthorised source or otherwise. This situation is somewhat similar to the unlawful delegation of its discretionary power.¹³⁵ It may be compared also with the situation of an authority which fetters its discretion by the hard and fast adoption of a policy decision.¹³⁶ In both aforementioned instances and the situation where an authority is unduly influenced by directions or advice, etc., the authority cannot be said to have itself exercised its discretion. In Colonial Produce & Export Co Ltd. v Paarl Licencing Court¹³⁷ the Court, per Van Zyl J was firm in its approach to the subject:

"But the point upon which I propose to decide the case is that Mr. P. Roux did not give his vote in that bona fide and unfettered manner which is required of a mem-

ber of the Licencing Court, but that he allowed himself to be influenced by another body in the giving of his vote, and that is an irregularity. A member of a Licencing Court must honestly, bona fide, and according to his own judgment decide as to whether a licence should be granted or not upon what is put before the Court. If he is not able to make up his own mind, but has to go for outside assistance, then he should not sit on the Court at all, the only people who should sit upon a court of that description are those who are able to exercise their own unfettered judgment ..."

The duty of a member of a licensing board to exercise his own discretion in a bona fide manner, free of undue influence in the form of advice, a fortiori instructions or directions as to how he is to decide, extends to the members of every administrative authority charged with the exercise of a discretion.

In two separate cases Mabi and Others v Venterspost Town Council and Another¹³⁸ and Semena v De Wet and Another,¹³⁹ Clayden J set aside decisions of separate authorities who instead of exercising their own discretion acted under the instructions of respective higher officials. In Mabi and Others v Venterspost Town Council and Another (above) the fact that the respondent authority was acting under instructions of a higher official became apparent only after the respondents filed their answering affidavits. The learned Judge held:

"... For the superintendent so to give effect to the instructions of a person not charged with the duty of considering cancellation under the Regulation was not, ... a proper discharge of his function under the Regulation. He allowed another to usurp his function, and gave the matter no consideration himself.¹⁴⁰

An argument by the respondents, that this issue was inadmissible as it had not been raised by the applicants in their application, did not commend itself to the learned judge who stated that as the respondents had themselves furnished the factual information the applicants were entitled to rely on such facts.¹⁴¹

c) By reason of a contract or undertaking.

In general terms an administrative authority, being limited by the terms of its enabling Act, may not contract beyond its authorised powers. Any contract not expressly or impliedly authorised is invalid.¹⁴² As with a condition precedent to the exercise of its discretion¹⁴³, failure to comply with a condition precedent to the contract renders such contract invalid.¹⁴⁴ Further, as with the exercise of discretion, failure to comply with peremptory procedural requirements¹⁴⁵ before entering into a contract also renders such contract invalid.¹⁴⁶

A distinction must be drawn between a contract which is valid and binding and an undertaking to fetter its discretion. Subject to the terms of the enabling Act, the validity of a contract entered into between an authority and a third party which has the effect of fettering the (future) discretion of the authority would appear to be invalid, at least in so far as the limiting of its discretion is concerned. An authority does not have the power to limit or extend its jurisdiction. This is the sole prerogative of the legislature. If jurisdiction is the 'power to decide', discretion is the choice of alternatives. On the other hand any subsequent decision by the authority, founded upon the limiting contract, cannot be said to be the subject of a free exercise of discretion and is therefore invalid. This situation could arise where the authority has as part of the consideration for the acquisition of property given an undertaking that no trading licences will be granted in opposition to the previous owner of the property. By refusing to grant any further licences on account of the contract, the authority may be seen to have refused to exercise its discretion at all, as in the case of the authority which refused to consider a licence application from an Asian, where it considered sufficient Asians held licences in the area.¹⁴⁷ At best, this action could be compared to that by an authority which applies a 'hard and fast' policy decision without considering each case on its own merits.¹⁴⁸

Although the South African cases in point concern acts of Ministers of State, (save any references to the prerogative) the basic principles regarding the fettering of discretion are applicable to all administrative

authorities. In Fellner v Minister of The Interior¹⁴⁹ the Court, per Centlivres CJ, held:

"... the Crown cannot by contract fetter its future executive action. The granting of a renewal of a passport is ... an executive act ... consequently even if the Crown had professed to fetter its future executive action by entering into a contract with the holder of a passport and agreed that the holder should have the right to require the Crown to renew his passport, such an agreement would not be binding on the Crown"¹⁵⁰

An undertaking by a Minister that the Government would not erect houses for blacks within a certain proximity of a certain township was held by the Court in Waterfalls Town Management Board v Minister of Housing¹⁵¹ to be unenforceable. The situation was seen by Murray CJ as follows:

"... (the applicants) were dissatisfied with the administrative action of the Government ... (and) obtained from the respondent Minister a promise that in regard to his building programme he would refrain permanently from building on a specific portion of Highfield. This promise, had it been given by an individual, might well have been binding and enforceable. Given by the Minister it was not more than an undertaking to discharge his administrative duties in regard to building in a way which would remove their grievances. I cannot regard the Minister's "agreement" as anything more than a promise to meet their objection by exercising his discretionary administrative powers in a particular way. This promise cannot fetter his right ... to exercise his discretion in some other way ..."¹⁵²

d) By way of estoppel.

The crisp question is whether, as a result of earlier action on its part, an administrative authority may be estopped from exercising its discretion. The answer depends on whether a situation may arise which is founded upon a judicially recognised irregularity or otherwise. In Hoisain v Town Clerk Wynberg¹⁵³ the plaintiff contended that the relevant town council was estopped from raising the illegality of a general dealers certificate

erroneously issued by the defendant town clerk. The Appellate Division, per Innes CJ, had little hesitation in rejecting this contention, the learned Chief Justice stating:

"... It is sought to compel the Town Clerk to place the applicants name upon the statutory list: he can only do that upon the grant of a certificate by the Council, which that body has definitely refused to give. Such a certificate is not in truth in existence. So that the Court is asked to compel the Town Clerk to do something which the Statute does not allow him to do; in other words we are asked to force him to commit an illegality. There can be no question of estoppel as far as he is concerned."¹⁵⁴

In Salisbury City Council v Donner and Another¹⁵⁵ Murray CJ ruled that estoppel cannot be raised in matters concerned with the exercise of a statutory public duty.¹⁵⁶

On the other hand where the relevant act does not constitute a recognised irregularity a plea of estoppel may be sustained. Thus in Mossel Bay Municipality v Ebrahim¹⁵⁷ the authority was estopped from raising the validity of a trading licence which it had itself authorised. The applicant Municipality alleged that the grant of the licence was contrary to a long standing policy decision and had been approved erroneously. The Court, per Van Winsen J, distinguished this case from Hoisain v Town Clerk Wynberg above.¹⁵⁸ The learned Judge found that:

"There is no reason in law why the (trading) certificate should not have been granted. Putting it at its highest in the Council's favour it would seem that all that can be said is that the Council considered, in the public interest, that it would be undesirable for a certificate to be granted allowing the trade ... to be carried on at (the site) ... and that but for a mistaken view of certain facts it would not have granted the certificate ... this is not sufficient to warrant ... the limitation of the operation of estoppel."¹⁵⁹

Where a member or official of the authority, ostensibly on behalf of the latter, contracts with a bona fide third party, the authority may be estopped from denying the validity of the contract or the authority of the

member, etc.,. A successful plea of estoppel is of course subject to such contract being intra vires and otherwise lawful. In National and Overseas Distributors Corporation (Pty) Ltd v Potato Board¹⁶⁰ the Board was precluded from setting up an inadvertent error on the part of its manager in accepting a tender for the construction of a certain shed. The Appellate Division also distinguished Hoisain v Town Clerk Wynberg (above) and ruled that although the manager may have had no right as against the Board to enter into the contract, there was no illegality if in fact he did so.¹⁶¹

Conversely a party who has entered into a contract with an administrative authority and has derived benefits thereunder is estopped from raising a defence that the contract is ultra vires the enabling Act.¹⁶² But a licensee who is granted a conditional licence is not estopped from subsequently applying to Court to have the conditions set aside as ultra vires, even though he may in the interim have traded in terms of the licence.¹⁶³

3.1.7 An act performed by an administrative authority after it has become functus officio.

In the absence of a legislative provision to the contrary, a court of law of administrative authority exercising a judicial or quasi-judicial function is functus officio once it has given its decision.¹⁶⁴ The rationale for the functus officio rule would appear to be founded on equitable grounds. First that there must be an end to any dispute, application or inquiry. Secondly, once a determination has been made the affected parties knowing the position may act accordingly. From this flows the requirement that the determination must be final before an authority may be said to be functus officio. Thirdly, if an authority has the right to change its mind it effectively becomes the judge as to the correctness or otherwise of his own decision - an undesirable situation.¹⁶⁵

In Minister of Agricultural Economics & Marketing v Virginian Cheese and Food Co (1941)(Pty.) Ltd., Ludorf J. indicated that there are certain exceptions to the functus officio rule relating to courts of law.¹⁶⁶ There are exceptions also which apply particularly to actions by administrative authorities. First, it is suggested that an authority may be functus

officio only if the initial act or determination is valid. In Garment Worker's Union (Western Province) and Others v Industrial Tribunal and Minister of Labour,¹⁶⁷ the Appellate Division, per Steyn CJ, stated:

"Counsel for the appellants also contended that once the Minister has made a determination he is functus officio, with the result that he cannot make a determination in substitution thereof, and that he cannot make two different determinations on the same recommendation. These contentions could ... only be upheld if the first determination is a valid one ..."

A fortiori an authority is not functus officio where it reconsiders and rectifies a decision reached as a result of fraud or perjury.¹⁶⁸ Secondly, subject to any statutory enactment providing for a fiscal assessment to be final and binding on the State and all affected parties¹⁶⁹ the fiscus would appear not to have become functus officio after assessing the payment of a tax. In Sekretaris van Binnelandse Inkomste v Florisfontein Boerdery¹⁷⁰ the Appellate Division held that the Department of Revenue which had incorrectly assessed the sum of transfer duty in respect of the transfer of property was not thereafter functus officio. Once the mistake had been ascertained the Department was within its rights, in fact obliged, to reassess and claim the correct amount.¹⁷¹ A third exception may occur where the authority concerned exercises a purely administrative function. In his judgment in Minister of Agricultural Economics v Virginia Cheese and Food Co (above),¹⁷² Ludorf J held that the general rule applied to courts of law and administrative authorities exercising judicial and quasi-judicial functions. He appears to have specifically excluded the situation of authorities exercising a purely administrative function.¹⁷³ Wiechers raises some doubt as to the correctness of this exception.¹⁷⁴ This contention was noted by Jansen JA in Transair (Pty.) Ltd. v National Transport Commission and Another,¹⁷⁵ an important case considered more fully below. Unfortunately the learned Judge of Appeal found it unnecessary to decide the issue. The fact that when exercising a purely administrative function an authority, generally, may breach the rules of natural justice¹⁷⁶ may be seen as adding credence to the existence of this exception, a subject which will be further considered below.¹⁷⁷

Two further aspects require consideration. First, an affected party may waive rights granted in his favour by an authority which thereafter became functus officio.¹⁷⁸ Finally, there is the essential question what action may an authority, which is functus officio, take in regard to its decision determination or act which it finds erroneous and which is not subject to one of the above exceptions. In Bronkhorstspuit Liquor Licencing Board v Rayston Bottle Store, Murray J stated:

"... if it is accepted that the Board is functus officio and cannot normally reverse its own decision, the same principle applies to prevent it, in the absence of specific authority thereto, from moving the Court to cancel a licence which it should not have granted".^{178a}

While the logic of this statement may not be denied the requirement of a general rule to this effect is questioned. There are many situations which may arise and which make such general rule undesirable. The question was considered by the Appellate Division in Transair (Pty) Ltd. v National Transport Commission and Another.¹⁸⁰ The facts of this case were extraordinary. Although fraud on the part of the applicant was not inferred some unauthorised individual unlawfully or negligently altered the terms of a non-scheduled air transport licence by including certain areas in which the applicant had not been licensed to operate. Subsequently the licence and the unauthorised addition were renewed by the authority, the members of which were unaware that the addition, i.e. the inclusion of the areas in which the applicant was not authorised to operate had not been validly granted. It was only some years later when the applicant sought to include a more sophisticated jet-propelled aircraft on his licence that the invalid alteration was noticed by the authority. South African Airways, the second respondent in the case, objected to the application to include the further aircraft which obviously was to be acquired to serve the unauthorised areas. The application was refused by the authority first on the ground that the alteration was invalid and secondly on the merits. The applicant instituted proceedings against the authority seeking the setting aside of its refusal to licence the further aircraft and its ruling that the renewal in so far as the unauthorised areas were concerned were invalid. Before the Appellate Division the applicant contended that the decision by the authority, (to the effect that its renewal of the unauthorised alteration was invalid), could not be sustained as it was then functus officio and

could not review its own prior decision.¹⁸¹ The Court, per Jansen JA, found that there was no evidence to justify any inference that the applicant was guilty of fraudulent behaviour.¹⁸² However, he held that the disputed renewal was invalid as the peremptory procedure for the grant of any alteration or modification of a licence which after all is what the renewal containing the unauthorised areas was, had not been followed.¹⁸³ The learned Judge of Appeal, considering the statement made by Murray J in the Bronkhorstspuit Liquor Licencing Board case cited above,¹⁸⁴ held (although by obiter dictum) that the statement should not be elevated to a general rule to be applied by administrative authorities:

"Whether it operates in a particular case must depend upon the legislation involved and the nature of the functions of the particular body. It seems obvious that, although an administrative body may be neither equipped nor competent to investigate the validity of its own prior acts, it may by the nature of its functions be entitled and obliged to call upon a Court to pronounce upon such acts ... that the NTC is an administrative body with wide powers of supervision over air services, in the interests of the public and national security, is clear from the provisions of the Act as a whole ... It would appear that if the NTC should issue a licence irregularly - be it the result of an administrative error, fraud or other circumstance - it would not only be entitled but also bound to raise the matter in a Court of law if prejudiced ..."¹⁸⁵

3.1.8 The failure by an authority to apply its mind to the matter before it.

There are many cases in which the Court has set aside the decision of an administrative authority on the ground that the authority is said to have failed to apply its mind to the matter before it.¹⁸⁶ An analysis of the cases indicates that the term "a failure by an authority to apply its mind" is not capable of a simple and unqualified explanation. An authority may fail to apply its mind in a very real (factual) way. It may be so disinterested in the matter that whatever its decision it cannot be said to have applied its mind. By not considering the enabling Act and/or the facts before it, whether intentionally or on account of an inability to do so, the

authority has placed itself in the position of having failed to consider the matter in terms of the powers conferred upon it. For example, in Richardson and Others v Administrator, Transvaal,¹⁸⁷ considered above in regard to a policy decision, the Court, per Marais J, stated that an authority wishing to apply a general policy decision must not allow the policy:

"... to develop into hard and fast rules which preclude the person exercising the discretion from bringing his mind to bear in a real sense on the particular circumstances of each and every individual case coming up for decision ..."

Such inequality may be seen as a jurisdictional fact. This first explanation of the term is concerned directly with the subjective attitude of the authority and to contrast it with the following explanation, it may be said to be a direct or de facto failure by an authority to apply its mind.

The second meaning of the term arises when the Court examines a decision of an authority which is inexplicable save as to a failure on the part of the authority to have applied its mind properly or at all. Here the term 'a failure to apply its mind' is perhaps no more than a 'convenient tag'.¹⁸⁸ Under these circumstances, the Court, in addition to such finding, may find the reason for the failure on the part of the authority to apply its mind is mala fides or gross unreasonableness.¹⁸⁹ The Court has referred to this objective inference as a de jure failure by the authority to decide the matter at all. In National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd,¹⁹⁰ the Appellate Division, per Holmes JA held:

"There is no appeal against the decision of the Commission ... its decision stands - unless it is vitiated by proof on review in the Supreme Court that -

- (a) the Commission failed to apply its mind to the issues in accordance with the behests of the statute and the tenets of natural justice: in other words that, de jure, it failed to decide the matter at all. Such failure could be established by reference to mala fides, improper motive, arbitrariness or caprice. The list is not exhaustive; or

- (b) the Commission's decision was grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind...¹⁹¹

Wiechers on the other hand sees the necessity for an authority to apply its mind as an essential component to each and every ground of validity (geldigheidsvereistes):

"Ten tye van die uitoefening van sy diskresie moet die administratiewe orgaan beslis redelik optree in die sin dat hy sy aandag nie slegs aan die wenslikheid en doelmatigheid van sy moontlike optrede moet skenk nie, maar dat hy ook sy volle aandag aan die nakoming van alle geldigheidsvereistes moet bestee ... aandagbesteding is 'n noodsaaklike voorwaarde wat by die uitoefening van alle diskresionêre bevoegdhede vereis word."¹⁹²

He sees mala fides as an intentional failure by an authority to apply its mind.¹⁹³ The failure by an authority to comply with the rules of natural justice, he considers also the result of a failure by the authority to apply its mind.¹⁹⁴ This approach by Wiechers must be seen in the light of his positive approach to administrative acts ie. he classifies only the conditions necessary to establish a valid administrative act. This approach is in strict contrast to the irregularity doctrine¹⁹⁵ which lists and defines the (specific) judicially recognised grounds of invalidity. Wiechers considers the necessity of every authority to apply its mind bona fide as an essential positive requirement of every administrative act.¹⁹⁶ On the other hand a failure by an authority to apply its mind or mala fides are recognised as irregularities by the irregularity doctrine. None the less it is difficult to reconcile Wiecher's approach regarding 'aandagbesteding' to an intentional act that is mala fide, i.e. a positive failure by an authority to apply its mind. In other words how can an authority which has intentionally acted in a particular manner be said to have de facto failed to apply its mind? It may have refused or intentionally avoided its statutory and common law duties but it cannot be said not to have applied its mind - on the contrary.

In his judgment, cited above, in National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd¹⁹⁷ Holmes JA appears to regard a failure by an authority to apply its mind as a blanket irregularity under

which all other irregularities may be listed. This he sees as a de jure failure by an authority to decide the matter at all. This approach, seemingly similar, should not be equated with Wiecher's positive method as the latter is concerned exclusively with the essential grounds of validity while Holmes JA uses the term to denote all irregularities. In other words the learned Judge of Appeal appears to favour the irregularity doctrine albeit under a blanket irregularity.

Finally there is the question of establishing that an authority has failed to apply its mind. This may present an insurmountable hurdle particularly in regard to de facto failure on the part of an authority to apply its mind, (unless the Court is able to infer such conduct from the nature of the decision, as it would in a de jure situation).¹⁹⁸

On the other hand where the decision is such that the only reasonable inference which the Court may draw is that the authority has failed to apply its mind or has been motivated by mala fides an applicant may convince the Court to set aside the decision. Proof may be more easily obtained where the authority is obliged to furnish reasons for its decision.¹⁹⁹ Where the respondent has furnished reasons the Court will not permit argument that the decision was based on other (possible) reasons.²⁰⁰

Unless the enabling Act specifically provides for the furnishing of reasons, a subject considered more fully below^{200a}, there is no obligation upon an authority to do so. The law regarding the failure to furnish reasons where this is not obligatory is clearly set out in National Transport Commission and Another v Chetty's Motor Transport (Pty.) Ltd.²⁰¹ It would not be inappropriate to cite the full judgment by Holmes JA on this aspect.

"... the Commission is not obliged to give reasons for its decision. However, if there is direct prima facie testimony against it, for example of arbitrariness, and it elects to remain silent, in general the direct testimony ipso facto tends to become strengthened in that there is nothing to gainsay it and therefore less reason to doubt it; see, by way of analogy, S. v Snyman, 1968 (2) S.A. 582 (A.D.) at p. 588G, and S. v Mthetwa²⁰² ... and Hoffman on Evidence, 2nd ed., pp. 429 in fin., to 430.²⁰³

By contrast, if the evidence is circumstantial, a failure to give reasons does not necessarily strengthen it; see The Firs Investment case, *supra* at p 81G.204 It will depend upon various factors such as the strength or weakness of the applicant's case, and the ease with which the Commission could demolish it, if untrue, by giving reasons. Basically, the applicant must make out a prima facie case before he can invoke the absence of reasons by the Commission in order to tip the scales of inference to a preponderance of probability; see, by way of analogy R. v Ismail, 1952 (1) S.A. 204 (A.D.) at p. 210; S. v Masia, 1962 (2) S.A. 541 (A.D.) at p. 546E; and S. v Letsoko and Others, 1964 (4) S.A. 768 (A.D.) at p. 776A-D. In other words, it is not enough for an applicant to aver vitiating conduct by the Commission: he must demonstrate it, prima facie, before he can draw supporting inferences from the absence of reasons by the Commission. This is consistent in principle with what was indicated by De Wet, J., (as he then was) in Hung Son v Municipal Council of Krugersdorp, 1935 W.L.D. 26 at p. 33, namely, that the refusal to give reasons is an important element to be taken into account only where there is evidence aliunde of bad faith. That reasoning was referred to with apparent approval by this Court in Pretoria North Town Council v A I Electric Icecream Factory, (Pty.) Ltd., 1953 (3) SA 1 (A.D.) at p. 16E.

It is apparent from the foregoing that a body such as the Commission, by not giving reasons, runs the risk of an adverse inference being drawn, depending on the circumstances of the case. At the final stage the Court takes into account the papers as a whole, and if an adverse inference can be drawn from the absence of reasons, such inference is weighed together with all the other factors in the totality of the case, in deciding whether there is proof, upon a preponderance of probability, of the arbitrariness, etc., averred against the Commission."

Where the decision of an authority is attacked on account of its not having applied its mind, the authority may deny any allegations of improper conduct and comprehensively set out the steps it took to reach the decision. Under these circumstances, subject to direct contradictory evidence, the Court will rule in favour of the authority. Thus in Johannesburg City Council v The Administrator Transvaal and Mayofis²⁰⁵ the Appellate Division per Ogilvie Thompson JA, held:

"As clearly appears ... the information placed before the Administrator was very comprehensive indeed. According to para. 3 of the Administrator's affidavit, set out above, he carefully considered that information and with due regard to the provisions of sec. 17 of the Ordinance. Prima facie, therefore, there is no room whatever for the contention that the Administrator failed to apply his mind to the City Council's interim scheme ..."

But where the authority has failed to explain its decision which raises the inference of a de jure failure to have applied its mind, the Court will not accept conjecture as opposed to a proper explanation by the authority. In Northwest Townships (Pty.) Ltd. v The Administrator, Transvaal and Another,²⁰⁶ Colman J firmly declared the approach of the Court in this regard:

"When the exercise of a statutory discretion, or the formation of an opinion in terms of a statutory duty to do so, is under attack, and the circumstances support the inference of malæ fides, ulterior motive or failure by the official concerned to apply his mind as required by the statute, and the official has given no explanation of his decision, one cannot defeat the inference by conjuring up some fanciful and fallacious chain of reasoning and saying that the official might have reasoned thus."

The Court in this case found that the authority had either misconceived the nature of its duty or had fallen into some error of law or fact so fundamental that it could not be said that it applied its mind to the real problem assigned to it by the legislature.²⁰⁷

3.1.9 A decision must be clear and certain.

It is necessary that an administrative decision must be clear and certain. Where this is not the case, the authority may be said to have failed to exercise its discretion or that it failed to apply its mind. Thus conditions which did not indicate with reasonable clarity 'what it is he (the applicant) may do and what he may not do ...' is so vague and uncertain in its terms to be void.²⁰⁸

In Douglas v Pim²⁰⁹ Innes CJ set aside an arbitration award on account of its terms being vague and uncertain. The principles contained in the judgment are applicable to an administrative decision. The arbitration concerned the dissolution of a partnership between two registered accountants. The arbitrator had ordered P, who had retained the majority of clients, to transfer a sufficient number of accounts to D so that both retained an equal number. In lieu of such transfer P was ordered to make D an equivalent annual payment. No actual sum was fixed by the arbitrator. The Court found that on account of the nature of the partnership, it was not in P's power to transfer clients and as the alternative award was not ascertainable the decision was set aside.²¹⁰

A decision which is not final may be seen as vague and uncertain, that is unless the enabling Act permits an interim determination. Apart from which, an authority that makes a decision which is not final may find itself functus officio if it should endeavour to put right the situation. In Delport v Kopjes Irrigation Management Board²¹¹ the Court, per de Beer J, stated of a decision that was both uncertain and not final:

"Vir my is dit duister wie die lyn moet oprig, waar en hoe dit opgerig moet word en wie moet beslis of dit billik is al dan nie. In uitbreiding van die betoog hieromtrent is dit beklemtoon dat sekerheid en finaliteit 'n onontbeerlike vereiste is van 'n geldige bevinding en dat na 'n bevinding bekend gemaak is, is die arbitrasiehof functus officio: die Hoër Hof kan die arbitrasiehof nie weer opwek en bekleed met die oorspronklike, uitgebreide of ingekorte gesag nie."

The criteria for vagueness and uncertainty in administrative decisions would appear to be the same as that applied to subordinate legislation.²¹² A test which has been cited with approval by the courts, including the Appellate Division, is that formulated by Broome J in R v Jopp and Another,²¹³ viz:

"... the Court must first construe the bye-law or regulation, applying the usual canons of construction ... Having ascertained the meaning, the Court must then ask itself whether the bye-law or regulation, so construed, indicates with reasonable certainty to those who are bound by it the act which is enjoined or prohibited."

If it does, it is good; if it does not, it is bad; that is the end of the matter ... the test is whether a reasonably precise meaning is ascertainable."

This test was qualified somewhat by the majority decision in R. v Pretonia Timber Co (Pty.) Ltd. and Another²¹⁴ more particularly:

"The degree of certainty, clarity or precision that must be present ... on pain of invalidity, depends on the circumstances, including the nature of the problem to be solved by the framer of the description ... The law requires reasonable and not perfect lucidity and the fact that cases may arise in which it would be difficult, perhaps extremely difficult, to decide whether a place falls within or outside the area is not, by itself, a reason for holding that the description is not reasonably clear."

In spite of the statement regarding similar criteria in regard to vagueness and uncertainty for both administrative decisions and subordinate legislation (above)²¹⁵ certain reservations should be expressed. First, it is doubtful whether the presumption in favour of the rendering of legislation valid rather than invalid, useful rather than nugatory and sensible rather than absurd,²¹⁶ applies to the decisions of administrative authorities. Secondly, whether the judicial approach towards the liberal interpretation of subordinate legislation, often referred to as 'beneficial interpretation'²¹⁷ applies to administrative decisions is also doubtful.²¹⁸

En passant it is interesting to note that Wiechers considers the rule that an administrative decision must be clear and certain as emanating from or being a common law requirement.²¹⁹ He does not explain how he arrives at this conclusion. While it is accepted that clarity and certainty is a common law requirement regarding legislation²²⁰ this does not necessarily mean that the requirement for clear and certain administrative decision owes its origin to the common law. It is suggested that the rule is a judicial requirement the non-fulfilment of which is a recognised irregularity.²²¹

3.2 Lack of bona fides or an unauthorised purpose in arriving at a decision.

A decision which is arrived at by reason of a lack of bona fides or an unauthorised purpose goes to the jurisdiction of the authority and accordingly should have been considered under the heading of irregularities which relate to jurisdiction, above. None the less, for two reasons, the subject will be considered separately. First, the Court has itself drawn a dichotomy between irregularities relating to jurisdiction and those relating to mala fides, fraud, etc. In the well-known case of Union Government v Fakir²²² in which the Appellate Division clearly stated the supervisory powers of the Court on review, both Innes CJ and Kotze JA held that in regard to jurisdiction, fraud and mala fides the Court retained an absolute jurisdiction which may not be ousted by legislation²²³. In a subsequent case, Narainsamy v Principal Immigration Officer,²²⁴ the term fraud was extended to include 'an element similar to fraud'. Secondly, the difference between a decision founded upon fraud or mala fides is not necessarily the same as one motivated by an ulterior motive and both are quite different from an excess or lack of jurisdiction, etc. For these reasons it will be more convenient to consider this irregularity separately.

The general rule regarding any unauthorised purpose may be summarised as follows:

"Where the power was granted to be used only for a particular purpose it is an invalid exercise of the power to use it for another purpose ... where the power is given generally, although it may be used for any permissible purpose, it may not be used for a purpose that is not permissible unless expressly or impliedly authorised by the enabling provisions."²²⁵

An analysis of the cases shows that the Court has differentiated between fraud and mala fides on the one hand²²⁶ and a decision motivated by an ulterior motive on the other.²²⁷ This dichotomy is complicated by the fact that the Court has held that the exercise of power conferred for a particular purpose only but used as a pretext or 'simulatio' for a different purpose is in fraudem legis.²²⁸ The distinction between both forms

of unauthorised purpose, i.e. mala fides and ulterior motive is illusory as both are equally invalid. Decisions which are the result of an ulterior motive remain invalid despite such motive being bona fide or even laudable.²²⁹

Subject to the proper achievement of the consequences or purposes intended by the legislation, an administrative decision is not invalid merely on account of its having been motivated by an ulterior motive.²³⁰

In a leading case the fact that an authority expropriated property in terms of an enabling act at a time which was financially advantageous to itself, was considered irrelevant by the Court. What was considered essential by the Court was that the expropriation was intra vires and furthered the intention of the legislature. The Court, per De Vos J, concluded that:

"... there is nothing to show that the Legislature ... prohibits the defendant from choosing its own time for serving a notice of expropriation, even if the choice ... means that the compensation payable to the plaintiff is less than it would otherwise have been ... that in acting as it has allegedly done ... the defendant's conduct cannot be faulted."²³¹

Where two possible procedures are available, to an authority, by which it may achieve a particular (lawful) result, it cannot be faulted for adopting one instead of the other.²³² But the unauthorised exercise of a procedure to achieve a desired result, whether or not an alternative procedure is available, would be irregular.²³³

3.3 Irregularities which relate to the rules of natural justice.

The two fundamental rules of natural justice may be seen as the right of an individual to enjoy a fair and just trial and secondly, the right of an individual to be heard in his defence (the audi alteram partem rule). These basic rules which emanate from English law, have been applied by the Court to all proceedings before it. With the (subsequent) advent and growth of administrative authorities and tribunals the Court adapted the rules, with

certain limitations considered below, to administrative proceedings. The general principles on which the rules of natural justice are founded are seen by our courts in the following terms:

- (i) it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done;
- (ii) nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.²³⁵

In a wider sense the rules of natural justice would include the right of a party to be represented by counsel and the right to be furnished with reasons for any decision. Each of the four aspects of natural justice will be examined separately.

Before such examination it will be apposite to consider briefly certain general exceptions to the rules of natural justice. First, a party may expressly or by his conduct waive his rights to the rules of natural justice.^{235a} Secondly, the relevant enabling Act may expressly or impliedly authorise a breach of the rules of natural justice, for example, in Sachs v Minister of Justice²³⁶ Stratford ACJ held that:

"Sacred though the ... (right to be heard) is held to be, Parliament is free to violate it. In all cases where by judicial interpretation it has been invoked, this has been justified on the ground that the enactment impliedly incorporated it. When on the true interpretation of the Act, the implication is excluded, there is an end of the matter."

The third exception is that the rules of natural justice may be excluded by the very nature of the administrative power of function conferred by the legislation. To be more specific the Court has held that an authority exercising a purely administrative decision (as opposed to a judicial or quasi-judicial decision) is not obliged to comply with the rules of natural justice.²³⁷ As will be observed below, the necessity, on the part of an

authority exercising quasi-judicial decision, to comply with the rules of natural justice, more particularly the audi alteram partem rule, is far from clear.²³⁸ Although the basis of this exception, more particularly the 'functional approach' is examined more fully below, at the risk of repetition it is necessary to refer to it at this stage. Despite a prudent judicial warning²³⁹ the Court saw fit to adopt the English functional approach in regard to the classification of administrative hearings, acts, decisions and proceedings.²⁴⁰ This means that administrative decisions, functions, etc., may be classified into a number of categories namely, legislative, ministerial, judicial, quasi-judicial and purely administrative. There would appear to be some confusion in South African administrative law regarding the difference between judicial and quasi-judicial decisions etc.,²⁴¹ and for this reason the terms will for these purposes be considered synonymous. A quasi-judicial (and therefore a judicial) administrative decision may be described as decision involving an enquiry into a factual situation and/or into the law involving those facts, the result of which may affect the rights of an individual.²⁴² A purely administrative decision or function is one based on the subjective discretion of an authority (the requirement of an enquiry is irrelevant to the exercise by the authority of its discretion). It has been suggested that a purely administrative decision etc., does not affect the rights of an individual.²⁴³ Some confusion too would appear to exist between the terms 'a purely administrative discretion, function' etc, and an 'absolute discretion, function' etc. For the purpose of the rules of the natural justice they may be regarded as being similar in effect, if not synonymous.²⁴⁴ The cases concerning the exception relating to a 'purely administrative' decision, refer pertinently to the right to be heard and not to the right to a fair and just trial. None the less it would appear that this exception concerns the rules of natural justice in the widest sense of the term except where the failure to comply with the rules of natural justice may be equated with mala fides or ulterior purpose. In such event the Court will intervene on these latter grounds.²⁴⁵

The fourth exception to a failure by an authority to comply with the rules of natural justice would occur where it could be shown that the aggrieved party suffered no prejudice.²⁴⁶ Nonetheless it is suggested by the writer that the failure to obtain a fair and just trial or the right to be heard

is in itself sufficient prejudice for the Court to intervene.

Further, where such conduct may be seen to prejudice or even be said to be calculated to prejudice the party concerned, the onus is upon the respondent to show that no prejudice occurred.²⁴⁷

3.3.1 The right to a fair and just trial.

Although the maxim nemo iudex in sua causa is often articulated as the basis of a fair and just trial, this may be misleading as a fair and just trial is something more than a hearing before an apparently fair and impartial tribunal.²⁴⁸ Thus, subject to the exceptions considered²⁴⁹, the Court may set aside a decision by an administrative authority or tribunal where a member of such authority:

- (i) is related by blood or affinity to one of the interested parties²⁵⁰;
- (ii) has a pecuniary interest either directly or indirectly²⁵¹;
- (iii) he is a witness to any material aspect of the matter²⁵²;
- (iv) he previously acted as prosecutor for the State in the matter²⁵³;
- (v) he instituted or caused the proceedings to be commenced²⁵⁴;
- (vi) he previously acted as counsel for one of the parties²⁵⁵;
- (vii) he acted in a judicial capacity in an earlier matter regarding the same material facts and cause of action, although the previous case concerned other parties - this is especially so if the judicial officer or other adjudicator in the earlier case commented on the guilt or other liability of one or more of the present parties²⁵⁶;

- (viii) He expressed his opinion on the merits of the case or the untruthfulness of one of the parties, either before or during the present proceedings.²⁵⁷ The holding of certain strong political or economic views, prior to his appointment to a tribunal, etc, which may militate in favour of a particular situation, is not per se sufficient grounds for the refusal of an adjudicator.²⁵⁸

There is a further exception which relates pertinently to the right of a fair and just trial, namely, the so-called doctrine of necessity. The doctrine may be described as the expedient 'watering down of the rule against bias'.²⁵⁹ The doctrine is applicable where it becomes necessary to appoint persons, who may otherwise be incompetent to act on account of bias, to membership of a board or tribunal. This situation could come about where no other suitably qualified person is available and the matter could otherwise not be proceeded with.²⁶⁰ A party raising the question of bias under these circumstances must show 'substantial injustice or substantial prejudice' before the offending decision will be set aside.²⁶¹

3.3.2 The right to be heard (or the audi alteram partem rule).

The right to be heard in one's defence is basic to the principles of justice.²⁶² In criminal proceedings before the ordinary courts such right is paramount. Not only is an accused entitled to be heard in his defence as of right, but subject to certain statutory exceptions his presence in Court during the whole trial is obligatory.²⁶³ Although there is no duty on a defendant in civil proceedings to defend or answer any claim he has the unequivocal right to do so. Any attempt to frustrate this right will be regarded as grossly improper and corrected on appeal or statutory review in terms of the Supreme Court Act 1959.²⁶⁴ On the other hand, the right of a party to be heard in administrative proceedings is an uncertain subject which, as indicated below, does not lend itself to a simple explanation. Before considering its application in administrative proceedings, the content of the rule will be examined.

a) The content of the audi alteram partem rule.

Unless a party is given notice of the impending matter the authority concerned cannot be said to have complied with the rule.²⁶⁵ The party concerned should be informed of the proposed action in sufficient detail to enable him to meet the case against him.²⁶⁶ While it is not necessary for the notice to be framed with the accuracy and formalities of a criminal charge,²⁶⁷ the affected party should be informed of the substance of the matter,²⁶⁸ particularly any allegations prejudicial to him.²⁶⁹ This latter requirement is of particular importance where the nature of the proposed action is of quasi-criminal nature, e.g. allegations of professional impropriety.²⁷⁰ If there is a limited period for the affected party to apply, he should be so informed. Where there is to be a hearing, the notice should set out clearly the time, date and venue of such enquiry.²⁷¹ The notice should give the parties concerned a reasonable time to prepare and submit any written representations or in the event of an oral hearing, to prepare themselves fully.²⁷²

The affected party may waive notice either expressly²⁷³ or, it is submitted, impliedly. Once notice has been given to a party, who fails or neglects to state his case, he cannot be heard to complain that the rule has not been complied with.²⁷⁴ Further, by acquiescing in the failure of an authority to comply with the rule a party may be seen to have waived his right thereunder.

Unless the enabling Act provides that an affected party may state his case orally, the latter has no right to insist on being heard in person.²⁷⁵ Subject to such party being afforded the opportunity of controverting any allegation or matter prejudicial to him or otherwise stating his case, the Court has held that written representations are sufficient compliance with the rule.²⁷⁶

Although the Court is not prepared to impose the procedure of an ordinary court of law upon an administrative authority, it has firmly ruled that where an oral hearing is permitted an affected party must be heard fully.²⁷⁷

Ancillary to its reluctance to impose judicial procedures upon an administrative authority, the Court has held that:

- (i) An affected party is not entitled to further particulars unless it is shown that he is prejudiced in the preparation and presentation of his case.²⁷⁸ On the other hand it has been held that, where the party should reasonably have anticipated that certain facts or aspects of a situation would be raised by the authority and he fails to present his case in regard thereto, there has been no breach of the audi alteram partem rule²⁷⁹.
- (ii) As with further particulars, a party is not entitled to demand full discovery of all documents.²⁸⁰ He is entitled only to such information so as to enable him to state his case.²⁸¹ Where such evidence is deemed to be prejudicial or detrimental to the interests of the State or to public policy, an affected party may not obtain discovery or particulars²⁸².
- (iii) Even under circumstances where a party may be heard orally it would appear that he does not enjoy the right to be present throughout the proceedings unless his absence is prejudicial to his presenting his case fully. Further, any person considered by the Court to be in the position of a litigant, such as a valuer in town valuation proceedings, should be present to give evidence²⁸³.
- (iv) The right to demand an inspection in loco would appear similar to a right to further particulars, viz. if a party is unable to state his case properly without an inspection, then such procedure should be afforded to him.²⁸⁴ It would appear that there is no objection against an authority holding an inspection in the absence of all interested parties²⁸⁵ but the latter should be apprised of any matter prejudicial to them which may have been ascertained at such

inspection.²⁸⁶ It would of course be highly irregular for an authority to conduct an inspection in the presence of one of the contending parties only, as it would be to permit a party to be present during its deliberations²⁸⁷.

(v) Although there is no absolute right to cross-examine witnesses²⁸⁸ there are circumstances where a failure to permit cross-examination would be a breach of the audi alteram partem rule and accordingly a reviewable irregularity. Such situation would occur where a witness may be considered a party to a dispute and a failure to test his evidence could be prejudicial to other interested parties, e.g. in the case of applicants for a licence who reciprocally oppose each other's application. Another example would be the refusal by the Valuation Board to permit cross-examination of a valuer²⁸⁹.

(vi) While there is Appellate Division authority that the right to be heard does not include the right to call witnesses,²⁹⁰ there are instances where the only manner in which a party may be heard in his defence properly or at all is through the testimony of witnesses. In proceedings before the Appellate Division concerning a departmental enquiry, the refusal by a tribunal to permit the calling of a material witness was considered by the Court to be '... a gross irregularity and a violation of a fundamental principle of justice'.²⁹¹ The question of the calling of witnesses relates also to a situation where an authority has information prejudicial to a party. As indicated elsewhere there is an obligation on the authority to disclose all such prejudicial information.²⁹² Where such information is material to the issue, and is not the result of common knowledge, e.g. where prejudicial information has been passed privately to the tribunal,²⁹³ it is incumbent on the authority to permit the calling of evidence if this is the only manner in which the affected party may controvert the allegations²⁹⁴.

- (vii) A party has no absolute right to address an authority at the termination of the hearing. If an affected party has been fully apprised of the case against him and has enjoyed the opportunity of stating his case, there would be little purpose in permitting him to address the authority unless the failure to do so may be prejudicial to his case.²⁹⁵ Two aspects essential to the content of the audi alteram partem rule, viz. the right to be represented by counsel and the furnishing of reasons for its decision by an authority, will be considered separately below.²⁹⁶

Finally, in so far as the proceedings of administrative authorities are concerned, although the Court has repeatedly held that it is not prepared to force ordinary judicial procedures on such bodies²⁹⁷ it has also repeatedly held that it will enforce ordinary rules of procedure and indeed the rules of evidence where the failure to do so by an authority results in a party not enjoying a full and fair hearing and the rights of presenting his case. The question was seen by Innes CJ in these terms:

"Clearly ... the strict rules of evidence were not intended to govern the proceedings of these courts. The enquiry must proceed on other lines; the question is not has a legal rule of evidence been broken, but has there been a fair hearing; has the enquiry been full and impartial or have the fundamental principles of justice been violated"²⁹⁸

b) The application of the audi alteram partem rule.

The right to be heard in administrative proceedings is a subject of some controversy. The text, which follows, is a summary of an article, by the writer, which is annexed below.²⁹⁹ The general rule is that any party whose rights may be affected by an administrative decision is entitled to be heard. The audi alteram partem rule was described by Rumpff JA in Publication Control Board v CNA Ltd.³⁰⁰ as follows:

'... It is ... firmly established in our law that when a statute gives judicial or quasi-judicial powers to affect prejudicially the rights of person or property,

there is a presumption, in the absence of an express provision or of a clear intention to the contrary, that the power so given is to be exercised in accordance with the fundamental principles of justice. One of these principles is that the person affected should be given an opportunity to defend himself or of being heard ...'

Apart from the question of waiver or of the acquiescence of a party to a failure of his right to be heard,³⁰¹ it would appear from this statement of law by Rumpff CJ that there is little room for controversy. None the less, there are no less than seven separate and distinct judicial approaches to the audi alteram partem rule in regard to administrative proceedings.

1. Every individual whose rights are prejudicially affected by an administrative act has the right to be heard unless it is clear that Parliament has excluded such right either expressly or by clear intention. Under very exceptional circumstances, e.g. a national emergency, the Court may find that a failure to comply with the rule is justifiable. The right to be heard may be considered a presumption in favour of the affected individual.³⁰²
2. No person has the right to be heard where the act complained of is of a 'purely administrative' nature or is the result of an authority exercising a 'purely administrative function with an unlimited discretion'.³⁰³
3. No person has the right to be heard where the rights he seeks to protect are considered by the court to be non-existent.³⁰⁴
4. No member of a community or group either jointly or severally has the right to be heard under circumstances where the whole group is prejudicially affected by an administrative decision.³⁰⁵

5. No person has the right to be heard where his rights are prejudicially affected in the interest of the community as a whole.³⁰⁶
6. No person has the right to be heard unless the administrative act complained of is of a 'quasi-judicial' nature.³⁰⁷
7. The audi alteram partem rule is not available to an affected individual as of right. Where such party seeks judicial relief on the ground that the relevant administrative authority has failed to comply with the rule, the Court will examine the legislative enactment in order to ascertain whether it was the intention of the legislature, either expressly or by implication, to include the provisions of the rule. Thus the right to be heard is seen as a privilege which may be afforded to an affected party by the legislature.³⁰⁸

Although the decisions are based on seven separate approaches, two of the major approaches warrant further comment. The first approach, i.e. every person whose rights are prejudicially affected by an administrative act is entitled to be heard³⁰⁹ and the seventh approach, viz. 'no person is entitled to be heard unless the court is satisfied that the legislature so intended'³¹⁰ are mutually exclusive. The fact that the Appellate Division has attempted unsuccessfully to reconcile these conflicting approaches³¹¹ rather than electing one or other, has brought about uncertainty and legal controversy.

The subject is further complicated by the judicial approach to the failure on the part of a voluntary association to comply with the audi alteram partem rule. In Turner v Jockey Club of South Africa³¹² the Appellate Division set aside a decision arrived at by the respondent in breach of the audi alteram partem rule. The Court, per Botha JA, equated the rules of natural justice with 'fundamental principles of fairness'.³¹³ The learned Judge of Appeal drew a dichotomy between voluntary associations and administrative authorities. He held that it is the duty of the former to act fairly,³¹⁴ while the obligation of the latter:

"... to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment."³¹⁵

Thus, Botha JA reiterated the basic ruling in the Defence and Aid Fund case³¹⁶ viz. that an affected party is entitled to a hearing only if the enabling Act has provided for such hearing, either expressly or by necessary implication.

c) The right to be represented by counsel in administrative proceedings.

Whether this subject should be considered under the rules of natural justice is questionable.³¹⁷ None the less it is convenient to consider the judicial approach thereto at this stage. The law on the subject is that no affected party has the right to be represented by counsel unless the enabling Act so provides or where the hearing, etc., may be considered of a judicial nature.³¹⁸ While under other circumstances an authority may permit a party to be represented, there is no obligation upon it to do so. The subject is controversial and it has been suggested that where an Act is silent as to legal representation, this should be permitted where the rights of a person may be affected and in cases where the decision may involve complicated aspects of law.³¹⁹

d) The right to be furnished with reasons for the decision.

As with the right to be represented by counsel, this controversial subject may be regarded as sui generis rather than falling under the rules of natural justice.³²⁰ There is no obligation upon an authority to furnish reasons for its decision unless the furnishing of reasons is required, expressly or impliedly, by the enabling Act.³²¹

Where an authority is expressly required to furnish reasons few problems arise. But where it is sought to establish an implied requirement, the question may present difficulties regarding interpretation.³²² While each case must be considered on its own merits, it would appear that when an affected party has the right of appeal stricto sensu he enjoys also the right to reasons for the decision.³²³

Furnishing reasons for a decision means the actual reasons upon which the authority has reached its decision.³²⁴ The mere reiteration of a conclusion or finding does not constitute reasons for a decision³²⁵ nor does an 'enumeration of all the details of a person's conduct' which led to the decision.³²⁶ Reasons must state the general effect of the findings in regard to the person's acts.³²⁷

The question of reasons becomes more complicated where the decision is based on privileged information received by the authority and which has not been communicated to the affected party. In Sachs v Minister of Justice³²⁸ De Waal JP, in the Court a quo stated:

'There must necessarily be a certain amount of overlapping between the two—information on the one hand and reasons on the other—from which it follows that the reasons will be full or not according to the nature of the information which, in the judgment of the Minister, can with safety be disclosed, or should not be disclosed. One can readily conceive of cases where the reasons would necessarily have to be very bald indeed if the Minister's fear of disclosure of facts were well founded and reasonable.'

Despite the rule regarding the disclosure of prejudicial allegations as set out in Loxton's case³²⁹ it would appear that the only obligation upon the authority under these circumstances is to act bona fide.³³⁰ A decision founded upon incorrect privileged information is not reviewable.³³¹ A minister or a state official may refuse to furnish reasons for his decision on the grounds of public policy or state security.³³² It would appear that the Court is bound by an objection on the part of the relevant minister on the grounds that the information is, in his opinion, detrimental to public policy or state security. An illuminating statement on the subject to that of Van Wyk J in Joyi v Minister of Bantu Administration:³³³

"The mere fact that a Judge, who has much less information before him than the Minister, cannot think of a possible reason why the disclosure of a particular item of information could be detrimental to public interest, does not mean that a proper reason could not exist: and consequently the inference is not justified that

the Minister was actuated by mala fides or failed to apply his mind properly to the matter. This demonstrates to what extent the Court is bound by a Minister's statement in matters of the present kind, and emphasises the great responsibility, and need for caution, on the Minister's part. It is hardly necessary to stress that information which could be of vital importance to a person, with a view to representations against authoritative action making serious inroads upon his liberty and welfare, ought not to be withheld from him without good cause. The Act in terms (sic) imposes upon the Minister the duty of making as full a disclosure as is compatible with the public interest: but from a practical point of view he is virtually the sole judge as to proper and conscientious performance of that duty."

Save where the reasons are privileged on account of being detrimental to public policy or state security, the Court may use the failure by an authority to furnish reasons to support an inference of mala fides, ulterior motive or the failure of the authority to have applied its mind.³³⁴ As unreasonableness per se is not a ground for judicial intervention, save where it is symptomatic of a recognised irregularity, the failure by an authority to furnish reasons where unreasonableness is alleged may be of material importance to the applicant's case.³³⁵ The following extract of the judgment by Colman J in Northwest Township Ltd v The Administrator Transvaal and Another³³⁶ is apposite:

"When the exercise of a statutory discretion, or the formation of an opinion in terms of a statutory duty to do so, is under attack, and the circumstances support the inference of mala fides, ulterior motive or failure by the official concerned to apply his mind as required by the statute, and the official has given no explanation of his decision, one cannot defeat the inference by conjuring up some fanciful and fallacious chain of reasoning and saying that the official might have reasons thus ... Conscious though I am of the limited jurisdiction which this Court has in a matter of this kind, I am driven to the view that interference is justified and required. In my judgment the unexplained conclusion by the first respondent that the appellant's real rights were either valueless or had a value which was not materially diminished by the removal of the

restriction, was so gravely erroneous as to be explicable only on the footing that the first respondent (no doubt a very busy official) misconceived the nature of his duty or fell into some error or misconception of law or fact so fundamental that he cannot be said to have applied his mind to the real problem assigned to him by the Legislature."³³⁷

Sight must not be lost of the fact that the failure by the authority to furnish reasons is not an irregularity per se but merely the means of corroborating or supporting an alleged irregularity.

Finally an authority which is obliged to furnish reasons and which fails or refuses to do so, may be compelled to furnish same by an order of court. It is unlikely that the Court will initially set aside the decision. Subject to the merits of the case, where the Court has seen fit to order the furnishing of reasons, it may set aside the decision should the respondent fail to comply with the order of Court.³³⁸

3.4 Irregularities caused by an abuse of discretion on the part of the authority (other than irregularities classified under 3.1, 3.2 and 3.3 above).

Situations occur in administrative proceedings that cannot be classified under one or more of the headings considered above. On account of their very nature it is convenient to consider them as sui generis. This is particularly so in regard to:

- (i) decisions based on an error or mistake of fact;
- (ii) decisions founded on an error or mistake of law;
- (iii) unreasonable decisions.

At the outset it must be emphasized that these three situations are not necessarily regarded by the Court as reviewable irregularities. In fact, the judicial approach would indicate that it is more the exception than the rule to regard such decisions as reviewable, that is, unless the decision which is based upon a error of fact or of law or is unreasonable may be said to be symptomatic of a recognised irregularity.³³⁹

Before considering each of these situations it is apposite to reiterate an essential feature of the Court's review jurisdiction, namely, that while an appeal is concerned with the merits of a decision, i.e. the substantive correctness of the decision based upon the facts and the law relevant to those facts, review is concerned only with an irregularity in the proceedings.³⁴⁰ In other words the essential question in review proceedings is not the correctness of the decision under review, but its validity and as stated by Potgieter JA in Changuion and Another v Secretary for the Interior:³⁴¹

"Inasmuch as the application to the Court a quo was not an appeal from the Secretary's decision but a review of his decision, the Court a quo was not and this Court is not called upon to adjudicate on the correctness of the classification but merely on the validity thereof."³⁴²
(my italics)

It is against this background that the three situations will be examined.

3.4.1 Decisions based on an error or mistake of fact.

For the reasons indicated above a decision founded on an error or mistake of fact is not reviewable.³⁴³ If the decision which is based on a mistake of fact is grossly unreasonable, so as to be explicable only as the result of arbitrariness or a failure on the part of the authority to apply its mind or some other recognised irregularity, it will be set aside by the Court.³⁴⁴ But on the other hand as stated by Nestadt, J in Carr v Jockey Club of South Africa:³⁴⁵

"... The Court will not interfere on review merely because the decision was unwise or one which the Court itself would not have come to".³⁴⁶

Subject to the authority bona fide applying its mind to the matter before it, it may be said to have the privilege to err within its jurisdiction.³⁴⁷

3.4.2 Decisions founded upon an error or mistake of law.

The general rule regarding a decision founded upon a mistake of law was established by the Appellate Division in Doyle v Shenker & Co Ltd.³⁴⁸ The Court, per Innes CJ, held that a (mere) mistake of law in adjudicating a suit in respect of which the tribunal has jurisdiction is not a reviewable irregularity.³⁴⁹ The facts in this case were that a magistrate in his capacity as adjudicator in terms of the Workman's Compensation Act 1905 dismissed the claim of the applicant. In arriving at his decision the magistrate had overlooked or misconstrued a section of the Act. As no appeal against a decision was permitted in terms of Act, the applicant, relying upon the error of law, sought to have the decision set aside on review. The essence of his judgment is contained in the following statement by the learned Chief Justice:

"The position, if the section means what the applicant contends, is that the magistrate either honestly misinterpreted or completely overlooked it. In either event it would not, I am afraid, be the first occasion on which a court of law has misread a statutory provision or overlooked one not brought to its notice at the trial. Whichever supposition were the correct one, the result would be (still assuming the correctness of the applicant's interpretation) an unfortunate error of law which, but for the special prohibition of the statute would afford good ground for an appeal. But there would be no gross irregularity in the proceedings, and therefore no justification for a review".³⁵⁰
(my italics)

The reasoning by the learned Judge, more particularly that if an error of law was acknowledged as a reviewable irregularity the distinction between appeal and review procedure 'so carefully drawn by statute and observed in practice would largely disappear'³⁵¹ is, as submitted below, not convincing.³⁵² None the less the general rule on this point is that, subject to the authority applying its mind to the particular question of law, an erroneous decision in regard thereto is not a reviewable irregularity. The situation is further complicated on account of an administrative authority

not being obliged to follow a Supreme Court decision in point, save one which defines the nature and extent of its jurisdiction.^{352a}

In a number of subsequent cases it was pointed out by the Court that an error of law is not regarded as a reviewable irregularity where such error relates to the merits and results in an incorrect or even a bad decision, in the sense that the authority 'has decided the case fairly but has gone wrong on the law'.³⁵³ On the other hand, the following errors of law have been regarded as reviewable irregularities:

- a) where the authority has misunderstood or has deliberately ignored or neglected an express provision of a statute;³⁵⁴
- b) where the authority has misunderstood or misconstrued the extent of its jurisdiction;³⁵⁵
- c) where the authority has failed to appreciate the nature of its discretion through misreading the Act which confers his discretion.³⁵⁶
- d) where the authority has misunderstood the nature of the inquiry or of its duties in connection therewith, bringing about a situation that the affected party has not had a fair trial or has been prevented from having his case 'fully and fairly determined';³⁵⁷
- e) where the authority has applied the provision of a statute which is inapplicable to the issues before it.³⁵⁸

3.4.3 Unreasonableness per se as a ground for judicial intervention.

An unreasonable administrative decision will not be set aside by the Court merely on account of unreasonableness per se.³⁵⁹ The locus classicus on the subject is Union Government v Union Steel Corporation (South Africa) Ltd³⁶⁰ in which case the Court per Stratford JA established what may be

referred to as the symptomatic unreasonable rule³⁶¹ viz. an administrative decision is reviewable on the grounds of unreasonableness only where such unreasonableness is so gross as to be symptomatic of a recognised judicial irregularity. This rule placed the Court in the position that it was obliged to examine three basic factors, first, the enabling Act; secondly, the facts leading up to the decision; and, thirdly, the (grossly unreasonable) decision in relation to the enabling Act and the facts. Once having examined these factors fully, it was necessary for the Court to decide on a balance of probabilities whether the (grossly unreasonable) decision warranted the inference that the authority had committed an irregularity. The decisive factor was the relationship between the facts and the decision. In its original form the rule enabled the Court to 'lift the veil covering the exercise of discretion'. In other words the Court was able, to a limited extent, to ascertain the reason or failure thereof for a decision. Effectively the rule confined 'quasi-appellate' powers on the Court.

The rule was decisively modified by the Appellate Division in National Transport Commission v Chetty's Motor Transport (Pty.) Ltd.³⁶² The Court, per Holmes JA, restricted the operation of the rule by modifying it in two respects. First, he raised the degree of gross unreasonableness required before the Court may intervene. The learned Judge of Appeal held that the offending decision was to be 'grossly unreasonable to so striking a degree...'³⁶³ before the Court may intervene. Secondly, he introduced a presumption of due performance in favour of administrative authorities. 'The degree of proof' he held 'is a preponderance of probability; but this is less easily envisaged in that one does not readily impute dereliction of duty to a responsible body'.³⁶⁴ As a result of this decision the symptomatic unreasonableness rule in its modified form may be expressed in these terms; that the Court will intervene only in cases where a decision which is so grossly unreasonable as to be disturbing, warrants no inference other than that the authority has committed a recognised irregularity. The modification of the rule owes nothing to judicial precedent or any other recognised source of law. It has been described elsewhere as an example of individual law-making by a forceful judge who changed the shape of our law in a number of areas.³⁶⁵

Subsequently an attempt by Jansen JA in Theron en Andere v Wellington Ring van die NG. Sendingkerk in Suid-Afrika³⁶⁶ to have reasonableness per se recognised as a separate irregularity proved abortive.³⁶⁷ While morally sound there is little to commend this decision legally.³⁶⁸ In his dissenting judgment Botha JA could say of the majority judgment:

"Indien stare decisis nog betekenis het, kan daar geen weg wees waarlangs blote onredelikheid in beslissings van kwasi-judisiële liggame tot hersieningsgrond verhef kan word nie ..."³⁶⁹

The decision by Jansen JA regarding the unreasonableness issue in Theron's case carries little weight as there was parity of judicial opinions in regard thereto.³⁷⁰ Further, in Goldberg and Others v Minister of Prisons³⁷¹ where the subject of unreasonableness was again raised, the Appellate Division followed the modified symptomatic unreasonableness rule as expressed in Chetty's case.³⁷² The majority of the Court in this latter case did not mention or even refer to the decision in Theron's case. The present position is that the modified symptomatic unreasonableness rule remains the law, i.e. 'the Court will interfere only in cases where the decision which is so grossly unreasonable as to be disturbing, warrants no inference other than the authority has committed a recognised irregularity.'^{372a}

Finally, on the subject of unreasonableness mention should be made of the judicial approach to unreasonable delegated legislation. Judicial review of delegated legislation is sui generis and will be considered separately below.³⁷³ Nonetheless the judicial approach to unreasonable legislation is relevant, at this stage, on account of certain decisions, particularly Sinovich v Hercules Municipal Council³⁷⁴, being cited in support of the view that unreasonableness per se has been or should be recognised by the Court as a separate ground for the review of administrative action.³⁷⁵ The judicial approach to delegated legislation generally, and unreasonable delegated legislation specifically, should not be equated with the judicial approach to administrative action either generally or specifically. A legislative function is quite distinct from discretionary administrative functions or actions. It is subject to a number of different rules. In

regard to unreasonable delegated legislation the Court has adopted the special meanings attributed to the term 'unreasonable' as defined in the well known English case of Kruse v Johnson,³⁷⁶ more particularly, delegated legislation which is "a) partial or unequal; b) manifestly unjust; c) discloses bad faith; and d) involves oppressive or gratuitous interference with the rights of those subject to them which are not justified in the minds of reasonable men." The use of cases adopting the Kruse v Johnson approach in support of unreasonableness per se as a separate ground of review only confuses the issue and may have the 'backlash' of limiting the review of unreasonable alleged legislation rather than extending the review of unreasonable administrative action. In any event in Sinovich v Hercules Municipal Council³⁷⁷ Schreiner JA mero motu raised the dichotomy between the review of delegated legislation on the one hand and the review of discretionary administrative decisions on the other.

"... by-laws, presumably because they lay down rules of conduct and so modify the law, are not treated in the same way as discretionary decisions of public officers. The power of the court to declare a by-law invalid is wider than its power to go behind the exercise of a discretion by an official. In the latter class of case once the court is satisfied that a discretion has been given to the official his exercise of it stands, unless it is shown that he has not applied his mind to the question or has acted from a wrong motive. But that is not the position in regard to by-laws. They are invalid if they are unreasonable, in the specialised sense, and they can only be upheld, despite their unreasonableness, if the enabling provision in effect says they shall nevertheless be good."³⁷⁸

3.5 Grounds for the review of subordinate legislation.

All legislation in South Africa, other than that passed by Parliament, is subordinate legislation. Subordinate legislation is either original, i.e. legislation passed by an authority which does not legislate as an agent or delegate of a higher legislative authority, e.g. provincial councils in their legislative function,³⁸⁰ or delegated. Delegated legislation is passed by an authority acting as an agent for a higher legislative authority and duly authorised thereby to enact enabling legislation, e.g. regula-

tions made by a Minister in terms of an enabling statute, a proclamation by the State President in terms of an enabling Act, by-laws passed by a municipality in terms of an Ordinance, etc.

Subordinate legislation is subject to the testing powers of the Court. In other words subordinate legislation is subject to the inherent review jurisdiction of the Court. All subordinate legislation may be declared invalid on the following grounds:

- (i) Where such legislation is ultra vires the enabling Act. A subordinate legislative authority may not exceed the legislative powers conferred upon it. In R. v Williams³⁸¹ Kotze J stated the law in the following simple terms:

"There is no clearer rule of law than that the exercise of a delegated authority must conform to the terms of the instrument or commission conferring such authority."

Delegated legislation may be ultra vires for the same reasons as discretionary administrative decision. Thus, it may be ultra vires, ratione personae,³⁸² e.g. it is ultra vires for an authority upon which delegated legislative powers have been conferred to delegate such powers further, unless this has been specifically authorised by the enabling Act;³⁸³ ratione loci,³⁸⁴ e.g. a municipality does not have the power to tax property outside its territorial boundaries;³⁸⁵ ratione temporis,³⁸⁶ e.g. an authority upon whom legislative powers has been conferred may not legislate retrospectively;³⁸⁷ ratione materiae i.e. an act which concerns the extent of power conferred.³⁸⁸ Thus an authority with delegated legislative powers may not confer jurisdiction upon an ordinary court of law nor may it oust the jurisdiction of such court by subordinate legislation nor may it impose duties or otherwise interfere with the jurisdiction of such court³⁸⁹.

- (ii) Where such subordinate legislation is repugnant to an Act of Parliament.³⁹⁰ This rule applies to all subordinate legis-

lation including provincial ordinances³⁹¹ notwithstanding the latter being regarded as statutes and not delegated legislation.³⁹² Unless specifically authorised by statute subordinate legislation which is repugnant to the common law, or which interferes with common law or other vested rights of an individual, will be struck down by the Court³⁹³.

(iii) Where the necessary formalities for the proper passing of the legislation has not been complied with. Unless the necessary formalities for the due and proper making and passing of subordinate legislation are complied with, any such purported legislation is valid. The following formal defects in subordinate lawmaking will render the legislation invalid:

(a) a failure to comply with a condition precedent to such legislation or the unlawful formulation or drafting of legislation;³⁹⁴

(b) a failure to obtain the required assent of the State President,³⁹⁵ a Provincial Administrator³⁹⁶ or another authority³⁹⁷

(c) a failure in the promulgation of subordinate legislation.³⁹⁸

(iv) Where the subordinate legislation is vague and uncertain. The law relating to vague and uncertain administrative decisions is, for all practical purposes, similar to that relating to vague and uncertain subordinate legislation.³⁹⁹ The basic rule is that vague and uncertain subordinate legislation will be set aside by the Court.⁴⁰⁰ The criterion by which the clarity of subordinate legislation may be tested is that formulated by Broome J in R. v Jopp and Another⁴⁰¹ and approved by the Appellate Division, and which for the sake of convenience will be repeated:

"... the Court must first construe the bye-law or regulation applying the usual canons of construction ... Having ascertained the meaning, the Court must then ask itself whether the bye-law or regulation, so construed, indicates with reasonable certainty to those who are bound by it the act which is enjoined or prohibited. If it does, it is good; if it does not, it is bad; that is the end of the matter ... the test is whether a reasonably precise meaning is ascertainable."⁴⁰²

The judicial approach to vagueness and uncertainty concerning administrative decisions has been considered above.⁴⁰³ There is little doubt that the (judicial) approach to administrative decisions on the one hand and subordinate legislation on the other is fairly similar.

There is one further ground of judicial review which is applicable only to delegated, but not original subordinate, legislation⁴⁰⁴ more particularly unreasonableness in the special meaning attributed to the term in Kruse v Johnson.⁴⁰⁵ Original subordinate legislation, on account of being considered as a statute and not delegated legislation, is not subject to the test of unreasonableness.⁴⁰⁶

The Court has struck down delegated legislation which it has found unreasonable in terms of the special meanings attributed to the term in Kruse v Johnson,⁴⁰⁷ more particularly delegated legislation which:

- (i) is partial and unequal in the sense of racial discrimination⁴⁰⁸ or in a more general sense⁴⁰⁹;
- (ii) is manifestly unjust⁴¹⁰;
- (iii) discloses bad faith⁴¹¹;
- (iv) involves such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.⁴¹²

Annexure 3

Reproduction of the article

"The application of the audi alteram partem rule
in South African Administrative Law"

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Professor A D J van Rensburg (see note 262)

The application of the *audi alteram partem* rule in South African administrative law

(An analysis of the leading appellate division decisions)

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OPSOMMING

Ons howe het al verwys na die *audi alteram partem*-reël, of die reg om in 'n mens se eie verdediging aangehoor te word, as "heilig" en daar is erken dat dit gebaseer is op "natuurlike billikheid" of "fundamentele regverdigheid." Aanmerkings soos hierdie deur die hoogste regsprekende organe veronderstel dat daar volledig en vryelik aan die reël gehoor gegee word, behalwe onder buitengewone omstandighede. Dit is stellig waar dat geen persoon in Suid-Afrika deur die gewone howe, sowel straf- as burgerlike howe, onaangehoor veroordeel mag word nie. Tog is dit ook waar dat die geregtelike benadering tot die *audi alteram partem*-reël op die gebied van die administratiefreg, waar statutêre owerhede die bevoegdheid het om die lewe en vryheid van mense onherstelbaar te beïnvloed, sig nie leen tot so 'n eenvoudige aanwending nie. 'n Ontleding van die toonaangewende uitsprake van die appèlhof bring aan die lig dat die hof die toepassing van die reël op nie minder nie as sewe verskillende wyses regverdig. Sommige van hierdie regverdigings of benaderings bots, en sluit mekaar uit. Nóg tans het die hof dit tot dusver nie goedgevind om hierdie botsende benaderings te verwerp of te kritiseer nie. Inteendeel, daar is onsuksesvolle pogings aangewend om die meer ernstig botsende benaderings met mekaar te versoen, en om 'n sintese te bereik. Die gevolg, soos hieronder aangetoon sal word, is 'n dubbelsinnige en verwarrende stel regsreëls.

Skrywer bepleit ten slotte dat die howe die beginsel handhaaf dat elke persoon wie se regte deur administratiewe optrede geraak word of kan word, die absolute reg het om aangehoor te word, tensy hierdie reg hom deur die ondubbelsinnige geskrewe bevel van die parlement ontsê word.

1 INTRODUCTION

Whether the *audi alteram partem* rule¹ or "the right of an individual to be heard in his own defence" owes its origin to divine clemency² or otherwise, there is little doubt that today the rule is of general application in all

¹ For a detailed analysis of the content of the Rule see Corder "The Content of the Audi Alteram Partem Rule in South African Administrative Law" 1980 *THRHR* 156.

² In *R v Chancellor, Masters and Scholars of the University of Cambridge* (1723) 1 *STR* 557 567 where the chief justice, referring to the Book of Genesis, stated "... even God himself did not pass sentence upon Adam before he was called upon to make his defence..." (see *The English Reports* vol 93, Kings Bench 698 704); cf Heuston *Essay in Constitutional Law* 2ed 115.

civilised states. In South Africa the rule has been referred to as "sacred"³ and its basis acknowledged as being founded on "natural justice or fundamental fairness."^{3a} Comments such as these, from the highest judicial source in the country, presuppose a full and free compliance with the rule, save under exceptional circumstances.⁴ Certainly before the ordinary courts, criminal or civil, no person in South Africa may be condemned unheard.⁵ Yet in the field of administrative law where statutory authorities have the power to affect the lives and liberties of individuals irreparably, the judicial approach to the right of persons to be heard by such authorities, does not lend itself to such simple application.⁶ Apart from cases dealing with the right of an affected party to waive the *audi alteram partem* rule either expressly or by his actions and conduct^{7a} (or his acquiescence in the failure of an authority to afford him the right to be heard?), an analysis of the leading appellate division decisions indicates that the court has found justification for no fewer than seven different approaches to the application of the rule. Some of these judicial approaches are mutually exclusive. None the less, the court has seen fit not to overrule or criticise conflicting approaches. It has sought unsuccessfully to synthesise the more mutually destructive approaches. The result is, as will be observed below, an equivocal and confusing set of legal rules.

Before the relevant decisions are analysed it would not be inappropriate to consider briefly judicial review of administrative action. The supreme court has confirmed that it enjoys an inherent jurisdiction whereby it may supervise or review the exercise of power by administrative authorities.⁸ Such review jurisdiction is restricted to ensuring that, in the course of its proceedings, an administrative authority will not commit a judicially recognised irregularity or illegality.⁹ As a result of strict compliance with this approach, referred to as the *irregularity doctrine*, a list of judicially recognised irregularities has been established.¹⁰ The recognised irregularities may be classified under three headings:

i. irregularities that relate to the jurisdiction of the authority, for example a decision that is beyond the jurisdiction of the authority (an *ultra vires* decision);

³ *Sachs v Minister of Justice* 1934 AD 11 38.

^{3a} *Winter v Administrator-in-Executive Committee* 1973 1 SA 873 (A) 890H.

⁴ In *Minister of Interior v Bechler & Others* 1948 3 SA 409 (A) 542 it was held that "... very exceptionally, the requirements of natural justice might be departed from."

⁵ s 105 of the Criminal Procedure Act 51 of 1977; *Union Government v Mack* 1917 AD 731 739.

⁶ *Wiechers Administratiefreg* (1973) 225 *et seq*; Dean "Whither the Constitution?" 1976 *THIR* 266 279 *et seq*.

^{7a} *Marlin v Durban Turf Club* 1942 AD 112 128.

⁷ LA Rose-Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 157-158.

⁸ *Johannesburg Consolidated Investment Corporation v Johannesburg Municipality* 1903 TS 111 114-115; *Klipriver Licensing Board v Ebrahim* 1911 AD 458 463-464; *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 309 *et seq*; *Harnaker v Minister of Interior* 1965 1 SA 372 (C) 377.

⁹ *Shidiack v Union Government* 1912 AD 575 582-583; *National Transport Commission v Chetty's Motor Transport Co* 1972 3 SA 726 (A) 735.

¹⁰ *Harnaker v Minister of Interior* (*supra*) 377G.

ii an irregularity that offends the rules of natural justice, for example a failure by the authority to afford an affected party the right to be heard (within the judicial criteria considered below);

iii an irregularity resulting from an abuse of the power conferred by statute and/or of the common law (save as set out in (ii) above). This will include such irregularities as *mala fides*, ulterior purpose *et cetera* on the part of the authority.

Although the review jurisdiction of the court may be invoked through a number of procedures, for example declaration of rights, interdict *et cetera*, the most usual method is by way of common law review. An applicant instituting review proceedings must proceed by way of motion.¹¹ This procedure places a heavy burden on the applicant, particularly where he relies on circumstantial evidence.¹² In regard to whether a party has had the opportunity of being heard, proof of the factual situation in affidavit form would appear to present few problems. The difficulty facing an applicant under these circumstances is not of an evidential nature. Difficulties arise from the mutually destructive and often timid approaches to the *audi alteram partem* rule by the court. Any inconsistent or inequitable approach by the court to an important judicially recognised irregularity is critical, particularly when it is considered that the only relief that may be afforded an aggrieved individual is by virtue of the review jurisdiction of the court.

2 THE VARIOUS JUDICIAL APPROACHES TO THE *AUDI ALTERAM PARTEM* RULE

The major decisions that will be considered below span a twenty-one year period from 1954 to 1974. The decisions are all of the appellate division. The various judicial approaches will initially be found in the following four cases, *viz.*:

- i *R v Ngwevela* 1954 1 SA 123 (A);
- ii *Laubscher v Native Commissioner, Piet Retief* 1958 1 SA 546 (A);
- iii *Pretoria Municipal Council v Modimola* 1966 3 SA 250 (A); and
- iv *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A).

These cases will be analysed separately and, where appropriate, subsequent appellate division decisions will be referred to.

2 1 *R v Ngwevela* 1954 1 SA 123 (A)

The facts:

- i In terms of section 9 of the Suppression of Communism Act 44 of 1950 (presently known as the Internal Security Act), an individual may be served with a notice issued by the Minister of Justice, prohibiting him from

¹¹ Rule 53 of the Uniform Rules of Court.

¹² *Johannesburg Local Road Transportation Board v David Morton Transport Ltd* 1976 1 SA 887 895A-G.

attending any gathering of persons for a period stipulated in the notice (a banning order).

ii The act (more particularly section 11 (h)) provides that an individual failing to comply with the terms of a banning order is guilty of an offence and liable on conviction to a penalty in terms of the act.

iii The appellant Ngwevela, having been served with a banning order in terms of the act, attended a gathering in contravention thereof. He was accordingly charged before the magistrate's court and duly convicted. His appeal to the Cape provincial division was unsuccessful. With leave of that court he appealed to the appellate division.

iv Ngwevela appealed *inter alia* on the ground that before the minister exercised his banning powers, he, Ngwevela, as an affected party should have been given an opportunity of being heard in regard thereto. It was common cause that Ngwevela had not had an opportunity of being heard before the banning order was served on him.

The decision:

The appeal was upheld on the ground that the *audi alteram partem* rule had not been complied with.

The reasoning:

It was reasoned that in the cases where a statute empowers an authority to give a decision prejudicially affecting the property or liberty of an individual, such individual has the right to be heard before such action is taken against him, unless it is clear that parliament has expressly or by necessary implication excluded that right or that there are exceptional circumstances which would justify the court's not giving effect to the rule.¹³

Comment:

The five judges of appeal considering this case were unanimous in their decision. The court considered the possibility of a national emergency which may justify a failure to comply with the right to be heard. Centlivres CJ supported this reservation by reference to the English decision of *De Verteuil v Knaggs*¹⁴ in which Lord Parmoor held that "... a decision may have to be given on an emergency, when promptitude is of great importance; or there might be obstructive conduct on the part of the person affected."

Despite the subsequent decisions considered below,¹⁵ in 1970 in the case of *Publications Control Board v Central News Agency*¹⁶ Rumpff JA, while giving the unanimous decision of the court, expressed the law in regard to the *audi alteram partem* rule in the following terms:

¹³ Ngwevela's case 127, 129, 131 and 133.

¹⁴ 1918 AC 557-560-561.

¹⁵ *Laubscher v Native Commissioner, Piet Retief* 1958 1 SA 546 (A); *Pretoria City Council v Modumola* 1966 3 SA 250 (A); *S v Moroka* 1969 2 SA 394 (A); *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A) all of which are considered in this paper.

¹⁶ 1970 3 SA 479 (A) 488H-489A. Italics supplied.

"It is, of course, firmly established in our law that when a statute gives judicial or quasi-judicial powers to affect prejudicially the rights of person or property, *there is a presumption*, in the absence of an express provision or of a clear intention to the contrary, *that the power so given is to be exercised in accordance with the fundamental principles of justice*. One of the principles is that the person affected should be given an opportunity to defend himself or of being heard . . ."

This statement leaves little doubt as to the law. Rumpff JA considered the right to be heard as embodied in a presumption of law in favour of an affected individual, rebuttable only by the express provision or by the clear intention of the legislature. Citing *Ngwevela's* case with approval, Rumpff JA disagreed with the wording in the earlier case regarding the implied exclusion of the rule: In *Ngwevela's* case the court held that the rule was to be complied with unless parliament expressly or by necessary implication excluded its operation.¹⁷ The judge of appeal in the *Publications Control Board* case stated that before the rule could be excluded the court must find that this was the *clear intention* of the legislature and not merely the *necessary implication*.¹⁸

Referring again to the presumption the judge held:

"One begins with a presumption that the kind of statute referred to impliedly enacts that the *audi alteram partem* rule is to be observed, and because there is a presumption of an implied enactment the implication will stand unless the clear intention of Parliament negatives and excludes the implication . . ."¹⁹

The decision in the *Ngwevela* case as amplified by Rumpff JA in the *Publications Control Board* case may be considered as the first approach to the *audi alteram partem* rule and may be described as follows:

Every individual whose rights are affected by an administrative decision has the right to be heard unless it is clear that the legislature has excluded such right either expressly or that it clearly intended such exclusion. Under exceptional circumstances, for example a national emergency, the court may find that the circumstances of the particular case justified a failure in complying with the rule.

This first approach may be considered the judicial high water mark regarding the subject.

2 2 Laubscher v Native Commissioner, Piet Retief 1958 1 SA 546 (A)

The facts:

i In terms of the Native Trust and Land Act 18 of 1936 (as amended) no person had the right to enter a native trust area without the written consent of the person acting under the authority of the trustee. In the case under consideration the official authorised to give such written consent was the respondent, the native commissioner of Piet Retief.

ii Laubscher, an attorney, applied for written permission to enter a trust area in order to consult his client, a local chief. Permission was refused by the native commissioner.

¹⁷ 127F.

¹⁸ 489B-D; cf *Minister van Naturellesake v Mohnakgotla* 1959 3 SA 517 (A) 521.

¹⁹ 489C-D.

iii Laubscher applied unsuccessfully to the supreme court (the Transvaal provincial division) for relief. He thereupon appealed to the appellate division.

iv The gravamen of his complaint was that the respondent had not afforded him an opportunity of being heard before refusing his application to enter the trust property for the purposes of carrying out his lawful profession.

The decision:

The appeal was dismissed on the ground that there was no obligation on the part of the native commissioner to give Laubscher a hearing.

The reasoning:

Although the decision was unanimous, two separate and distinct *rationes decidendi* appear in the three judgments handed down.

The first, per Schreiner JA, may be considered a corollary to the first judicial approach as contained in *Ngwenela's* case. He ruled that the applicant was not entitled to a hearing, as he enjoyed no antecedent right to enter the trust land. The refusal by the native commissioner did not prejudicially affect his property or liberty, nor did the refusal affect any legal right he already held.²⁰ The judge stated that trust land should not be equated with private property and that the duty of the native commissioner was only to consider the application.²¹

The second judgment is that of Hall AJA. This judge, despite an earlier judicial caution by Schreiner JA in *Pretoria North Town Council v Al Electric Ice Cream Factory (Pty) Ltd*²² against the adoption of the functional approach, based his ruling on the notoriously untenable functional classification.²³ He found that:

"... where an official is required by Statute to exercise a purely administrative discretion, he is under no obligation whatsoever to acquaint an applicant for permission with information upon which that decision may have been based."²⁴

The third judgment handed down, that of Reynolds AJA, endeavours to straddle the judgments of Schreiner JA and Hall AJA and requires no further comment. Both the two other judges, Fagan CJ and Steyn JA concurred in the judgment of Schreiner JA.

Comment:

According to the rules of *stare decisis* it follows that the reasoning of Schreiner JA should have constituted the basis of any future decision on the point.²⁵

²⁰ 549F-G.

²¹ 549G.

²² 1953 3 SA 1 (A) 11.

²³ Robson *Justice and Administrative Law* (1951) 424 *et seq*; Street "Quasi-Judicial Acts and the Maxim Audi Alteram Partem" 1967 *SAIJ* 386; Wiechers *Administratiefreg* 127 *et seq*.

²⁴ 554H.

²⁵ Kahn "Ratio Decidendi and Divided Courts" 1955 *SAIJ* 6.

The functional approach with its trichotomy of administrative functions viz "judicial," "quasi-judicial" and "purely administrative" classifications owes its origin to the conceptional period of English administrative law. The place of this approach in South African law is doubtful. There was absolutely no reason for its adoption into South African law. Unfortunately neither space nor time permits any real criticism of the approach although further comment will be made in regard to it when the decision in *South African Defence and Aid Fund v Minister of Justice*²⁶ is considered below.

En passant Schreiner JA expressed the doubtful view that the value of the *audi alteram partem* rule would be lessened if it were applied outside its proper limits.²⁷ Irrespective of the correctness of this statement, subsequent courts, as will be observed below, used the statement as authority for further restricting the application of the rule.²⁸

Both the approaches adopted in *Laubscher's* case were used in *Administrateur van Suidwes-Afrika v Pieters*.²⁹ In terms of the existing law no foreign non-white may enter the territory of South West Africa without the necessary authority of the administrator-in-executive committee. Pieters, a non-white South African and qualified attorney, wished to reside and practise in South West Africa. He sought the necessary consent, which was refused without his having had the opportunity of being heard.

A South African attorney has the almost automatic right of admission as an attorney of the high court of South West Africa. Admission as an attorney entitled him to practise.

Pieters successfully applied to the high court of South West Africa for relief. His case was *inter alia* that he had not been afforded an opportunity of being heard. The appellate division reversed the decision of the court *a quo*. In regard to the *audi alteram partem* rule issue it based its decision on the two approaches found in *Laubscher's* case. Regarding the dichotomy of opinion in that case, the appellate division relied on both lines of reasoning. First, it found that Pieters had no existing rights that required protection³⁰ and, secondly, it found that the executive committee, in considering the application, exercised a "purely administrative" function with unlimited discretion.³¹

The finding that Pieters had no existing rights is difficult to comprehend. Clearly he had a right to practise as an attorney in the territory. This aspect does not appear to have been considered by the court. The facts in *Pieters's* case cannot be equated with those in *Laubscher's* case. Laubscher wished to consult with a client on the trust property. There was no reason for his not consulting with his client elsewhere. Pieters on the other hand had the right to practise in the territory. He had the further fundamental right to change his place of practice and residence.

²⁶ 1967 1 SA 263 (A).

²⁷ 549C.

²⁸ *Modimola's* case 262H; *S v Moroka* 398G.

²⁹ 1973 1 SA 850 (A).

³⁰ 861.

³¹ 861F.

The appellate division had occasion to refer to both *Laubscher's* case and *Pieters's* case in *Oberholzer v Padraad van Outjo*.³² The facts in that case were that one C made application to the respondent board for the closing of a private road on her property. The applicant, who lawfully used the road, lodged an objection against its closure with the respondent. The applicant received no notice of the respondent's meeting when the matter was to be considered and accordingly did not have the opportunity of being heard. The respondent, after hearing oral evidence by C, granted her application. The applicant instituted review proceedings and unsuccessfully sought to have the respondent's decision set aside before the court *a quo*.³³ In that court Hoexter J found that as the function exercised by the respondent was "purely administrative," there was accordingly no obligation on the part of the respondent to comply with the *audi alteram partem* rule. The judge cited both *Laubscher's* case and *Pieters's* case as authority for his decision. The appellate division, per Rumpff CJ, upheld an appeal by the applicant. The chief justice found that neither *Laubscher* nor *Pieters* in the two earlier cases enjoyed any right to enter the trust property (in the case of *Laubscher*) or South West Africa (in the case of *Pieters*). *Oberholzer's* case may be distinguished in that he was lawfully entitled to the use of the road on C's property.³⁴ He further found that certain issues resulting from the closure of a road may arise, which may be resolved only by the hearing of evidence.³⁵ Regarding the finding by the court *a quo* that the respondent's function was "purely administrative" and therefore that no hearing was necessary, Rumpff CJ adopted an approach similar to that taken by Schreiner JA in *Pretoria North Town Council v A1 Electric Ice Cream Factory (Pty) Ltd*.³⁶ While the Chief Justice did not question the rule that an authority performing a "purely administrative" function is under no obligation to comply with the *audi alteram partem* rule, he criticised the labelling of functions without due enquiry and gave warning of the consequences of such action. He stated:

"Hierdie etikettering van 'n funksie, sonder meer, is m.i. gevaarlik en kan lei tot ooreenvoudiging van die vraag of geregtigheid in besondere omstandighede geskied het of nie. Die doel, bewoording en samehang van wetgewing wat ter sprake is en die aard van die belang van 'n persoon wat deur optrede onder sodanige wetgewing geraak word, moet noukeurig oorweeg word."³⁷

Reverting to *Laubscher's* case, one may describe the two judicial approaches contained in the decision as follows: no person has the right to be heard (a) where the decision affecting him is of a "purely administrative nature" and (b) when the rights he seeks to protect are regarded by the court as being non-existent.

³² 1974 4 SA 870 (A).

³³ *Oberholzer v Die Padraad van Outjo* 1974 2 SA 168 (SWA).

³⁴ 1974 4 SA 870 (A) 876D.

³⁵ 876D.

³⁶ *supra*.

³⁷ 876A-B.

2 3 Pretoria City Council v Modimola 1966 3 SA 250 (A)*The facts:*

i The local authority was empowered by law to expropriate immovable property in the interest of the community in terms of section 24(1) of the Group Areas Development Act 69 of 1955.

ii In the furtherance of a scheme allegedly in the interest of the community, a large area of land was expropriated. The land was the property of a number of owners including Modimola.

iii The local authority did not afford the owners an opportunity of being heard before the expropriation order was made.

iv Modimola successfully instituted proceedings in the Transvaal Provincial Division for the setting aside of the expropriation order on account of the failure of the authority to comply with the *audi alteram partem* rule. The local authority appealed against this decision to the appellate division.

The decision:

The decision of the court *a quo* was reversed, it being held that there was no obligation on the part of the local authority to afford a person affected by the expropriation order an opportunity of being heard in regard to it.

The reasoning:

The unanimous judgment of the court, per Botha JA, appears to be based on two separate lines of reasoning. The first is that where a group of persons is prejudicially affected by a decision of a public authority (in pursuance of an enabling statute) no single individual of that group is entitled to a hearing. This ruling by the learned judge is expressed as follows:

"In those statutes, for example, where a public authority is authorised to force a decision prejudicially affecting the property or liberty of the members of a whole community *e.g.*, to levy taxation on them or their property, or to restrict their movements, no principle of natural justice is violated by a decision taken under the statute without affording an opportunity to every individual member of the community to be heard before the decision, which obviously prejudicially affects his property or liberty, is taken."³⁷

The second line of reasoning is that where a statute confers powers on an authority which are to be exercised in the interest of the community as a whole, an affected party is not entitled to a hearing. The court is not concerned with the circumstances of any affected individual, the only question being whether the decision by the authority is in the interests of the community as a whole:

"In exercising its powers under such an enactment (*i.e.* an enactment which confers power on an authority to take a decision prejudicially affecting the members of a whole group) the public authority is guided solely by what is best for the community as a whole and the peculiar conduct or circumstances of any individual member of that community is a completely irrelevant consideration."³⁸

³⁷ 261H.

³⁸ 261H-262A.

Also of importance in this respect is the following:

"It is clear that sec 24(1)(a) is not directed against any individual. It authorises the Board to expropriate property required in the interest of the community as a whole. It is also clear . . . that the conduct or circumstances of an owner of property are in no way relevant to the question whether the acquisition of his property by way of expropriation is in the interest of the community or not."³⁹

Comment:

The first approach, viz that no individual member or group whose rights are prejudicially affected by an administrative act is entitled to be heard, was adopted with approval in *S v Moroka*.⁴⁰ The facts in that case were that a large group of blacks had occupied and resided upon a commonage, the property of the Native Land Trust. The local bantu commissioner, in terms of powers conferred on him by the Native Trust and Land Act 1936 (as amended), ordered the ejectment of the occupiers. A number protested on the ground that they had not been afforded the opportunity of putting their case before the ejectment order was made. The appellate division dismissed their appeal, basing its decision on the first line of reasoning in the *Modimola* case.⁴¹ It is interesting to note that counsel for the appellants argued that if no single individual was entitled to be heard, then the community as a whole should have been given an opportunity of being heard.⁴² This argument did not commend itself to the court. Viewed in the light of the judgment of Rumpff JA in the *Publications Control Board* case⁴³ and the tenuous difference between a person affected individually and a group affected jointly, this (first) line of reasoning appears illogical.

Perhaps a sounder line of reasoning may have been a finding that the nature of the particular expropriation order was of a legislative and not of an executive nature. No right to a hearing accrues to a party adversely affected by legislation or even subordinate legislation.⁴⁴ While the court has found that a proclamation made under the Group Areas Act is of a subordinate legislative nature,⁴⁵ it is doubtful whether an expropriation order under these circumstances may be afforded such status. In any event the point was not considered in *Modimola's* case.

The second approach is that where a statute confers power upon an authority to carry out an act or scheme (in the interest of the community as a whole), no individual prejudiced by such an act is entitled to be heard. The personal situation of an individual under these circumstances was considered irrelevant by the court. While this line of reasoning may appear sounder than the first, it is not convincing. The fact that a statute authorises an authority to act in the interest of the community, does not necessarily exclude the right of an affected individual to be heard. Neither does the

³⁹ 262F-G.

⁴⁰ *supra*.

⁴¹ 397A-398G.

⁴² 398A.

⁴³ 488H-489G.

⁴⁴ *South African Defence and Aid Fund* case *supra* 277H.

⁴⁵ *ibid*; see also *Hurnaker v Minister of Interior* *supra* 378B.

particular enactment expressly or by clear implication exclude the *audi alteram partem* rule.

In *Modimola's* case the court failed to consider the basic rule of statutory interpretation requiring a strict construction to be placed upon statutory provisions which interfere with "elementary rights."⁴⁶ If this principle of interpretation has the meaning, particularly in regard to fundamental rights, given to it by the Roman-Dutch jurists⁴⁷ and subsequently ratified by the courts,⁴⁸ the decision in *Modimola's* case would appear to be erroneous. It could hardly be argued with any conviction that the right to be heard is not a basic fundamental right, although the decision in *South African Defence and Aid Fund v Minister of Justice* (as considered below) appears to place this submission in issue.

Reverting to the rule of strict construction regarding an interference with basic rights, one could contend that this rule is rendered ineffective by the presumption in favour of the public interest. This presumption also found favour with the Roman-Dutch jurists.⁴⁹ It is cited with approval in a number of cases.⁵⁰ In *Transvaal Investment Co v Springs Municipality*⁵¹ where the issue related to the validity of a retrospective enactment (but one in favour of the community as a whole) the court, per Solomon JA, held:

"The true rule seems to me to be, at any rate in the cases in which the public advantage alone is sought, that where the general object of the Act is plain, and where the natural meaning of the special provisions which operate retrospectively is clear, then the private rights concerned are, notwithstanding cases of hardship, governed by the retrospective provisions."⁵²

In *Modimola's* case it was not the validity of the legislative enactment that was in issue, but a decision made by the local authority in pursuance thereof. This decision was attacked on the ground that the fundamental right of an affected party to be heard had not been complied with. The cases which ratify the existence of a presumption in favour of the public interest relate to validity of the legislation *per se* and do not suggest the precedence of such legislation over the fundamental rights of the individual. This may be seen in regard to compensation for property expropriated. The cases which establish the presumption in favour of the public interest do not suggest that where compensation is not expressly mentioned in the enactment a party affected is not entitled to compensation simply because the expropriation is in the public interest. On the contrary, there is authority that in the absence of express legislative provision or clear intention to the

⁴⁶ *Dadoo Ltd v Krugersdorp Municipal Council* supra 552; *Vrystaat Ko-operasie Bpk v Minister van Landbou-Ekonomie en Bemarking* 1965 3 SA 377 (A) 382.

⁴⁷ Steyn *Die Uitleg van Wette* 5 ed 103 et seq.

⁴⁸ *Dadoo Ltd v Krugersdorp Municipality* supra 552; *Transvaal Investment Co v Springs Municipality* 1922 AD 337 347; *Shaboodien v Sekretaris van Binnelandse Sake* 1971 3 SA 684 (C) 688-689.

⁴⁹ Steyn op cit 124 et seq.

⁵⁰ *Stellenbosch Divisional Council v Myburgh* (1887) 5 SC 8 13; *Cape Provincial Administration v Honiball* 1942 AD 1 14.

⁵¹ 1922 AD 337.

⁵² 358.

contrary an individual is entitled to compensation for property expropriated.⁵³ The right to be heard is no less valid nor less important than the right to compensation.

Modimola did not contest the validity of the enactment, nor did he enter into any issue regarding the precedence of his interest over that of the public. His complaint was that he was not afforded the right to be heard before the authority exercised its decision, an aspect which appears to have been overlooked by the court. Finally, Modimola's reasons for wishing to retain his property could not have been anticipated by the local authority or by the court until he had been given the opportunity of being heard. Can the present market value of expropriated land ever compensate an individual who, in future, may not be able to own any land on account of legislation to the contrary?

Arising from *Modimola's* case are the following further judicial approaches to the *audi alteram partem* rule, viz (a) no single member of the community as a whole, whose rights jointly and/or severally is prejudicially affected by an administrative decision is entitled to be heard; and (b) no person has the right to be heard if his rights are prejudicially affected in the interest of the community as a whole.

2 4 South African Defence and Aid Fund v Minister of Justice 1967 1 SA 263 (A)

The facts:

i(a) In terms of section 2 of the Suppression of Communism Act 1950 (now the Internal Security Act 1950) the State President may by proclamation outlaw any organisation if satisfied about the existence of certain factual situations, for example that the organisation professes by its name or otherwise to be an organisation for propagating the principles of or promoting the spread of communism or has as one of its purposes the object of propagating the principles of, or the furthering of any of the objects of communism *et cetera*.

i(b) The effect of an organisation's being so outlawed is its liquidation and the vesting of its assets in a liquidator. After the payment of the organisation's debts, the legal costs of its liquidation *et cetera*, any free residue may be distributed to such scientific or charitable organisations as may be determined by the Minister of Justice. Any property not realised by the liquidator is to be disposed of in such manner as the minister may direct.

A further consequence of the organisation's being outlawed is that it becomes an offence for any person to continue to be a member or officer of such organisation or to carry on directly or indirectly in any activity which the organisation could have previously engaged in (sections 3 and 4 of the act).

⁵³ *Freeman v Colonial Secretary* 1889 NLR 71 73; *Blackmore v Moodies GM and Exploration Co Ltd* 1917 AD 402 416; *Union Government v Schierhout* 1925 AD 322 348.

i(c) In terms of the act a three-stage procedure leading up to the outlawing of an organisation is provided for, viz:

1 An enquiry into the functions of the organisations by a committee of three members appointed by the minister is held. One member of this board is to be a senior magistrate. After its enquiry the board is obliged to submit a factual report about the organisation to the minister (section 17);

2 The minister is obliged to consider such factual report. He may thereafter place the matter before the state president to take the necessary action (section 17);

3 Thereafter if satisfied about the unlawful functions of the organisation, the state president may issue the necessary proclamation (section 2(2)).

i(d) In terms of section 2(2) the state president is specifically empowered to take the necessary action without giving any notice to the organisation.

ii The applicant, the South African Defence and Aid Fund, (hereafter referred to as the Fund) was an organisation whose objects were: the protection of human rights and civil liberties; the assistance of persons thought to have lost such rights or liberties; and the collecting of funds for these objects.

iii In terms of the act an enquiry was made into the functions of the Fund. The necessary procedures were carried out and the Fund was declared an unlawful organisation in terms of the act.

iv It was common cause that the Fund was at no stage afforded an opportunity of being heard in its defence.

v The Fund unsuccessfully applied to the Cape provincial division for the setting aside of the proclamation. On appeal before the appellate division the Fund argued that, although it was not entitled to be heard by the state president before he issued the proclamation, it should have been heard in its defence either before the board of enquiry or by the minister.

The decision:

By a majority of three (Steyn CJ, Botha and Van Blerk JJA) to two (Williamson and Trollip JJA dissenting) the appellate division held that the Fund was not entitled to a hearing.

The reasoning:

The majority judgment was expressed by Botha JA. From a full analysis of the judgment it would appear that the majority held, first, that unless the rights of a party are affected by the exercise of delegated power, such an act is not of a "quasi-judicial nature." Flowing from this ruling, the court further held that unless the (administrative) act is of a "quasi-judicial nature" the individual concerned is not entitled to a hearing.⁵⁴ The judgment does not end on this note. The majority of the court introduced an extraordinary

⁵⁴ 270C-G 271H-272C; cf the dissenting judgment of Williamson JA 278B-G.

approach to the *audi alteram partem* rule. It was held that where non-compliance with this rule is alleged an "initial enquiry" into the relevant legislative enactment must be instituted by the court. The purpose of the enquiry is to establish whether the right to be heard has been provided for in the enactment either expressly or impliedly.⁵⁵ In other words, the court held that the right to a hearing is nothing more than a privilege which, if not provided for by the legislature (either expressly or by implication), does not exist. This ruling runs contrary to the first approach established by the court in the *Ngwenela* case.⁵⁶ Once he had rejected this first approach or criterion Botha JA was able to examine the nature of the functions exercised by the enquiry board and by the minister in terms of the act and state regarding such examination:

"The question whether Parliament has in any particular case either expressly or by clear implication excluded the incorporation of the maxim *audi alteram partem* can only arise where, upon the true construction of the enactment concerned, the incorporation of the maxim is implied, for, where it cannot be implied, there is obviously no need to exclude it. The first question to be determined must, therefore, always be whether the enactment concerned impliedly incorporates the maxim . . ."

Botha JA found that the function of the investigating board was merely to ascertain the factual situation and submit a report to the minister. He held that it was not required to decide anything and therefore its report could not affect the rights of the Fund. While conceding that the factual report of the board and its consideration by the minister were essential steps that could ultimately lead to the issue of the proclamation "and even substantially contribute to it" the judge found that

"... it cannot be said that, in terms of the relevant provisions of the Act, there exists between the report and the decision by the State President to declare an organisation an unlawful organisation such a causal relationship to justify the conclusion that the rights of the organisation are affected by the report."⁵⁷

Further, the judge found that neither the minister nor the state president was limited to the information contained in the factual report. They could rely on information gleaned elsewhere.⁵⁸ Finally, in regard to the Fund's being heard by the minister, Botha JA expressed the view that in performing his functions in terms of the act, the minister in no way affected the rights of an organisation. The Fund was therefore not entitled to a hearing.⁵⁹

Comment:

The dissenting judgments of Williamson JA⁶⁰ and Trollop JA⁶¹ follow the traditional approach as established in the *Ngwenela* case⁶² and subsequently ratified in the *Publications Control Board* case.⁶³ Williamson JA expressed doubt as to the efficacy of the functional approach.⁶⁴ He suggested

⁵⁵ 270F.

⁵⁶ *Ngwenela's* case *supra* 127E-F; *Publications Control Board* case *supra* 488H-489D.

⁵⁷ 270E-F.

⁵⁸ 271D-E.

⁵⁹ 271B.

⁶⁰ 275B.

⁶¹ 275.

⁶² 283.

⁶³ 127E-F.

⁶⁴ 488H-489D.

⁶⁵ 278B-E.

that recourse be had to certain well-known English decisions as authority for the *audi alteram partem* rule, more particularly *Ridge v Baldwin*,⁶⁵ *Local Government Board v Arlidge*⁶⁶ and *R v Registrar of Building Societies*.⁶⁷

Trollip JA refused to accept the basis of the initial critical enquiry as expounded by Botha JA. "The only question that . . . arises here" he held, "is, does the act itself expressly or by necessary implication exclude (the Rule?)"⁶⁸ He also turned to English law for authority and cited with approval⁶⁹ the following statement by Swift J in *Denby (William) and Sons Ltd v Minister of Health*:⁷⁰

"It was argued before me that the person who held the enquiry was not a judicial functionary but was merely a collector of information . . . I do not think that this is the right view to take of the position of the person who holds the enquiry. He is, in my opinion, an administrative officer helping in the administration of the Act of Parliament, but he comes more nearly to the position of a judicial functionary, or as nearly to that position as the Minister himself does. It seems to me obvious that he, in discharging his duties, must be bound by the dictates of natural justice."

The strict relevance of certain of the English cases cited, including *Denby (William) and Sons Ltd v Minister of Health* and *Local Government Board v Arlidge* was questioned by the chief justice in a brief judgment.⁷¹ This criticism by the chief justice appears well-founded.

The finding by Botha JA that the right to be heard is available to an aggrieved party if, and only if, provision for the right has been made by the legislature has no foundation in South African law. There is no authority for this proposition in Roman-Dutch law or in English law, the two systems upon which South African law is founded. The fact that the majority judgment saw fit to fly in the face of existing decisions of the appellate division without finding that the previous decisions were given *per incuriam*, casts doubt on the integrity of the *stare decisis* doctrine. It begs the very question as to the value of the doctrine, raised subsequently by Botha JA in *Theron v Wellington Ring van die NG Sendingkerk in Suid-Afrika*.⁷² In that case Botha JA found himself in the minority despite his expressing a correct interpretation of the existing law. In that case his judgment rings with the plea for the very doctrine he ignored in the *Defence and Aid Fund* case.

The *Publications Control Board* case was decided subsequent to the *Defence and Aid Fund* case and it appears that the court wished to relegate the *Defence and Aid Fund* decision to the limbo of cases better forgotten. But it was not to be. The issue has become more complicated with the resurrection of the *Defence and Aid Fund* decision in *Winter v Administrator-in-Executive Committee*,⁷³ and the attempt in that case by the court to reconcile the mutually destructive approaches contained in the *Ngwevela* and the *Defence*

⁶⁵ (1963) 2 All ER 66, cited at 276E-F.

⁶⁶ 1915 AC 120, cited at 278H.

⁶⁷ (1960) 2 All ER 549, cited at 280B-H.

⁶⁸ 284A.

⁶⁹ 287A-B.

⁷⁰ (1936) 1 KB 337 342.

⁷¹ 266, 267.

⁷² 1976 2 SA 1 (A) 11H.

⁷³ 1973 1 SA 873 (A) 888H-889C.

and *Aid Fund* cases. In *Winter's* case the applicants (the Bishop of Damaraland and certain other serving members of the Anglican Church in South West Africa) were issued with deportation orders. They were afforded no opportunity of being heard in regard thereto. The applicants unsuccessfully appealed to the appellate division. Ogilvie Thompson CJ who gave the unanimous decision of the court, found that the applicants did not have a right to be heard. In his judgment the Chief Justice based his decision on the *Defence and Aid Fund* case and more particularly on the *Ngwevela* decision:

"The Proclamation makes no express provision for a prospective deportee to state his case. The deportation orders, however, obviously prejudicially affected the liberty, and possibly also the property, of the applicants. Under such circumstances the applicability of the maxim *audi alteram partem* will, generally speaking, ordinarily be applied (*South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 263 AD at p 270) but, as was also pointed out in that case (*ibid*), the initial enquiry must nevertheless always be whether the particular enactment in issue impliedly incorporates the maxim. Before addressing myself more specifically to that enquiry, I make three preliminary observations. First . . . Secondly, after an exhaustive examination of the maxim *audi alteram partem* in *R v Ngwevela* 1954 (1) SA 123 (AD), it was stated by Gertlives CJ at p 131H that:

"The maxim should be enforced unless it is clear that Parliament has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify the Court's not giving effect to it.""

Clearly the chief justice regards the two criteria as being co-extensive and has endeavoured to reconcile them. The judgment continues with comment on the meaning of "necessary implication" and the decision in *Publications Control Board v Central News Agency* was brought into the crucible, as follows:

"... the use of the word "necessary" in this context has been criticised as placing the criterion of exclusion unduly high . . . this Court has now accepted that the implication that maxim should apply operates 'unless the clear intention of Parliament negatives and excludes the implication' (see *Publications Control Board v Central News Agency Ltd* 1970 (3) SA 479 (AD) at 489) . . ."

The chief justice failed to come to grips with the fact that the *Ngwevela* decision and the decision in the *Defence and Aid Fund* case are mutually destructive. The attempt to reconcile these decisions appears to be illogical. Either the right to be heard is available to all persons who are prejudicially affected by an administrative decision (except where this right has been excluded by parliament expressly or by clear implication), or the right to be heard is available only where parliament has expressly or by necessary implication included such right. What appears to have confused the issue is the suggestion by Botha JA in the *Defence and Aid Fund* case that parliament impliedly intended the right of a hearing to be included where a person is prejudicially affected by the administrative act.⁷⁶ Whether or not the approach in the *Defence and Aid Fund* case is logical when not reconciled with the approach in the *Ngwevela* case, it remains incorrect in law.

Reverting to the *Defence and Aid Fund* case, one must still consider the appraisal by Botha JA of the functions of the enquiry board and that of the minister. The judge found no "causal relationship" between the factual

⁷¹ 888H-889B (italics supplied).

⁷² 889C-D (italics supplied).

⁷⁶ SA *Defence and Aid Fund* case 270C-G.

report by the board and the decision by the state president.⁷⁷ He explained the term "causal relationship" in these terms:

"No causal link can . . . be said to exist between the committee's report and the State President's decision . . . and they cannot in any way be regarded as constituting one single proceeding."⁷⁸

Seen in the light of the three (legislative) phases leading to the outlawing of an organisation, this line of reasoning is not convincing. The fact that the state president is not obliged to rely on the factual report does not make this reasoning any more convincing. Although the statute in question confers the power upon the state president to issue the necessary outlawing proclamation if he is satisfied about the unlawful activities of the association,⁷⁹ might the reference to the State President not mean "the state president acting by and with the advice of the executive council, i.e. the state president-in-council? This was the finding by Corbett J in the court *a quo*.⁸⁰ This finding and its significance appear to have been neglected by Botha JA and if correct in law, the reference to the *causal connection* between the board and the state president is quite meaningless. The significance of the finding is that the decision to outlaw an organisation is made by the minister or by the executive council, and that the function of the state president in issuing the proclamation may be likened to that of a mere rubber stamp. In any event the board conducts an enquiry into a factual situation and must ultimately present a report. The notion of a body of three individuals simply recording data in a mechanical fashion without making a decision that may affect the subject of the enquiry is equally unconvincing. The board must get its information from some extraneous source. The choice of witnesses or methods of investigation into the factual situation necessitates decisions that may directly affect the rights of the organisation.⁸¹ Finally, if the state president refers to the report at all, the rights of the organisation are affected. In the general scheme of things it would be highly unlikely that the minister would submit the matter to the state president for the necessary action if the factual report denies unlawful conduct on the part of the organisation.

On the other hand, if the report by the board was in favour of the organisation, or was so bland as to be ineffective, the submission of the matter to the state president by the minister must be based on information gleaned by him elsewhere or be activated by some ulterior motive on his part. The ruling by the court that the minister's function does not affect the rights of the organisation is therefore equally unsound.⁸²

By basing its decision on a combination of the tenuous functional approach and the ruling that the *audi alteram partem* rule is applicable only if included by the legislature, the majority decision has sown the seeds of

⁷⁷ 271C-E.

⁷⁸ 273D-E.

⁷⁹ s 2(2) of the Suppression of Communism Act (now the Internal Security Act) 44 of 1950.

⁸⁰ *SA Defence and Aid Fund v Minister of Justice* 1967 1 SA 31 (C) 33F.

⁸¹ For a critical review of the *SA Defence and Aid Fund* case see Wiechers 1967 *THRHR* 56.

Wiechers found the logic of the majority judgment difficult to comprehend.

⁸² 275B.

doubt and confusion regarding the rule. In conclusion, it would not be inappropriate to quote a criticism of the majority decision in the *Defence and Aid Fund* case by a renowned English jurist:

"I believe . . . that it is impossible to decide cases of this kind by labelling a function as 'quasi-judicial' or 'administrative.' Proceedings that lead up to Government decisions are so complex that there is no single answer."⁸³

The two judicial approaches which were established in this case may be summarised as follows:

a No person is entitled to a hearing unless the administrative act is of a "quasi-judicial" nature. Unless the rights of the affected individual are affected by such administrative act, it is not of a "quasi-judicial" nature. In other words, no person is entitled to be heard unless the administrative act complained of is of a "quasi-judicial" nature.⁸⁴

b The right to be heard is not impliedly incorporated in any legislative enactment nor is it part of the common law of South Africa. A judicial enquiry is necessary in order to ascertain whether the right to be heard is incorporated either expressly or by necessary implication in the legislative enactment. In this approach the right to be heard is seen as a privilege which may be conferred only by legislation, expressly or by implication.

If the approach in the *Ngwevela* case as amplified by the *Publications Control Board* case may be considered the judicial high water mark, then the relegation of the right to be heard from a presumption of law to a mere privilege which depends on the result of a judicial enquiry whether the legislature intended to include such privilege, must be considered the ebb-tide mark regarding the subject.

3 CONCLUSION

In the final analysis the following seven judicial rulings regarding the right of an individual to be heard in respect of an administrative decision may be considered to be the existing law.

i Every individual whose rights are prejudicially affected by an administrative act has the right to be heard unless it is clear that parliament has excluded such right either expressly or by clear intention. Under very exceptional circumstances, e.g. a national emergency, the court may find that a failure to comply with the rule is justifiable. The right to be heard may be considered a presumption in favour of the affected individual.⁸⁵

ii No person has the right to be heard where the act complained of is of a "purely administrative" nature or is the result of an authority performing a "purely administrative" function with an unlimited discretion.⁸⁶

⁸³ Street *op cit* 387.

⁸⁴ The "functional" approach in this case may be compared with that in *Laubscher's case* 554H (above); see text relating to notes 22 and 35.

⁸⁵ *R v Ngwevela* *supra* 127 *et seq*; *Publications Control Board v Central News Agency* 488H-489D.

⁸⁶ *Laubscher v Native Commissioner, Port Reef* *supra* 554 and *Administrateur van Suidwes Afrika v Peters* *supra* 861D-E.

iii No person has the right to be heard unless the administrative act complained of is of a "quasi-judicial" nature.⁸⁷

iv No person has the right to be heard where the rights he seeks to protect are considered by the court to be non-existent.⁸⁸

v No member of a community or group either jointly or severally has the right to be heard under circumstances where the whole group is prejudicially affected by an administrative decision.⁸⁹

vi No person has the right to be heard where his rights are prejudicially affected in the interest of the community as a whole.⁹⁰

vii The *audi alteram partem* rule is not available to an affected individual as of right. Where such party seeks judicial relief on the ground that the relevant administrative authority has failed to comply with the rule, the court will examine the legislative enactment in order to ascertain whether it was the intention of the legislature, either expressly or by implication, to include the provisions of the rule. Thus the right to be heard is seen as a privilege which may be afforded to an affected party by the legislature.⁹¹

That the right to be heard in one's defence is one of the most fundamental judicial rights which an individual enjoys, is to state the obvious. Unless this right is fully recognised, justice can hardly be seen to be done and even less be said to be done. Yet the court has, through the machinations of the functional approach and other legalistic reasoning, curtailed this right. Why has the court adopted this limited approach?

It is perhaps appropriate at this stage to consider the appellate division decision in *Turner v Jockey Club of South Africa*.⁹² In this case the court, per Botha JA,⁹³ came out strongly against the failure by a disciplinary tribunal of the Jockey Club to afford the applicant a fair hearing in regard to certain allegations of corrupt practices against him. In the course of the disciplinary trial, the applicant had not been informed that certain evidence, obtained at an earlier hearing against a third party, was considered by the tribunal to count strongly against him nor was he afforded an opportunity of rebutting this evidence. In his decision, Botha JA equated the "principles of national justice" with "fundamental principles of fairness."⁹⁴ The judge cited numerous English decisions in support of his findings regarding the application of the "principles of fairness" which "... underlie our system of law as well as the English law."⁹⁵

⁸⁷ *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A) 270A *et seq.*

⁸⁸ *Laubscher v Native Commissioner, Piet Retief* *supra* 549.

⁸⁹ *Pretoria City Council v Modimola* *supra* 261H and *S v Moroka* 1969 2 SA 394 (A) 398.

⁹⁰ *Pretoria City Council v Modimola* *supra* 262F.

⁹¹ *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A) 270B-F; *Winter v Administrator-in-Executive Committee* *supra* 889.

⁹² 1974 3 SA 633 (A).

⁹³ The judgment in *Modimola's* case and the majority judgment in *SA Defence and Aid Fund* case are also that of Botha JA.

⁹⁴ *inter alia* 645F-A; 646G; 651C-D.

⁹⁵ 645F-G.

While this decision appears to open the door to the adoption of the English judicial approach of "fundamental fairness"⁹⁶ this is not the position. The judge indicates clearly that the duty to act fairly relates only to domestic tribunals of voluntary associations.⁹⁷ In regard to statutory tribunals (administrative authorities) he finds that their

"... obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment."⁹⁸

In other words, Botha JA merely reiterated his basic ruling in the *Defence and Aid Fund* case, viz that an affected party is entitled to a hearing, only if the enabling act has provided for such hearing, either expressly or by necessary implication.

The judgment by Botha JA in *Turner's* case exposes once again the disturbing and questionable judicial failure to enforce the right of an individual, affected by executive action, to be heard in his defence. The use of the fine terms in *Turner's* case such as "fundamental fairness," "fair play" and "fundamentally unfair" in regard to a failure to comply with an individual's right to be heard before a domestic tribunal only appears to make a mockery of the *audi alteram partem* rule. It is not possible to answer the question why the court has seen fit to limit the right of an individual to be heard in regard to the decision of an administrative authority, in simple terms. However, the answer to another simple question will indicate how illogical and unjust any judicial decision limiting the right of any individual to be heard in his defence is. That question is "*would the authority making the decision have acted differently if the individual concerned had been given a hearing?*" If the answer is in the negative, then clearly no harm would have ensued by allowing the party to state his case. If, on the other hand, there would have been or may have been a different decision, then in interests of simple justice a hearing should have been granted.

Elsewhere a plea to the court to establish an informal judicial bill of rights has been made.⁹⁹ One of the three principles which the court was requested to enshrine is the absolute right of any individual, who is or who may be affected by any administrative decision, to be heard in his defence — such right to be denied only on the unequivocal written command of parliament.

□

⁹⁶ For a detailed analysis of the English approach to fundamental fairness, see Baxter "Fairness and Natural Justice in English and South African Law" 1979 *SALJ* 607, more particularly 625 *et seq.*

⁹⁷ *Turner's* case 646A.

⁹⁸ 645A.

⁹⁹ Taitz "Let the Courts Protect our Rights" *Sunday Times* 15 Nov 1981.

FOOTNOTES TO CHAPTER THREE

1. See page 79 et seq above.
2. Taitz, 'Unreasonable Acts of Administrative Authority as a Ground for Judicial Intervention', Unpublished LLM thesis (UNISA 1977) 44 et seq., 63-101:
3. 1903 TS 111 at 114
4. The case of Shidiack v Union Government may be found at 1912 AD 642 in the original 1913 printed edition of the 1912 Appellate Division decisions. In the 1921 reprint of the 1912 Appellate Division decisions the case is reported at p 575. For the sake of clarity both citations are given, more particularly, 1912 AD 642 at 651 and also 1912 AD 575 at 582.
5. See page 194 et seq below.
6. See for example Shidiack's case (note 4) 1912 AD 642 at 648 and 1912 AD 575 at 580.
7. 1965(1) SA 372 (C) at 377 G.
8. See page 134 above.
9. See page 137 above.
10. Inter alia : Halsbury's Laws of England (4th ed) VOL 1, para 93: De Smith (note 12) 110 et seq; Rubinstein, Jurisdiction and Illegality (1965), 81 et seq
11. See page 493 below.
12. De Smith, Judicial Review of Administrative Action (4 ed) 110.

13. Wiechers, Administratiefreg (1973), (hereafter referred to as Wiechers) 231; see also Taitz, 'But t'was a Famous Victory', 1978 Acta Juridica 109 at 115 et seq.
14. Rent Control Board and Another v S A Breweries Ltd 1943 AD 456; Sieg v Willow House (Pty.) Ltd. 1945 AD 294.
15. This further subclassification is attributed to Wiechers, 193-204.
16. De Smith, (Note 12) 94 et seq.
17. Wiechers, 193.
18. Shidiack's case (note 4) at 648-649; Maske & Another v Aberdeen Licensing Court 1930 AD 30; Jeewa v Dönges NO. and Others 190 (3) SA 414 (AD) at 420; Arenstein v Durban Corporation 1952(1) SA 279 (AD) at Administrator, Cape v Associated Buildings Ltd. 1952(2) SA 317 (AD) at 321; Attorney General OFS. v Cyril Anderson Investments (Pty.) Ltd. 1965(4) SA 628 (AD) at 639; see also, Citimakers (Pty.) Ltd. v Sandton Town Council 1977(4) SA 959(W) at 960-962.
19. GN 1111 dated 1 December 1961.
20. S 9 (5) (a) of Act No 9 of 1933.
21. See S. v De Blom 1977(3) SA 513 (AD) at 527.
22. At 527 F; R. v Ngati 1948(1) SA 596(C) at 602.
23. Stoner v S A Railways & Harbours 1933 TPD 446 at 448-449. The position of an enquiry board established in terms of the Internal Security Act No 44 of 1950 which considered a factual situation only was considered by Botha JA in South African Defence & Aid Fund v Minister of Justice 1967(1) SA 263 (AD) at 271 A-E, and was found to have '... no causal relationship as to justify that the rights of the organisation are affected by the report.'

24. Inter alia : Citimakers (Pty.) Ltd. v Sandton Town Council (note 18) at 962 A.
25. Port Elizabeth Municipality v Uitenhage Municipality 1971(1) SA 724 (AD) at 735 - 736; United Dairies Co-Operative Ltd. v Searle & Another 1974(4) SA 117(E) at 124 C-E.
26. R. v Ngati (note 22) at 602 and 607-608.
27. See page 137 above.
28. Shidiack's case (note 4) at 580 et seq.
29. Shidiack's case (note 4) at 581; Citimakers (Pty) Ltd. v Sandton Town Council (note 18) at 965 B-D; Behr v S.A.Railways & Harbours 1920 CPD 606; Steyn, Die Uitleg van Wette (5 ed), (hereafter referred to as Steyn), 50 and 207.
30. Citimakers (Pty) Ltd. (note 18) at 962 A.
31. See notes 29 and 30.
32. Tshabalala and Others v Minister of Bantu Administration and Development and Others 1964(4) SA 194(N); Hertzberg v Germiston City Council 1968(1) SA 163(W); Morland v Niehaus 1973 (1) SA 240 (C); Bolandse Eksekuteurskamer Bpk. v Dorpsraad van Gouda 1973(1) SA 592 (C); Woods v East London Municipality 1974(4) 541 (E).
33. Ss. 2 and 3 of the Attorney's Act no 53 of 1979.
34. S. 3 of the Admission of Advocates Act No 74 of 1964.
35. Inter alia : Jasat v Incorporated Law Society Natal 1970(1) SA 221 (AD), Ex parte Roeleveld 1971(1) SA 905 (N) and Ex parte Miles 1973(2) SA 691 (T) which cases concerned the admission as an attorney and advocate respectively by persons qualified as an English barrister, a doctor of laws (LLD) of the University of Leiden and a

bachelor of laws (LLB) of the University of London respectively; the case of Browne v Incorporated Law Society of Natal 1968(3) SA 535(N) concerns the necessity for an application seeking admission as an attorney to be adequately qualified in Afrikaans.

36. S. 25 of the Liquor Act No. 87 of 1977.
37. Wiechers, 199 et seq.
38. Inter alia : RCK Roberts (Pty.) Ltd. v Liquor Licensing Board Area No 18 1964(2) SA 579(E) at 583; Sims v Salisbury Liquor Licensing Board 1967(1) SA 227 (RAD) 229.
39. Johannesburg City Council v Dhlamini 1964(2) SA 333 (T).
40. Ruredzo Motors (Pty.) Ltd. v Baker NO. and Another 1972(1) SA 440 (R).
41. 1966(1) SA 357 (RAD).
42. Wiechers, 200, Arenstein v Durban Corporation 1952(1) SA 279(AD); Landelike Lisensieraad, Krugersdorp v Cassim en Andere 1961(3) SA 126 (AD); Springs Town Council v Soonah 1963(1) SA 659(AD).
43. Caney, Statute Law and Subordinate Legislation (1957) 59, 78; Steyn, 79 and 233
44. Oranjezicht Estate Ltd. v Registrar of Deeds 1924 CPD 237; Vaid v Westville Town Board 1949(3) SA 37 (N); cf. Johannesburg City Council v Administrator Tvl 1952(3) SA 809 (AD)
45. Wiechers, 196 et seq.
46. S. 4 read with s. 2 b of the Road Transportation Act no 74 of 1977; cf. Herbst v Dittmar en 'n Ander 1970(1) SA 238 (T).
47. Mutavdzic v Schrader en 'n Ander 1966(4) SA 678 (SWA).

48. Durban North Estates Ltd. v Durban Corporation and Others 1935 NPD 558; cf. Rent Control Board and Another v S A Breweries Ltd. 1943 AD 456 in relation to controlling rent of properties not subject to the rent control legislation.

49. See inter alia : Die Bestuursraad van Sebokeng v Tlelima 1968(1) SA 680 (AD) regarding the powers of the State President to declare certain areas as designated areas under Act No 51 of 1963; Willem Dawids (Pty) Ltd. v Minister of Economic Affairs 1970 (2) SA 1 (C) relating to sale of rock lobsters caught beyond South African territorial waters; Feinstein v Baleta 1930 AD 319 regarding a bylaw restricting a hawker from trading in specified areas during specific times; cf. Benoni Municipality v Deen 1925 TPD 90 which concerning the definition of 'spot' in relation to a place used by a hawker.

50. Wiechers, 204.

51. Callis v Willman NO. 1958(2) SA 554 (T).

52. Landmark Investments (Pty.) Ltd. v Port Elizabeth Municipality 1968(2) SA 693 (E) Feinstein v Baleta (note 49).

53. Peri Urban Areas Health Board v Nightingale Investments (Pty.) Ltd. 1965(4) SA 531 (AD).

54. Wiechers, 204.

55. Port Elizabeth Municipality v South African Breweries 1925 EDL 99 at 117; R. v Manyisana 1929 CPD 399 at 400; Sieg v Willow House (Pty.) Ltd. (Note 14) at 300 Garydale Estate and Investment Co (Pty.) Ltd. v Johannesburg Western Rent Board 1957(2) SA 473 (W); McConnell v S A Stevedores Service Co (Holdings) (Pty.) Ltd. and Another 1976(2) SA 126 (C) at 132-133 H, Cotton Tail Homes (Pty.) Ltd. v Palm Fifteen (Pty.) Ltd. 1977(1) SA 264 (W) at 270 C-D.

56. See page 299 below.

57. 1916 NPD 236: see also Ameen & Co v Glencoe Borough 1935 NPD 356; cf. Singh v Umzinto Rural Licensing Board and Others 1963(1) SA 872 (D).
58. Cf. Chotabhai v Union Government and Another 1911 AD 13 at 41 and 51.
59. Chassay Brothers (Pty.) Ltd. v Controller of Customs & Excise and the Minister of Finance 1956(3) SA 502 (FS).
60. 1971(3) SA 292 (SWA).
61. At 294 F-295A.
62. See page 79 below.
63. Rubinstein, Jurisdiction and Illegality (note 10), at 212-213; cf. Ellis v Morgan 1909 TS 576 at 581.
64. 1928 AD 220 at 234-235.
65. See also, S A Railways v Swanepoel 1933 AD 370 at 378; Touriel v Minister of Internal Affairs, Southern Rhodesia 1946 AD 535 at 547; Local Road Transportation Board and Another v Durban City Council and Another 1965(1) SA 586 (AD) at 597 H-598C.
66. John Bishop (Africa) Ltd. v Road Service Board and Another 1955(4) SA 166 at 175A; cf. Road Service Board v John Bishop (Africa) Ltd 1956(2) SA 504 (FC).
67. Minister of Justice and Law and Order v Musarurwa and Others 1964(4) SA 209 (SR, AD) at 227 E-G.
68. Jabaar v Minister of Interior 1958(4) SA 107(T) at 113 F-114C.
69. Bregin v Assistant Magistrate Benoni 1975(1) SA 171(W) at 177 A-G.

70. Agricultural Supply Association (Pty.) Ltd. v Minister of Agriculture 1970(4) SA 65(T) at 70H-71B.
71. 1974(3) SA 44 (AD).
72. At 47 C-D; see also, Estate Geekie v Union Government 1948(2) 495(N) at 501; Singh v Umzinto Rural Licensing Board 1963(1) SA 872 (D) at 876 C - 877 D.
73. Cf. the law regarding a condition precedent to a contract; see inter alia Wessels Law of Contract in South Africa (2 ed), VOL 1 399 et seq; (1284) Resisto Diary (Pty.) Ltd. v Auto Protection Insurance Co Ltd 196 (3) 1 SA 632 (AD) at 643; see also, R. v Katz 1959(3) SA 408 (C) at 417.
74. Minister of the Interior v Farmer 1914 TPD 130 at 134; A H Sing v Minister of Interior 1919 TPD 338; Kader v Minister of Interior 1954(2) 516(C) at 521 E - G.
75. Taitz, 'But t'was a famous victory', 1978 Acta Juridica 109 at 115-118. Certain aspects contained therein under the section entitled 'The Jurisdictional Facts Issue' at 115-118 have been reproduced here.
76. Shidiack's case (note 6) which concerned s 3 of the Immigration Act no 30 of 1906 (Cape).
77. Shangase v Minister of Native Affairs and Others 1958(4) SA 554 (N).
78. Note 77.
79. Shangase's case (note 77) at 557 H - 558 A; Lengene v Johannesburg City Council & Others 1958(1) SA 647(T) at 650.
80. Shidiack's case (note 6) at 651-652.

81. 1948(3) SA 395(AD) at 442.
82. At 442.
83. Struben v Minister of Agriculture 1910 TS 903 Stocken & Walker v Johannesburg Municipality 1923 TPD 311; R v Kutu 1930 TPD 413 at 418; Benoni Town Council v Mallela 1930 TPD 671 at 680; cf. Molife v Municipality of Potchefstroom 1930 TPD 197 at 202.
84. R. v Kly 1940 TPD 328.
85. Inter alia : Molife's case (note 83) at 202-203.
86. Thomas v Brakpan Municipality 1927 TPD 893 at 896; R. v Jopp & Another 1949(4) SA 11 (N) at 14.
87. Steyn, 123 et seq.
88. Hulley v Johannesburg Municipal Council 1909 TS 115 at 118; Stanton v Johannesburg Municipality 1910 TPD 742 at 745-747; Reynolds and Williamson v Pretoria Municipality 1912 TPD 540 at 545-546; Kharwa v Inspector of Police, Durban 1931 NPD 197 at 206; cf. Ermelo Municipality v Ismail Ibrahim 1913 TPD at 360-361.
89. Ermelo Municipality v Ismail Ibrahim (note 88) at 360-361.
90. Arderne Scott Thesen Ltd. v Administrator Cape 1937 AD 429 particularly the judgment of Curlewis CJ, at 449 with which the judgment by Stratford JA at 459 may be compared; cf. Lambat v Receiver of Revenue 1926 TPD 520 at 526-527.
91. Mallela's case (note 83).
92. Molife's case 1930 TPD 197 at 201.
93. Mallela's case 1930 TPD 671 at 680.

94. Lewis v R. 1910 TS 413; Simpson v R. 1916 TPD 486 R. v Ngati and Others 1948(1) SA 596(C); Tewari v Durban Corporation 1953(1) SA 85(N) at 87; Ex parte Minister of Bantu Administration: In re Jili v Duma & Another 1960(1) SA 1 (AD) at 12; cf. S. v Van Niekerk 1975(3) SA 233 (C) at 235E.
95. Wightman v Beaconsfield Municipality 5 HCG 296 at 300 Farah v Johannesburg Municipality 1928 TPD 169 at 174; Van Vuuren v R. 1928 EDL 82.
96. Mdhluli v Brakpan Town Council 1933 TPD 472; R. v Dekeda 1950(3) SA 583(C) at 586G; R. v Hemstead and Another 1953(4) SA 186(T) at 187; R. v Nyandeni and Others 1960(4) SA 532(N) at 541 B; see also Arenstein v Durban Corporation 1952(1) SA 279 (AD).
97. See the text relating to note 81.
98. 1945 TPD 179.
99. S. 7 (1) (E) of Act No 18 of 1926 as amended.
100. Kellermann's case (note 98) at 182.
101. At 190-191.
102. 1953(2) SA 61 (T).
103. This Act was repealed and substantially replaced by Internal Security Act No 74 of 1982.
104. S. 4 (10) of Act 44 of 1950.
105. Tefu's case (note 102) at 67F et seq.
106. Ibid.
107. At 70G.

108. 1978 (2) SA 430 (AD) at 433H-434E.
109. Lion Match Co v Wessels 1946 OPD 376 at 380; Ex parte Slabbert 1960 (4) SA 677(8) at 678 H et seq; Van der Merwe v Ingelyfde Wetsgenootskap Transvaal 1966 (3) SA 160 (T) at 163E.
110. Nkisimane's case (note 108) at 433H-434E.
111. Sutter v Scheepers 1932 AD 165 at 173; Messenger of the Magistrates' Court, Durban v Pillay 1952 (3) SA 678 (AD) at 682-3 Feinberg v Pietermaritzburg Liquor Licensing Board 1953(4) SA 415 (AD) at 419; Mostert v Munro en 'n Ander 1965 (1) SA 193 (AD) at 201; Maharaj and Others v Rampersad 1964 (4) SA 638 (AD) at 643H et seq: cf. Stadsraad van Vanderbijlpark v Administrateur, Transvaal, and Others 1982(3) SA 166 (T) at 188 H.
112. Sutter v Scheepers (note 111) 173 et seq; R. v Noorbhai 1945 AD 58 at 64; Pio v Franklin NO. and Another 1949 (3) SA 442 (C) at 451-452.
113. Sutter v Scheepers (note 111) at 173 et seq; Maharaj and Others v Rampersad (note 111) at 645D et seq; Du Plessis v Southern Zululand Rural Licensing Board 1964 (4) SA 168 (N) at 171H; Sikwane v Viviers and Others 1965 (3) SA 557 (W) at 560D et seq; Shalala v Klerksdorp Town Council and Another 1969 (1) SA 582 (T) at 587 F-588H; JEM Motors Ltd. v Boutle and Another 1961 (2) SA 320 (A) at 327-328 B.
114. Administrator Transvaal v Husband 1959 (1) 392 (AD) at 394; Rondalia Versekeringskorporasie Van Suid-Afrika Bpk. v Lemmer 1966 (2) SA 245 (AD) 257-258H; cf. Northwest Township Ltd. v The Administrator Transvaal 1975 (4) SA 1 (W) at 1 2 H-13A.
115. Note 111 at 173 - 174.
116. S T Myer v C J Pretorius 1944 OPD 144 at 151; Sentrale Kunsmis Korporasie (Edms.) Bpk. v NKP Kunsmisverspreiders (Edms.) Bpk. 1970 (3) SA 307 (AD) at 387H; Sutter v Scheepers (note 111) at 173.

117. Sutter v Scheepers (note 111) at 174; Gokal v Moti and Another 1941 AD 304 at 314-315; R. v Rajah 1955 (3) SA 276 (AD) at 280 E-281 C; cf. Pottie v Kotze 1955 (3) SA 719 (AD) at 726 et seq; Pio v Franklin NO. and Another (note 112) at 451-452.

118. Sutter v Scheepers (note 111) at 174; R. v Sopete 1950 (3) SA 769 (E) at 772G; Jajhay v Rent Control Board 1960 (3) SA 189 (W) at 194 B; cf. R. v Noorbhai (note 112) at 64; S. v Manelis 1965 (1) SA 748 (AD) at 757C.

119. McLoughlin NO. v Turner 1921 AD 537 at 544; Eland Boerdery (Edms.) Bpk. v Anderson 1966 (4) SA 400 (T) at 405G; Johnston & Another NNO. v Johnston and Another 1972 (1) SA 72 (R) at 74G.

120. Sutter v Scheepers (note 111) at 174; R. v Sopete (note 118) at 773E: The fourth guideline suggested by Wessels JA (Sutter's case 174) raised the issue whether the Court may look at the history of the legislation. Although the mischief rule (Heydon's case) may be considered as part of our law of interpretation, (see for example Hleka v Johannesburg City Council 1949 (1) SA 842 (AD) at 852-853), the general rule is that the travaux preparatoire are not admissible. This judicial approach is raised by the writer in a review of the fifth edition of Steyn's Die Uitleg Van Wette 1981 Acta Juridica 194 at 197 et seq.

121. Wiechers, 'Administrative Law', The Law of South Africa Vol 1 (1976) at 48.

122. Ibid.

123. Britten & Others v Pope 1916 AD 150 at 158.

124. Ibid.

125. Britten v Pope (note 123) at 158.

126. 1957 (1) SA 521 (T).
127. At 530 A-C; cf. Tanjan and Others v Chairman Management Committee, Johannesburg City Council and Another (2) 1979 (1) SA 977 (W) at 985H-987A; see also, Computer Investors Group Incorporated and Another v Minister of Finance 1979 (1) SA 879 (T) at 897 H et seq.
128. 1959 (2) SA 758 (N) at 774 B et seq.
129. At 774 B-D.
130. At 774 D-G and 775 G-779A.
131. Britten v Pope 1916 AD 150 at 161.
132. At 156.
133. At 161.
134. At 156 and 161; cf. the dissenting judgment by Solomon JA at 167 et seq.
135. See page 187 above.
136. See page 203 above.
137. 1922 CPD 93 at 94-95.
138. 1950 (2) SA 793 (W).
139. 1951 (2) SA 444 (T).
140. Mabi's case (note 138) at 800.
141. Ibid.
142. De Villiers v Pretoria Municipality 1912 TPD 643 at 645.

143. See page 194 above.
144. Heidelberg Municipality v McKillop 1920 AD 82 at 98.
145. See page 200 above.
146. Inter alia : K & P Contractors v Standerton Town Council 1963 (1) SA 405 at (J) 406E-407D.
147. Veeramah v Pietermaritzburg Licencing Board 1916 NPD 236.
148. See page 203 above.
149. 1954 (4) SA 523 (AD).
150. At 536 C - E; cf. Sachs v Dönges NO. 1950 (2) SA 265 (AD).
151. 1957 (1) SA 336 (R).
152. At 342 D - G.
153. 1916 AD 236.
154. At 240; Singh and Another v Group Areas Development Board and Another 1964 (4) SA 391 (D) at 397 B et seq; Hauptfleisch v Caledon Divisional Council 1963 (4) SA 53 (C) at 59.
155. 1958 (2) SA 368 (R) at 372 B - F.
156. Singh and Another v Group Areas Development Board and Another 1964 (4) SA 391 (D) at 397 B et seq; Community Development Board v Revision Court Durban Central and Another 1971 (1) SA 557 (N) st 565 A.
157. 1952 (1) SA 567 (C).

158. Note 153; see Mossel Bay Municipality case (note 157) at 573H - 574 E.
159. Mossel Bay Municipality case (note 157) at 574 B - D.
160. 1958 (2) SA 473 (AD).
161. At 480; see also Potchefstroom se Stadsraad v Kotze 1960 (3) SA 616 (AD) at 623 E - 624 C.
162. Laing v Caledon Municipality 19 CTR 599; Bloemfontein Village Council v Calder 1924 TPD 7 at 8; Barnard v Cellierse 1929 EDL 106 at 110.
163. Swarts v Pretoria Municipality 1920 TPD 187 at 189.
164. Minister of Agricultural Economic and Marketing v Virginian Cheese and Food Co (1941) (Pty) Ltd. 1961 (4) SA 415 (T) at 424H in this case the history of the rule is detailed by Ludorf J, see 421 H - 424 H; see also Bronkhorstspruit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd. & Another 1950 (3) SA 593 (T) at 601-602; Thompson trading as Maharah & Sons v Chief Constable Durban 1965 (4) SA 662 (D) at 668 *et seq.* Essop v Sekretaris van Binnelandse Sake 1969 (4) 243 (C); Theron en Andere v Ring van Wellington NG. Sendingskerk in Suid-Afrika 1976 (2) SA 1 (AD) at 32 A - H; see also, Mining Commissioner of Johannesburg v Getz 1915 TPD 323 (particularly the judgement *a quo* by Wessels J at 323 *et seq.*) and Cape Coast Exploration Ltd. v Scholtz 1933 AD 56 at 65 *et seq.*
165. See the *a quo* judgment of Wessels J in Mining Commissioner of Johannesburg v Getz (note 164) at 323.
166. Note 164 at 424 F - G where the learned judge referred to i) Estate Garlick v Commissioner for Inland Revenue 1934 AD 499 at 502 - 503 for a case which concerned an order for costs granted in the absence of argument, ii) Muller v Fitzgerald and Fine 1941 WLD 200

- which related to the grant of provisional sentence, by default and,
 iii) Ex parte Willis and Willis 1947 (4) SA 740 (C) in which an
 inaccurate description of property was corrected in a judgment
 founded on a consent paper, otherwise the Court refused to alter the
 judgment (op.cit.742).
167. 1963 (4) SA 775 (AD) at 787 G.
168. Bronkhorstpruit Liquor Licensing Board v Rayston Bottle Store
(Pty.) Ltd. (note 164) at 601 - 602; Thompson t/a Maharaj & Sons v
Chief Constable Durban (note 164) at 669 F.
169. Commissioner for Inland Revenue v Delfos 1933 AD 242; Kahn v
Commissioner of Inland Revenue 1925 EDL 326; Dungarshi v Commis-
sioner of Inland Revenue 1927 TPD 124.
170. 1969 (1) SA 260 (AD).
171. Cf. Phillipstown Divisional Council v Du Toit 1964 (4) SA 796 (C).
172. Note 164 at 424 H.
173. See Thompson t/a Maharaj of Sons v Chief Constable Durban (note
 164).
174. Wiechers, 173 - 174.
175. 1977 (3) SA 784 (AD) at 792 E - G.
176. See page 232 above.
177. See page 399 et seq and page 597 et seq below.
178. Cape Coast Exploration Ltd. v Scholtz (note 164) at 65 et seq.
- 178a. 1950 (3) SA 598 (T) at 601 H.

179. Note 164 at 601 H.
180. Note 175 at 793 A - G.
181. At 792 A.
182. At 794 C - H.
183. At 794 H - 795 F.
184. 1950(3) SA 598 (T).
185. Transair (Pty.) Ltd. case at 793 A - G.
186. Inter alia : Clairwood Motor Transport Co Ltd. v Pillai 1958 (1) SA 248 (A) at 253 - 254; Asmals Bus Service Ltd. v Road Transportation Board 1966 (2) SA 456 (N) at 461 A - E; Chetty's Motor Transport (Pty.) Ltd. v National Transport Commission and Another 1972(1) SA 156 (N) at 159; Agricultural Supply Association (Pty.) Ltd. v Minister of Agriculture 1970 (4) SA 65 (T) at 70 H et seq National Transport Commission and Another v Chetty's Motor Transport (Pty.) Ltd. 1972 (3) SA 726 (AD) at 735 etc.
187. 1957 (1) SA 521 (T) at .
188. The expression 'a convenient tag' is attributed to the judgment by Homes JA in S. v Mtshiza 1970 (3) SA 747 AD at 751 D - E, the expression in this case related to aberratio ictus.
189. Chetty's Motor Transport (Pty.) Ltd. v National Transport Commission and Another (note 186) at 159 E - G and 166 F - 167 E.
190. Note 186 at 735 E - G.

191. See also, Computer Investors Group Inc. and Another v Minister of Finance (note 127) at 894 H - 895 A and 899 F - G.
192. Wiechers, 254 and 268.
193. Op cit 256 and 268.
194. Op cit 237, 254 and 268.
195. See page 79 et seq and page 183 et seq above.
196. Wiechers, 264, 268.
197. Chetty's case 1972(3) SA 726 (AD) at 735.
198. An eminent senior judge related the following experience he had endured as a senior counsel. In a matter in which he appeared for an applicant before a particular national licensing board, it became obvious from the outset that the members of the Board were not interested in the evidence led or any argument submitted. The Board retired after the conclusion of his address to consider their decision. After a respectable period lasting approximately an hour during which the members took refreshment in their shirtsleeves amidst the sounds of hilarity they resumed their places. The Chairman in the simplest terms formally announced that the matter had been fully considered by the Board which had decided that the application should be refused. Under these circumstances to prove that the Board had failed to apply its mind to the application would be extremely difficult, if not impossible.
199. See pages 234 and 595 below; see also the recent case of W C Greyling Erasmus (Pty.) Ltd. v Johannesburg Local Road Transportation Board and Others 1982(4) SA 427 (AD).
200. Computer Investor's Group Inc. and Another v Minister of Finance (note 127) at 891 E.

- 200a. See pages 234 and 595 below.
201. Note 186 at 736A-G.
202. 1972 (3) SA 726 (AD) at 736 A.
203. See Hoffmann and Zefferdt, The South African Law of Evidence (3 ed), 470 et seq.
204. The Administrator Transvaal and the Firs Investment (Pty.) Ltd. v Johannesburg City Council 1971 (1) SA 59 (AD) at 81 G.
205. 1971 (1) SA 87 (AD) at 99C.
206. 1975 (4) SA 1 (T) at 11 F.
207. At 12 B.
208. Ismail v Local Road Transportation Board 1967 (4) SA 659 (N) at 670A; cf. S v Engeldoe's Taxi Service (Pty.) Ltd. and Another 1966 (1) SA 329 (AD).
209. 1903 TH 306 at 310.
210. Cf. Basson v Herman 1904 TS 98 at 100.
211. 1948 (1) SA 255 (O) at 269.
212. R. v Pretoria Timber Co (Pty.) Ltd. and Another 1950 (3) SA 163 (AD) at 182 E - G.
213. 1949 (4) SA 11 (N) at 13-14; see inter alia : Gentiruco AG v Firestone SA (Pty.) Ltd. 589 (AD) at 615 G - H; S. v Fusaro 1972 (3) SA 218 (R, AD) at 219H-229A; Letraset Ltd. v Helios Ltd. 1972 (3) SA 245 (AD) at 250 B-C; Smith NO. and Lardner-Burke NO. v Wone-sayi 1972 (3) 289 (R, AD) at 295 G et seq; S. v Bechoo 1979(3) SA 946 (AD) at 951 C-H.

214. Note 212 at 176 F-H; R. v Marshall and Another 1931 (2) SA 326 (AD) at 324 F - 325 B; Garment Workers Union Western Province (Cape) and Others v Industrial Tribunal and Minister of Labour 1963 (4) SA 775 (AD) at 784 G; Minister of Agriculture, Economics and Marketing v Peyper 1964 (1) SA 206 (T) at 214 H.
215. see note 212 and the text in relation thereto.
216. Taitz, 'Vagueness and Uncertainty in Subordinate Legislation as a Ground of Invalidity', 42 THRHR (1979) 412 at 412, this presumption is sometimes described by the maxim 'ut res magis valeat quam pereat' i.e. that the Court should uphold the validity of the enactment rather than strike it down.
217. Taitz, (note 216), at 412 - 413; see inter alia : Minister of Posts and Telegraphs v Rasool 1934 AD 167 at 172, 177 and 180 and Sinovich v Hercules Municipal Council 1946 AD 763 at 789 - 790.
218. Benevolent interpretation should not be confused with the presumption of due performance i.e. the omnia praesumuntur rite esse acta rule sometimes used against any suggestion of dereliction of duty on the part of an authority; see National Transport Commission and Another v Chetty's Motor Transport (Pty.) Ltd. (note 186) at 735 H; and see page 242.
219. Wiechers, 212 et seq.
220. Steyn, 229 et seq. However it should be indicated that Voet 1.3.9-10 is not authority for the requirement of clear and certain legislation as suggested by the learned author note 81 at p 229.
221. See page 183 above.
222. 1923 AD 466 at 470.
223. See page 134 above.

224. 1923 AD 673 at 675; see also Singh v Umzinto Rural Licensing Board 1963 (1) SA 871 (N) at 877 E et seq for an explanation of the term 'element similar to fraud'; cf. Winter and Others v Administrator-in-Executive Committee and Another 1973 (1) SA 873 (AD) at 887 A.
225. Mustapha & Another v Receiver of Revenue Lichtenburg 1958 (3) SA 343 (AD) at 348H - 349A.
226. Adams Stores (Pty.) Ltd. v Charlestown Town Board 1951(2) SA 508 (N) at 512; Bunting v Minister of Justice 1963(4) SA 531 (C) at 533.
227. Broadway Mansions Ltd. v Pretoria City Council 1955 (1) SA 517 (AD) at 522 A-B; Aministrator, Cape v Associated Building Ltd. 1957 (2) SA 317 (AD) at 325 C-D; Port Elizabeth Municipality v Uitenhage Munisipality 1971 (1) SA 724 (AD) at 740 A-C.
228. Van Eck NO. and Van Rensburg NO. v Etna Stores 1947 (2) SA 984 (AD) at 998; cf. Broadway Mansions Ltd. v Pretoria City Council (note 227) at 522 A et seq; S. v Looij 1975 (4) SA 703 (RAD) at 706; Administrator, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms.) Bpk. 1977 (4) SA 829 (AD) at 838.
229. Administrator, Cape v Associated Buildings Ltd. (note 227) at 329 A-B; Fernwood Estates Ltd. v Cape Town Municipal Council 1933 CPD 399 at 403; Delew v Brakpan Town Council 1937 TPD 439 at 447-448.
230. Olifantsvlei Township Ltd. v Group Areas Development Board 1964 (3) SA 611 (T) at 616 A et seq.
231. Ibid; Feinstein v Baletta 1930 AD 319 at 326, where Roos JA held: "... a Court of law should not investigate the reasons actuating or the purpose impelling the municipality in exercising powers undoubtedly conferred upon it." See further, Broadway Mansions Ltd. v Pretoria City Council (note 227) at 522; cf. Collins v Minister of the Interior 1957 (1) SA 552 (AD) at 565.

232. Broadway Mansions Ltd. v Pretoria City Council (note 227) at 522; cf. McCarthy v Mustheights (Pty) Ltd. and Others 1974 (4) SA 328 (C) at 345 D-E and 347 D et seq.
233. Broadway Mansions Ltd. v Pretoria City Council (note 227) at 522 A et seq.; Schierhout v Union Government 1919 AD 30 at 41-42; Minister of Justice and Law and Order and the Attorney-General v Musarurwa and Others and Nkomo and Others 1964 (4) SA 209 (SR AD) at 216 A-B read with 217 F-H.
234. See inter alia : Dabner v SAR&H. 1920 AD 583 at 598.
235. Stadsraad van Vanderbijlpark v Administrator Transvaal and Others 1982 (3) SA 166 (T) at 186G - 187A. In Minister of the Interior v Bechler and others 1948 (3) SA 409 (AD) at 451, Tindall ACJ refers to the rules of natural justice as '... the stereotyped expression which is used to describe those fundamental principles of fairness which underlie or ought to underlie every civilised system of law.'
- 235a. Marlin v Durban Turf Club and Others 1942 AD 112 at 128.
236. 1934 AD 11 at 38.
237. Inter alia : Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (AD) at 553; Administrateur van Suidwes Afrika v Pieters 1973 (1) SA 850 (AD); cf. Oberholzer v Padraad van Outjo 1974(4) SA 870 (AD) at 876 D.
238. See page 227 et seq below and page 399 above.
239. Pretoria North Town Council v Al Electric Ice Cream Factory 1955 (3) SA 1 (AD) at 11.
240. Inter alia : Laubscher v Native Commissioner, Piet Retief (note 237) at 553; Peri-Urban Areas Health Board v Administrator, Transvaal 1961 (3) SA 669 (T) at 674; this and the following as-

pects regarding the functional approach was previously considered by the writer and used by him in "Administration of Justice and Due Process", being Chapter One to South Africa - Public Policy Perspectives, edited by R Schire (Juta - 1982) 1 at 21 (hereafter referred to as Taitz, Administration of Justice).

241. Hack v Venterspost Municipality 1950 (1) SA 172 (W) at 190; Minister of Agricultural Economics v Ring van Wellington NG Sendingskerk in Suid-Afrika 1976 (2) SA 1 (AD) at 10 et seq and 22; see page 138 above and page 399 below.
242. Inter alia : Peri-Urban Areas Health Board v Administrator Transvaal (note 240) at 673; Hack v Venterspost Municipality and Others (note 241) at 189; S A Defence and Aid Fund v Minister of Justice 1967 (1) SA 263 (AD) at 270 C-G and 271 H - 272 C; Carr v Jockey Club of South Africa 1976 (2) SA 717 (W) at 720 C-F; see Wiechers, 127 and 229 et seq; see page 399 below.
243. Inter alia : Peri Urban Areas Health Board v Administrator Transvaal (note 240); Laubscher v Native Commissioner, Piet Retief (note 237) at 554; Oberholzer v Padraad van Outjo (note 237); Carr v Jockey Club of South Africa (note 242) at 720 C-F and 229 et seq; Wiechers, 120 et seq.
244. See page 399 below.
245. See page 134 above, with particular reference to the ruling in Union Government v Fakir 1923 AD 466 at 469 - 470.
246. See Rajah & Rajah (Pty.) Ltd. and Others v Ventersdorp Municipality and Others 1961 (4) SA 402 (AD) at 407-408 (see page 91 above); Napolitano v Commissioner of Child Welfare 1965 (1) SA 742 (AD) at 745H.

247. Jockey Club of South Africa and Others v Feldman 1942 AD 340 at 359; see also Margate Hotel (Pty.) Ltd. v Town Council of the Borough of Margate and Another 1961 (1) SA 384 (N) at 362D et seq; cf. the cases set out under notes 260 and 261 below.
248. Taitz, 'The Administration of Justice' (note 240), at 17.
249. See pages 224 - 226 above.
250. Voet 5.1.46; Head and Fortuin v Wollaston NO. and de Villiers NO. 1926 TPD 549; S. v Bam 1972(4) SA 41 (E).
251. Pretorius v Divisional Council, Richmond 1875 Buch 78; Olley v Maasdorp 1948 (4) SA 657 (AD), Hack v Ventersdorp Municipality 1950 (1) SA 172 (W); Roopsingh v Rural Licensing Board 1950 (4) SA 248 (N) at 259.
252. R. v Morgan 1923 EDL 509; R. v Lutchozi 1927 PH H91 (N); Marlin v Durban Turf Club 1942 AD 112 at 127-130.
253. Levy and Levy v Addl Magistrate Rustenburg 1925 TPD 316 and 1925 AD 378; Head and Fortuin v Wollaston NO. and de Villiers NO. (note 250) at 555.
254. R. v Marker 1916 NPD 508; R. v Morgan 1923 EDL 509; cf. Sadar v Natal Committee Group Areas Board 1957 (2) SA 300 (N).
255. Appel v Leo 1947 (4) SA 766 W.
256. R. v Naran Vastha (1910) 30 NLR 151; R. v Heilbron 1922 TPD 99; Miller v Magennis 1924 CPD 295; cf. R. v Van Schalkwyk 1923 WLD 23 regarding the position of a presiding officer who in earlier proceedings commented on the untruthfulness of the present party; see also R. v Venter 1944 AD 359. See also, R. v I 1947(4) SA 272 at 280.

257. Newberry v Durban Corporation (1895) 16 NLR 221 at 225; Schonken v Asst Regional Magistrate Pretoria 1916 TPD 256 at 259; cf. R. v Venter (note 256).
258. R. v Milne and Erleigh (6) 1951 (1) SA 1 (AD); see Ellison Kahn, 'Alleged Bias of Judge' 68 SALJ (1951) 151.
259. Taitz, 'The Administration of Justice' (note 240).
260. Yoffe v Koppies District Licensing Board 1948 (3) SA 743 (o) at 752; M M Security (Pty.) Ltd. v Bloemfontein Municipality 1968 (2) SA 6 (0) at 11H - 12F; cf. Red Hill Garage and Others v Buchans Garage and Another 1954 (4) SA (4) SA 777 (N).
261. Minnaar v Oberholzer Liquor Licensing Board 1955 (2) SA 607 (T) at 611H - 612E; see also Red Hill Garage and Others v Buchans Garage and Another (note 260) at 781A et seq; Le Roux and Another v Grigg-Spall 1946 AD 246 at 254; cf. the cases set out under note 247 above.
262. See Taitz, 'The Application of the Audi Alteram Partem Rule in South African Administrative Law' 45 THRHR (1982) 254 a copy of which article is annexed hereto see page 246(i) below. The writer acknowledges with thanks the kind permission of the editor of the Tydskrif vir Hedendaagse Romeins-Hollandse Reg, Professor ADJ van Rensburg, to reproduce the article in this thesis.
263. S. 158 of the Criminal Procedure Act No 51 of 1977 cf. S. 159.
264. S. 24 of Act No 59 of 1959.
265. Marlin v Durban Turf Club (note 252) at 125; Innes v van Eeden 1925 CPD 368 at 369.

266. Dabner v SAR & H 1920 AD 583 at 598; Loxton v Kenhardt Liquor Licensing Board 1942 AD 275 at 315; Ross v Government Mining Engineer 1920 TPD 1 at 5; Schoonwinkel NO. v Fouché NO. 1954 (4) SA 92 (0) at 101.
267. Radloff v Clocolan Ko-operatiewe Landbou Bpk. 1955 (3) SA 418 (AD) at 422; Schoonwinkel NO. v Fouché NO. (note 266) at 102; Road Services Board v John Bishop (Africa) Ltd. 1956 (2) SA 504 (FC) at 518.
268. Dabner v SAR & H. (note 266) at 598.
269. Minister of the Interior v Bechler 1948 (3) SA 409 (AD) at 451 - 452; Loxton v Kenhardt Liquor Licensing Board (note 266) at 315; Turner v Jockey Club of South Africa 1974 (3) SA 633 (AD) at 653 F - H; cf. S A. Geneeskundige en Tandheelkundige Raad v Kruger 1972 (3) SA 318 (AD) at 323.
270. Ford v Law Society of Rhodesia 1977 (4) SA 175 (R, AD) at 188F, 190C-H, 192G, 194C and 200H; cf. Meyer v Law Society, Transvaal 1978 (2) SA 209 (T) at 218 A et seq; Turner v Jockey Club of South Africa (note 269) at 650H - 651D.
271. Bredell v Pienaar and Others 1922 CPD 578 at 586.
272. Taitz, "The Audi Alterem Partem Rule : An Opportunity to be heard before a decision is taken", 1978 Natal University Law Review 176 at 179 and 181; Turner v Jockey Club of South Africa (note 269) at 648 E et seq, 650E, 648E, 650 E-F, 652 D-F and 653 E-H.
273. Marlin v Durban Turf Club (note 252) at 128.
274. Radloff v Clocolan Ko-operatiewe Landboumaatskappy Bpk. (note 267) at 423; see also Taitz, "The Audi Alteram Partem Rule : An Opportu-

nity to be heard before a Decision is taken" (note 272), at 178 et seq.

275. Fernandez v South African Railways 1926 AD 60 at 69; R. v Ngwevela 1954 (1) SA 123 (AD) at 128 E.
276. R. v Ngwevela (note 275) at 128 E; Fernandez v South African Railways (note 275) at 69, Cassem v Oos-Kaapse Komitee van die Groepsgebied 1959 (3) SA 651 (AD) at 660.
277. Barlin v Licensing Court for the Cape 1924 AD 479 the Fernandez case (note 275) at 69; Jeewa v Dönges NO. 1950 (3) SA 414 (AD) at 422-423; S v Shangase 1963 (1) SA 132 (AD) at 148.
278. Ford v Law Society of Rhodesia (note 270) at 194C et seq.
279. Calvinia Licensing Board and Others v Estate Dansky 1944 AD 37 at 52; Down v Malan 1960 (2) SA 734 (AD) at 142 E; S A Geneeskundige en Tandheelkundige Raad v Kruger 1972 (3) SA 318 (AD) at 323 H.
280. Huyser v Louw 1955 (2) SA 321 (T) at 324 B-H.
281. Huyser v Louw (note 280) at 324 B-H; Road Services Board v John Bishop (Africa) Ltd. 1956 (2) SA 504 (FC) at 513 A-B; cf. Administrator SWA v Jooste Lithium Myne (Edms) Bpk 1955 (1) SA 557 (AD) at 567 B-G.
282. Minister of Justice v Alexander 1975(4) SA 530 (AD) at 544 H et seq.; Kloppenbergh v Minister of Justice 1964 (1) SA 813 (D) at 821A - 824; Michaelides v Commissioner of Police 1969 (1) SA 313 (W) at 316A - 318.
283. Helderberg Butcheries (Stellenbosch) (Pty.) Ltd. and Others v Municipal Valuation Court, Somerset West and Another 1977 (4) SA 99 (C) at 105C.

284. See page 229 above.

285. Helderberg Butcheries v Municipal Valuation Court Somerset West (note 283) at 106 A-E; Frost v Peninsula Rent Board and Another 1968 (3) SA 303 (C) at 308 A-H.

286. Ibid.

287. Helderberg Butcheries case (note 283) at 105H - 106A; Katz v Peri-Urban Areas Health Board and Others 1950 (1) SA 306 (W) at 308 and the cases referred to therein.

288. The Fernandez case (note 275) at 69; cf. Bell v van Rensburg NO. 1971 (3) SA 693 (C) at 726F et seq; cf. also, Barlin v Licensing Court for the Cape (note 277) at 479-480.

289. Helderberg Butcheries case (note 283) at 105 B-D.

290. R. v Ngwevela (note 275) at 128E; Cassem v Oos-Kaapse Komitee van die Groepsgebied (note 276) at 660E.

291. District Commissioner, South African Police and Another v Murray 1924 AD 13 at 18.

292. Loxton v Kenhardt Liquor Licensing Board (note 266) at 315.

293. Brink v Lichtenburg Liquor Licensing Board 1944 TPD 161 at 167.

294. Cf. Pretoria Rent Board (Southern) and Another v Levitt and Another 1953 (3) SA 36 (T) in which case a full bench of the Transvaal Court held that the Rent Board was entitled to use local knowledge of rents charged for different classes of property in its area even where no evidence was led. Further the Court held that there was no duty on the Board to inform the parties that it intended taking such knowledge into account. The resulting failure to call rebutting evidence on the part of the parties was not seen by the Court as a reviewable irregularity.

295. Cf. Helderberg Butcheries case (note 283) at 106D; cf. also, Bell v van Rensburg NO. (note 288) at 726E et seq.
296. See page 234 et seq below.
297. Dabner v SAR & H (note 266) at 598; the Fernandez case (note 275) at 69; Jeewa v Dönges 1950(3) SA 614 (AB) at 422-423; R v Ngwevela (note 275) at 128E.
298. Barlin v Licensing Court for the Cape (note 277) at 480.
299. The contents of the subject as herein contained represent a summary of an article by the writer 'The Application of the Audi Alteram Partem Rule in South African Administrative Law' (note 262). As indicated above a copy of the article is annexed hereto at p 246(i) below; see also Taitz, 'The Administration of Justice' (note 240) 34 - 36.
300. 1970 (3) SA 479 (AD) at 488H et seq.
301. See text relating to note 273 above.
302. R. v Ngwevela (note 275) at 127 et seq; Publications Control Board v CNA Ltd. (note 300) at 488H - 489D.
303. Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (AD) at 554; Administrateur van Suidwes Afrika v Pieters 1973 (1) SA 850 (AD) at 861 D-F.
304. Laubscher's case (note 303) at 549.
305. Pretoria City Council v Modimola 1966 (3) SA 250 (AD) at 261H; S. v Moraka 1969 (2) SA 394 (AD) at 398.
306. Modimola's case (note 305) at 262F.
307. South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 263 (AD) at 270A et seq.

308. At 270 B-E; Winter v Administrator-in-Executive Council 1973 (1) SA 873 (AD) at 889 et seq.
309. Note 302.
310. Note 308.
311. Winter's case (note 308) at 888H - 889D.
312. 1974 (3) SA 633 (AD).
313. At 645 F-H; 646G; 651 C-D.
314. At 646 A.
315. At 645 H.
316. See text relating to note 308 above.
317. Cf. Williamson v Helleux and Another NO 1978 (2) SA 348 (T) at 353 A.
318. Dabner v SAR & H (note 266) at 597; Director of Education v Lekhethoa 1949 (1) SA 183 (T) at 197; Bell v Van Rensburg NO (note 288) at 727 B.
319. Wiechers, 220 - 221.
320. Wiechers, too, considers the furnishing of reasons as a sub-rule. He sees the subject as '... die derde reël wat deur die audi alteram partem-beginsel behels word' Administratiefreg 221.
321. Hopf v Pretoria City Council 1947 (2) SA 752 (T) at 766; cf. Pretoria North Town Council v Al Electric Ice-Cream Factory (Pty.) Ltd. 1953 (3) SA 1 (AD) at 13 B - F and 16 D - F.
322. Steyn, 259 et seq.

323. Judes v District Registrar of Mining Rights Krugersdorp 1907 TS 1046 at 1051-1052; Sundarjee Investments (Pty.) Ltd. v De Vos Hugo NO en 'n Ander 1959 (2) SA 367 (T) at 370 et seq; cf. Simaan v S A Pharmacy Board 1982 (4) SA 62 (AD) at 75 D et seq.
324. Sachs v Minister of Justice 1934 AD 11 at 24 and 40.
325. Joyi v Minister of Bantu Administration 1961 (1) SA 210 (C) at 215 D; Sachs case (note 324) at 24.
326. Sachs case (note 324) at 24.
327. Ibid.
328. Note 324 at 19.
329. Note 266 at 313.
330. Jeewa v Dönges NO. 1950(3) SA 414 (AD) at 423; Jaga v Dönges NO. 1950 (4) SA 653 (AD) at 660; cf. Al Electric Ice-Cream Factory case (note 321) at 13 E-G.
331. Mabe v Minister for Native Affairs 1958 (2) SA 506 (T) at 510.
332. Rose-Innes, Judicial Review of Administrative Tribunals in South Africa, 245 et seq; Hoffmann and Zeffertt, South African Law of Evidence (3 ed), 215 et seq; see also, Van der Linde v Calitz 1967 (2) SA 239 (AD).
333. Note 325 at 217 C - F.
334. National Transport Commission and Another v Chetty's Motor Transport (Pty.) Ltd. 1972 (3) SA 726 (AD) at 736 A - F; Schoch NO. and Others v Bhettay and Others 1974 (4) SA 860 (AD) at 865 D et seq; see also, Judes v Registrar of Mining Rights Krugersdorp (note 323) at 1052; Administrator Transvaal and the Firs Investments (Pty.) Ltd. v Johannesburg City Council 1971 (1) SA 56 (AD) at 81C

et seq and the cases cited therein; see also, the case of Marshall Cavendish Ltd. and Another v Publications Control Board 1969 (4) SA 1 (C) at 3E where the Court, per Diemont J, in considering the refusal by the respondent to furnish reasons for its decision made the trenchant comment "... we are dealing here not with a matter of State security which may call for secrecy, we are dealing with the right of the citizen to read and enjoy books and periodicals"; see further, W.C. Greyling & Erasmus (Pty.) Ltd. v Johannesburg Local Road Transportation Board and Others 1982 (4) SA 427 (AD) at 448 A et seq.

335. See page 240 below.

336. 1975 (4) SA 1 (T).

337. At 11F et seq; cf. Joyi v Minister of Bantu Administration (note 325) at 217 C - F set out in the text under note 333.

338. Sachs v Minister of Justice (note 324) at 35 et seq; Mabe v Minister for Native Affairs (note 331) at 510 et seq.

339. Cf. Taitz, 'Unreasonable Acts of Administrative Authorities as a Ground for Judicial Intervention' (note 2), at 23 et seq.

340. See page 183 above.

341. 1971 (1) SA 1 (AD) at 5A.

342. See inter alia : Shidiack v Union Government 1912 AD 642 at 651 - 652; National Transport Commission v Chetty's Motor Transport (Pty.) Ltd. 1972 (3) SA 726 (AD) at 735A et seq.

343. See the text in relation to notes 348 - 358, and the cases cited in regard thereto; see also Steyn, 319 - 320; cf. Wiechers, 303 et seq and the cases cited by both learned writers.

344. Cf. the symptomatic unreasonableness rule at page 240 below; cf. also Feinstein and Another v Taylor and Others 1961 (4) SA 554 (W) at 559 G where Galgut J held that 'a mistake of fact is only a ground for a review if it resulted in there not being a fair trial by reason of the fact that the Committee did not direct its mind to the issues which it had to decide and thereby giving a grossly unreasonable finding'.
345. Note 242 at 720 G.
346. Cf. Durban Rent Board and Another v Edgemount Investments Ltd. 1946 AD 962 at 974.
347. Cf. Rubinstein, Jurisdiction and Illegality (note 10), 212.
348. 1915 AD 233 at 236; cf. Johannesburg City Council v Chesterfield House (Pty.) Ltd. 1952 (3) SA 809 (AD) at 825.
349. Doyle v Shenker & Co Ltd. 1915 AD 233 at 236.
350. At 237.
351. At 236.
352. See pages 397 et seq and 601 below.
- 352a Sachs v Minister of Justice (note 324) at 39.
353. Goldfields Investment Ltd and Another v Johannesburg City Council and Another 1938 TPD 551 at 559 and 560; S A Broadcasting Corporation v Transvaal Townships Board 1953 (4) SA 169 (T) at 177 A - 178 D.
354. Crown Mines Ltd. v CIR. 1922 AD 91 at 101; South African Railways v Swanepoel 1933 AD 370 at 374.
355. See page 192 et seq above.

356. Union Government v Union Steel Corporation 1928 AD at 235; South African Railways v Swanepoel (note 354) at 374; Agricultural Supply Association v Minister of Agriculture 1970 (4) SA 65 (T) at 70 H - 71 A; National Transport Commission and Another v Chettys Motor Transport (Pty.) Ltd. 1972 (3) SA 726 (AD) at 735.
357. Ellis v Morgan 1909 TS 576 at 581; Goldfields Investments Ltd v City Council of Johannesburg (note 353) at 557 and 560; S A Broadcasting Corporation v Transvaal Townships Board (note 353) at 177A - 178D; Feinstein and Another v Taylor and Others (note 344) at 559 G - H.
358. Bangtoo Bros and Others v National Transport Commission and Others 1973 (4) SA 667 (N) at 678 C - D.
359. African Realty Trust v Johannesburg Municipality 1906 TH 179 at 182. Union Government v Union Steel Corporation (South Africa) 1973 (4) SA 667 (N) at 678 C - D.
360. Note 359.
361. Taitz, Unreasonable Acts of Administrative Authorities as a Ground for Judicial Intervention (note 2), at 21 - 23.
362. Note 356.
363. At 735; cf. the statement in regard to this requirement by Henning J in Bangtoo Bros and Others v National Transport Commission (note 358) at 683H, where the learned Judge referred to the requirement by Holmes J A as a notion of a 'super-superlative'.
364. Chetty's case (note 356) at 735; Johannesburg Local Road Transport Board v David Morton Transport Ltd. 1976 (1) SA 887 (AD) at 895.
365. Taitz, "Prisoners Rights and Administrative Law : 'Symptomatic Unreasonableness' and the Notion of True Justice", 3 SACC (1979) 63 at 65.

366. 1976 (2) SA 1 (AD).
367. Taitz, 'Prisoners Rights and Administrative Law' (note 365) at 65; Taitz, "But 'twas a Famous Victory", 1978 Acta Juridica 109.
368. Taitz, "But 'twas a famous victory" (note 367), at 112 - 115.
369. Theron's case (note 366) at 11H.
370. Taitz, "But 'twas a famous victory" (note 367), at 122.
371. 1979 (1) SA 14 (AD).
372. See page 241.
- 372a. W C Greyling & Erasmus (Pty.) Ltd. v Johannesburg Local Road Transportation Board and Others 1982 (4) SA 427 (AD).
373. See page 243 below.
374. 1946 AD 783 at 799. Interestingly enough the judgment usually referred to is the dissenting judgment of Schreiner JA, although this part of his judgment is not affected by that of the majority.
375. Wiechers, 254 et seq.
376. (1898) 2 QB 91 at 98; see Sinovich v Hercules Municipal Council (note 374) at 802; see inter alia : Minister of Posts & Telegraphs v Rasool 1934 AD 167 at 182; R. v Abdurahman 1950 (3) SA 136 (AD); see also page 246 below.
377. Note 374.
378. Sinovich v Hercules Municipal Council (note 374) at 802.

379. In terms of s 59(2) of the Republic of South Africa Constitution Act No 32 of 1961 the Court has no power to test the validity of any act of Parliament save a law purporting to amend one of the entrenched clauses; cf. Harris and Another v Minister of Interior 1952(2) 428 (AD); The Minister of Interior v Harris 1952 (4) SA 769 (AD); Collins v Minister of the Interior 1957 (1) SA 552 (AD).
380. Caney, Statute Law and Subordinate Legislation (1957), 41; see Middelburg Municipality v Gertzen 1914 AD 544.
381. 1914 CPD 277 at 283.
382. See page 187 above.
383. Inter alia : Administrator Cape v Associated Buildings Ltd 1957 (2) SA 317 (AD) at 323; cf. Arenstein v Durban Corporation 1952 (1) SA 279 (AD) at 297.
384. See page 190 above.
385. Municipality of Grahamstown v Ford and Jeffreys 3 Menz 506; see also Feinstein v Baleta 1930 AD 319 at 320 et seq; cf. Bloemfontein Municipality v Bosrand Quarries (Pty.) Ltd. 1930 AD 370 at 379.
386. See page 191 above.
387. R. v Manyisana 1929 CPD 399; Principal Immigration Officer v Bhula 1931 AD 323; see also, the cases cited under note 55.
388. See page 189 above.
389. Johannesburg City Council v Makaya 1945 AD 252 at 256; Lekhari v Johannesburg City Council 1956 (1) SA 552 (AD).
390. Swart NO. and Nicol NO. v De Kock and Garner 1951 (3) SA 589 (AD); Transvaal Provincial Administration v Letanka 1923 AD 102; Ronnies Motors (Pty.) Ltd. and Others v Van der Walt and Others 1962 (4) SA 660 (AD) at 667 - 668.

391. Bloemfontein Municipality v Bosrand Quarries (Pty) Ltd (note 385) at 378; see also cases cited in the previous footnote.
392. Caney, 'Statute Law and Subordinate Legislation' (note 380), at 41; Johannesburg Consolidated Investment Co Ltd. v Marshalls Township Syndicate Ltd 1917 AD 662 at 666-667.
393. Inter alia : Green and Sea Point Municipality v Kramer (1902) 19 SC 337 at 340 - 341; R. v Johannes 1908 TS 180 at 184; R. v Nel 1913 EDL 332; Bakus v Ladysmith Municipality (1914) 35 NLR 469 at 472; Dhlamini v Inspector Police Durban 1927 NPD 145 at 150; cf. Winter v Administrator-in-Executive Committee 1973 (1) SA 873 (AD) at 891 A - G.
394. Makhoane v Klerksdorp Town Council and Others 1955 (3) SA 202 (T); Benoni Town Council v Mallela 1930 TPD 671 at 677; Salisbury Municipality v Transrhodes Services Ltd. 1952 (4) SA 14 (SR) at 19; R. v Ndaba 1956 (2) SA 673 (T); cf. R. v Mzimkulu 1956 (3) SA 429 (AD); see also, Tedstoive v Town Council of Germiston 1931 WLD 221 and R. v Hughes 1935 CPD 409; cf. R. v Naran Samy 1945 AD 618; cf. Springs Town Council v MacDonald 1968 (2) SA 114 (T) at 120.
395. R. v Hoossen and Another 1950 (3) SA 4 (T); Bloemfontein Municipality v Bosrand Quarries (Pty.) Ltd. (note 385) at 378.
396. Nigel Town Council v Ah Yat 1950 (2) SA 183 (T); Cradock Municipal Commissioners v Du Plessis (1881 - 1882) 2 EDC 407 at 412.
397. See cases cited in notes 395 - 396; see also, R. v Martine 1915 OPD 25 and R. v Baskin 1931 CPD 41.
398. R. v Gluck 1923 AD 149 at 151; Byers v Chinn and Another 1928 AD 322 at 328; R. v Schaper 1945 AD 716 at 720; Ismail Amod v Pietersburg Municipality 1904 TS 323 at 324; Van Rooy v Law Society (OFS) and Another 1953 (3) SA 580 (O) at 584.

399. See the text relating to note 212 particularly, R. v Pretoria Timber Co (Pty) Ltd and Another 1950 (3) SA 163 (AD) at 182 E - G.
400. See page 220 et seq above.
401. See note 213, and the text in relation thereto.
402. R. v. Jopp 1949(4) SA 11 (N) at 13 - 14.
403. See page 219 et seq above.
404. See notes 379 - 383 and the text relating thereto.
405. See note 376 and the text relating thereto.
406. Middelburg Municipality v Gertzen 1914 AD 551 at 557; Johannesburg Consolidated Investment Co Ltd. v Marshalls Townships Syndicate Ltd 1917 AD at 674; Joyce and McGregor Ltd. v Cape Provincial Administration 1946 AD 685 at 669; Swart NO. and Nicol NO. v Garner and Others (note 390) at 606.
407. Inter alia : Minister of Posts and Telegraphs v Rasool (note 376) at 173 and 180; Sinovich v Hercules Municipal Council (note 376) at 789 - 790.
408. Minister of Posts and Telegraphs v Rasool (note 376) at 182; Tayob v Ermelo Local Road Transportation Board 1951 (4) SA 440 (AD) at 446; R. v Abdurahman 1950 (3) SA 136 (AD) at 145; R. v Lusu 1953 (2) SA 484 (AD) at 489; cf. Minister of the Interior v Lockhat 1961 (2) SA 587 (AD) at 601 D et seq and S. v Werner 1981 (1) SA 187 (AD).
409. Municipal Council of Johannesburg v Stocken 1925 TPD 469 at 475; Potchefstroom Municipality v Van der Lingen 1929 TPD 496; Delew v Brakpan Town Council 1937 TPD 439 at 444; Meyerowitz v Durban Corporation 1940 NPD 387 at 394.

410. McKenzie v Union Government (1917) 38 NLR 306 at 319; Sinovich v Hercules Municipal Council (note 376) at 810; R. v Slabbert and Another 1966 (4) SA 16 (T) at 21; Brink and Others v Commissioner of Police 1960 (3) SA 65 (T).
411. Delew v Brakpan Municipality (note 409); Municipality of Johannesburg v Stocken (note 409) at 482.
412. Inter alia : Kharwa v Inspector of Police, Durban 1931 NPD 197 at 204; cf. Reddy v Durban Corporation 1954 (4), SA 304 (N) at 306; see Kovalsky, 'The Validity of Municipal By-Laws', 53 SALJ (1939) 446 et seq.

CHAPTER FOUR

The Procedures by which the Inherent Review Jurisdiction of the Court may be invoked.

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Footnotes to Chapter Four.

CHAPTER FOUR

THE PROCEDURES BY WHICH THE INHERENT REVIEW JURISDICTION
OF THE COURT MAY BE INVOKED

Before examining the methods by which the Court's inherent review jurisdiction may be invoked, it is important to consider, or reconsider the meaning of the term 'to review' in relation to such inherent review jurisdiction. When it reviews an administrative act or other decision subject to its inherent review jurisdiction, the Court may be said to determine or test the validity of the proceedings leading up to and including the offending act or decision.¹ From a practical point of view in determining the validity of any decision or act the Court must examine:

- (a) the enabling Act;
- (b) the factual situation leading up to the offending decision; and
- (c) the offending decision, its nature and result.

When reviewing an act or decision under its inherent powers the Court is concerned directly and exclusively with the validity of such act. In other words the issue before the Court is the validity of the act or decision a quo. On the other hand when considering an application for relief, other than the direct review of a decision but which is founded on the alleged invalidity of the decision, the Court is concerned with the essential requirements for such relief as well as the validity of the offending decision (the review process). For example, where an applicant applies for a mandament van spolie seeking the restoration of his dwelling which he alleges was removed by an authority in terms of an invalid administrative decision² the Court is obliged to consider the essential requirements for a spoliation order namely, whether the applicant was in peaceful possession of the dwelling and that he had been unlawfully dispossessed without his consent which latter essential includes the review of the offending decision.³ Under these circumstances the review process may be said not to be the issue before the Court but relevant to such issue.

A further situation occurs where the review process becomes the issue despite another remedy, quite unrelated to the Court's inherent review, being sought initially. For example, the applicant in Kruger v The Master⁴ initially sought relief in terms of the Insolvency Act 1936. Finding that it did not enjoy jurisdiction in terms of that remedy, the Court resorted to its inherent review jurisdiction in order to assist the applicant.⁵

No less than eleven remedies and procedures, by which the inherent review jurisdiction of the Court may be invoked and which may be classified under three situations described below, will be considered, more particularly:

4.1 Where the Review Process is the Direct (and exclusive) Issue before the Court .

- (i) common law review (4.1.1 at page 286 below).
- (ii) declaration of rights (4.1.2 at page 288 below).

4.2 Where the Review Process is Relevant to the Issue i.e. the Relief Sought ,

- (iii) prohibitory interdict (4.2.1 at page 293 below).
- (iv) mandatory interdict (mandamus) (4.2.2 at page 299 below).
- (v) mandament van spolie (4.2.3 at page 304 below).
- (vi) interdict de libero homine exhibendo (Habeas Corpus) (4.2.4 at page 308 below).
- (vii) an action for damages (4.2.5 at page 312 below).
- (viii) an exception to plaintiff's summons or defendant's plea (4.2.6 at page 316 below).
- (viv) criminal cases (4.2.7 at page 319 below).

4.3 Where the Review Process becomes the Issue despite Unrelated Relief being sought initially.

- (ix) an appeal (stricto sensu) (4.3.1 at page 325 below).
- (x) statutory review (4.3.2 at page 333 below).
- (xi) the review of the proceedings of inferior courts (4.3.3. at page 336 below).
 - (a) Review in terms of s.24 of the Supreme Court Act 1959 (at page 337 below).
 - (b) Review in terms of s.304 of the Criminal Procedure Act 1977 (at page 338 below).

It is relevant that save for Rule 53 of the Uniform Rules of Court which provides:

53 (1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected -

There are no other legislative enactments relating to the method or procedure by which the inherent review jurisdiction of the Court may be invoked.⁶ As Rule 53 relates only to review as a specific remedy it would not be applicable where an applicant seeks some other remedy. In other words Rule 53 is applicable only where the applicant institutes review proceedings (properly so called) e.g. common law review (review on motion) or the review of the proceedings of inferior courts etc.

4.1.1 Common Law Review. (Review on motion).

The essential features of common law review (review on motion), judicial review or hersiening as a separate remedy have been fully considered

above.⁷ The principal features of the Courts' inherent review jurisdiction were examined largely through the cases dealing with common law review, more particularly:

- (i) all but one of the features of common law review are unwritten and may be found in the case law⁸;
- (ii) only a superior court of first instance has jurisdiction to entertain common law review proceedings⁹;
- (iii) the remedy today extends beyond the proceedings of public bodies¹⁰;
- (iv) the remedy is concerned only with the legality or validity of the proceedings of the authority or tribunal a quo¹¹;
- (v) the invoking of the Court's inherent review jurisdiction by other than common law review¹²;
- (vi) the necessary locus standi in judicio of an applicant (1) concerning his status¹⁴;
- (vii) the necessary locus standi of an applicant (2) regarding the question of a personal interest in the cause¹⁵;
- (viii) the time period afforded to an aggrieved party within which to institute proceedings for relief¹⁶;
- (ix) a record of the proceedings a quo is not essential to the grant of the remedy¹⁷;
- (x) the necessary procedure to be adopted by an applicant in order to obtain relief by way of common law review¹⁸;
- (xi) the availability of the remedy in respect of part-heard or interlocutory matters¹⁹;
- (xii) the degree of proof to be established by an applicant for review²⁰;
- (xiii) the possible judgments which are within the jurisdiction of the Court considering an application for common law review²¹;
- (xiv) for costs²²;
- (xv) the right of an applicant to institute review and appeal proceedings simultaneously²³;
- (xvi) the right of an unsuccessful party in review proceedings to appeal to a higher court²⁴;
- (xvii) the territorial jurisdiction of the reviewing court²⁵;
- (xviii) legislative exclusion of the jurisdiction of the Court in relation to review proceedings²⁶;

- (xix) temporary exclusion of the Court's jurisdiction by reason of available domestic remedies²⁷;
- (xx) the exclusionary effect on the jurisdiction of the Court by reason of the so-called functional approach²⁸.

4.1.2 Declaration of Rights.

In terms of s 19(1)(c) of the Supreme Court Act 1959 a provincial or local division shall have jurisdiction:

"in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination"

A declaration of rights (declaratory order or declarator) may be seen as an order of court which sets out the rights and/or obligations of the parties without any accompanying order or consequential relief or consequential relief.²⁹

This remedy is available in all areas of law, e.g. insurance contracts,³⁰ suretyship,^{30a} options,³¹ prescription,³² rectification of contracts,³³ validity of notice to vacate premises,³⁴ company law,³⁵ the right to admission as an attorney,³⁶ payment of transfer duty,³⁷ wage determination disputes,³⁸ wills and deceased estates,³⁹ fideicommissum,⁴⁰ interpretation of statutes,⁴¹ review of administrative acts.⁴² These examples and the cases cited are only illustrative of the use of this remedy and are in no way intended to be exhaustive. Despite the wide and varied application of this important remedy, it is not extended by practitioners to its full potential.

a) The essential features of the remedy.

An examination of s 19(1)(c) of the Supreme Court Act 1959 (above) indicates three essential features.⁴³ These features, viz. the necessity of the applicant to have an interest, secondly, the interest and hence enquiry must relate to an 'existing, future or contingent right or obligation', thirdly, the discretion enjoyed by the Court whether or not to exercise its jurisdiction, will be considered separately below.

(i) The necessity to have an interest.

To enjoy locus standi in declaration proceedings, an applicant is required to have an interest in the subject of the enquiry. An interest is wider than a mere existing, future or contingent right or obligation. Williamson J equated the applicant's interest with 'some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent right or obligation'.⁴⁴ The Appellate Division, in Ex parte Nell⁴⁵ held that an existing dispute is not a pre-requisite to the grant of the declaration of rights, but it is necessary for there to be interested parties in order that the declaration to be made.⁴⁶

(ii) The interest must relate to an existing, future or contingent right or obligation.

Future or contingent rights or obligations were held by the Appellate Division to mean rights etc, which are 'contingent' as opposed to 'vested'.⁴⁷ In the Durban City Council case⁴⁸ Watermeyer JA explained the differences between 'contingent' in a narrow and in a speculative sense. It is only in the narrow sense that the term is applicable to declaratory orders. The learned Judge gave the following explanation:

"... it cannot be said that I have a contingent interest in my neighbour's house merely because my neighbour may give or bequeath it to me; but my relationship to my neighbour, or the terms of a will or contract, may create a title in me, imperfect at the time, but capable of becoming perfect on the happening of some event, whereby ownership of the house may pass from him to me. In those circumstances I have a contingent right in the house."⁴⁹

It then follows that a declaratory order may be granted in advance or in anticipation of a date when the actual cause of action may arise, ancillary or consequential relief may be sought thereafter.⁵⁰

(iii) The judicial discretion regarding declaratory orders.

The entertaining of applications for declaratory orders is within the discretion of the Court. Discretion in this sense means a judicial discretion.⁵¹

In a number of cases the Court has refused to exercise its discretion to entertain declaratory proceedings in regard to hypothetical or academic questions of law or fact. In Geldenhuys and Neethling v Beuthin⁵² the Appellate Division, per Innes CJ, held in regard to an application for a declaration of rights:

"... Courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."⁵³

The Court, too, has refused to exercise its discretion:

- a) where the issue is res judicata, having been decided by a court of competent jurisdiction⁵⁴;
- b) where the legal position is clearly set out in legislation⁵⁵;
- c) where the plaintiff sought a declaration as to whether he had a good defence to claim for damages⁵⁶;
- d) where the object of the application was merely to assist the applicant to decide which procedural course he should adopt⁵⁷;
- e) where the declaratory order would not have the effect of res judicata between the parties⁵⁸;
- f) where the application for a declaratory order was a guise for other relief e.g. a claim for rectification⁵⁹;
- g) where the application, if granted, would give the applicant no 'tangible and justifiable' advantage⁶⁰;
- h) where the declarator relates to a question of criminal law and criminal proceedings have been instituted already⁶¹ or where the applicant sought a declarator in order to avoid acting illegally and any possible criminal prosecution.⁶²

s 19(1)(a) (iii) concludes with the following wording "... notwithstanding that such person (i.e. the applicant) cannot claim any relief consequential upon the determination."⁶³ In Shaban and others v Culemborg Banking Corporation Ltd and Another⁶⁴ the Court held that these concluding words bar an application for a declaratory order where consequential relief is available to an applicant. On the other hand there are a number of cases which hold that the expression means nothing more than 'even if consequen-

tial relief is available an applicant is entitled to an order where his rights or obligations, existing future or contingent, may be infringed or otherwise affected.⁶⁵ The latter interpretation would appear to be preferable.

- (b) The place of the review process in relation to a declaration of rights.
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There is a strong similarity between an application for the review of the decision or proceedings of an administrative authority on the one hand and an application for a declaratory order as to the validity of such decision or proceedings. The actual review process in regard to both remedies appears identical. The effect of an application for the direct review of proceedings is declaratory in nature.⁶⁶

Declaration procedure has been used to test the validity of subordinate legislation⁶⁷ and administrative action⁶⁸ as effectively as common law review. The following significant differences between the two remedies are apposite:

- (i) in review proceedings the tribunal or board a quo is obliged to forward the record of the proceedings to the Registrar and where required by law to furnish his reasons for the decision⁶⁹;
- (ii) although a decision in review proceedings is declaratory in nature, the procedure of remitting the matter to the tribunal or board a quo with instructions is alien to declaratory proceedings⁷⁰;
- (iii) although a declaration order may be complete in itself in that no consequential (positive) relief is necessary, this is not the case in review proceedings as the order (although declaratory in nature) 'reviews, sets aside or corrects' the offending act.⁷¹

(c) The procedure for a declaration of rights.

A declaration of rights may be granted only by a Supreme Court of the first instance. Where the Appellate Division finds that the refusal to grant a declaratory order by such order is incorrect, it will not make the declaratory order itself but will remit the matter to the court a quo.⁷²

Where there is no dispute of fact an application for a declaratory order may be brought on motion proceedings, otherwise the order should be sought by way of summons.⁷³ If the declaration relates only to a disputed question of law there would appear to be no reason why the order should not be sought by way of a special case for adjudication by the Court in terms of Rule 33 of the Uniform Rules of Court. This latter procedure is available only after proceedings have been instituted.

An applicant for a declaratory order must join all interested parties as respondents.⁷⁴ The rights of any interested party, who was not joined in the application, are not affected.⁷⁵

An appeal against the decision of the court a quo in declaration proceedings is governed by the Supreme Court Act 1959 in the same way as any other appeal. Where the initial decision was given by a single judge, where the application was by way of motion, an appeal is to the Full Bench of the division⁷⁶, or, where the parties have consented in writing, to the Appellate Division.^{76a} A further appeal for the Full Bench of a division to the Appellate Division is permissible only with the leave of such Full Bench.⁷⁷ Finally where the application for the declaratory order was proceeded with by way of summons and subsequent action an appeal against any decision arising therefrom is to the Appellate Division.⁷⁹

4.2 Where the review process is relevant to the issue, i.e. the relief sought.

A second form of the review process occurs where the review of the offending act is not directly sought. The review process is, of course, relevant to such relief. In other words where the party concerned seeks a remedy other than the direct review of the offending decision or act the

court is nevertheless obliged to review such decision or act before granting the initial relief sought. In such cases the applicant must not only establish the essential requirements for the review and setting aside of the offending decision, but must also establish the essential requirements for the grant of the particular relief sought.

4.2.1 Prohibitory Interdict.

A prohibitory interdict has been described as an 'order requiring a person to abstain from committing a threatened wrong or from continuing an existing one....'⁸⁰ It is a summary remedy the origin of which may be traced to Roman law. The remedy is considered as extraordinary and its grant is subject to the discretion of the court. Although the court may, and indeed should, grant an interdict where the applicant establishes the essential requirements (below) the court is not obliged to do so and, in appropriate cases, in its discretion, it may decline to grant the relief sought.⁸¹

A prohibitory interdict may be granted to restrain any unlawful act which causes or may cause the applicant damage where no other remedy is available.⁸² An interdict has been granted inter alia under the following circumstances: in favour of a local authority restraining the quarrying and crushing on property in contravention of the Town Planning Scheme;⁸³ restraining a gold mining company from pumping water from its mine and discharging the water on the surface of the applicant's property;⁸⁴ restraining the owner of a farm from laying out or selling agricultural plots on a portion of the farm as this would infringe the right of the holder of mineral rights to prospect for minerals;⁸⁵ restraining the Bantu Affairs Commission from removing the applicants and their families from a township where they lived to temporary huts elsewhere;⁸⁶ restraining the relevant State department from erecting dwellings for occupation by Deputy-Ministers of State on Groote Schuur Estate in breach of the Rhodes Will (Groote Schuur Devolution) Act No 9 of 1910;⁸⁷ restraining the commission of a crime under circumstances where the normal criminal process was inadequate;⁸⁸ restraining the commission of a delict;⁸⁹ restraining the Minister of Agriculture from selling cattle confiscated under Stock Disease legislation under which he enjoyed the power to slaughter such confiscated

cattle only;⁹⁰ restraining the Minister of Mines from setting up a Conciliation Board under Industrial Disputes legislation before the names of the parties had been set out in terms of the relevant legislation.⁹¹ These examples are not exhaustive and are merely illustrative of situations in which the Court has exercised its discretion in favour of an aggrieved party in what may be regarded as administrative law situations.

a) The essential requirements for the grant of an interdict.

An applicant seeking the grant of an interdict is obliged to establish the following requisites to be in the position to request the grant of the remedy⁹²:

- (i) a clear right;
- (ii) an irreparable injury being committed or reasonably apprehended;
- (iii) the absence of similar protection by means of some other ordinary remedy.

(i) A clear right.

The term clear right means a right clearly established.⁹³ It has been held by the Court that an applicant for a final interdict (as opposed to an interim interdict) is obliged to establish such right on a balance of probabilities.⁹⁴

An applicant, who is unable to establish a clear right on a balance of probabilities, may nevertheless obtain an interim interdict where he is able to establish a prima facie right and that he will suffer irreparable loss should the relief not be granted. He must further show that the grant of relief will not cause irreparable harm to the respondent.⁹⁵ Under these circumstances the Court will consider the interests of the parties, including interested third parties, on a 'balance of convenience'.⁹⁶ The position is summarised in Olympic Passenger Service (Pty.) Ltd. v Ramlagan⁹⁷.

"Between those two extremes fall the intermediate cases the applicant's prospect of ultimate success may range all the way from strong to weak... (the Court) upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice considera-

tion of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him."

Finally it must be noted that the right which the applicant seeks to protect must be a legal right (jus) and not a moral or sentimental one.⁹⁹

(ii) An irreparable injury being committed or reasonably apprehended.

The second essential requirement for the grant of an interdict is proof of an injury actually being committed or a well grounded reasonable apprehension that such injury will be committed by the respondent.¹⁰⁰ An injury may be described as an act prejudicial to the applicant's rights¹⁰¹ or an infringement¹⁰² or an invasion of the applicant's rights.¹⁰³

In Von Moltke v Costa Areosa (Pty.) Ltd.¹⁰⁴ Diemont J made the following ruling regarding the second requisite:

"... Whether he proceeds by way of summons or on motion the party seeking relief must show that he is suffering or will suffer some injury, prejudice or damage or invasion of right peculiar to himself and over that sustained by members of the public in general. It is not enough to allege that a nuisance is being committed, he must go further and at the very least allege facts from which it can be inferred that he has a special reason for coming to Court."

The Court will authorise the grant of the remedy in cases where the applicant is able to establish objectively a well-grounded or reasonable apprehension of injury being committed by the respondent.¹⁰⁵ It is not necessary for an applicant alleging an apprehension of injury to establish on a balance of probabilities that such injury will necessarily occur. He has merely to establish on the facts that the apprehended injury may reasonably occur.¹⁰⁶

The injury must be of a continuing nature as the Court will not grant an interdict once the injury has been committed.¹⁰⁷ Further the Court will not grant an interdict where no irreparable injury is imminent¹⁰⁸ or where the injury is purely hypothetical,¹⁰⁹ and a fortiori where there is little or no probability that the injury will occur¹¹⁰ or re-occur.¹¹¹

- iii) The absence of similar protection by means of some other ordinary remedy.
-

On account of the extraordinary and drastic nature of an interdict, the Court will not, in its discretion, authorise an interdict if some other ordinary and satisfactory remedy is available to the applicant.¹¹²

The alternative ordinary remedy should be:¹¹³

- (a) adequate in the circumstances¹¹⁴;
- (b) ordinary and reasonable¹¹⁵;
- (c) a proper legal remedy¹¹⁶; and
- (d) such as will afford similar (and adequate) protection as would an interdict¹¹⁷.

- b) The place of the review process in relation to the remedy.

Where an applicant seeks an interdict restraining an authority from proceeding in terms of an alleged invalid administrative act or invalid subordinate legislation, the review process becomes relevant only after the applicant has established the right he is endeavouring to protect, i.e. a clear right.¹¹⁸ The Court is only then in the position to decide whether the rights of the applicant are being, or may be, infringed by the administrative proceedings resulting from, or otherwise following, the alleged invalid act or subordinate legislation. In other words it is at this stage that the Court will, of necessity, review the validity of such act, subordinate legislation, etc. which is the underlying cause of the injury to the applicant's rights.

The following hypothetical example is illustrative. An authority takes possession of an applicant's immovable property in terms of an expropriation order, which is, for some reason, ultra vires the enabling Act. The authority prepares the site for demolishing existing buildings, which it may lawfully have done had the expropriation order not been invalid. The applicant applies for an interdict restraining the demolition of the buildings. In order to succeed the applicant must establish:

- (i) A clear right, the first essential requisite for the grant of an interdict. This will present few problems as the applicant is the registered owner of the property;

- (ii) An injury committed or reasonably apprehended.¹¹⁹ The injury which the applicant seeks to avoid is the demolition of his property. But as the apprehended demolition is inexorably tied to the expropriation order it is at this stage that the Court is obliged to test the validity thereof. In other words if the applicant is unable to prove the invalidity or irregularity of the expropriation order, the interdict will be refused. In the example the applicant is able to establish that the order is ultra vires the enabling Act;
- (iii) In an application for an interdict it is incumbent on the applicant to show that he has no other adequate (ordinary remedy).¹²⁰ There is authority that an applicant seeking an interdict pending a vindicatory action¹²¹ or a quasi vindicatory action¹²² is not obliged to establish this essential requisite as he has the right to require that the property be preserved pending a final decision regarding any dispute. None the less by the very nature of the case it is unlikely that the Court will not exercise its discretion in favour of the applicant despite any argument that he may sue for any damages suffered:

Analogous to the above is the (reverse) situation where an applicant seeks to restrain conduct contrary to, or in breach of, a valid administrative decision or subordinate legislation. An example would be where a licensed trader applies to Court to restrain a party from trading illegally without a licence or where an applicant seeks to restrain conduct prohibited by legislation. Under these circumstances the review process would be relevant only where the respondent places the validity of the trading or legislation in issue. None the less the second requisite i.e. proof of injury or damage, is particularly relevant in such (reverse) situation as an applicant is obliged to establish that he has suffered or will suffer damages or injury as a result of the unlawful act by the respondent or that the particular legislation is in favour of a group or class of persons of whom he is a member.¹²³

c) The procedure.

Before considering the actual procedure to obtain an interdict two aspects should be considered. First, both superior and lower courts have jurisdiction to grant an interdict. As lower courts have no review jurisdiction either inherent or statutory¹²⁴ in cases where the review process is relevant an applicant should proceed in the supreme court irrespective as to whether the value of his claim is below the R1 500 jurisdiction of the magistrates' court.¹²⁵

Secondly, an interdict may be final (perpetual) or interim (interlocutory). An interdict in which the rights of the parties are finally determined is a final interdict. On the other hand an interdict which is granted solely to protect the rights of an applicant pending the determination of the rights of the parties in an action instituted or about to be instituted is an interim or interlocutory interdict. The essential difference is that a final interdict is res judicata and appealable while an interim interdict is subject to the appellate limitations placed on all interlocutory orders.¹²⁶ Although a magistrates' court has the jurisdiction to grant a final interdict¹²⁷ as indicated above, it enjoys no review jurisdiction and is thus unable to test the validity of an administrative act. An applicant for a final interdict where the review process is relevant must proceed in the supreme court.

The procedure for a final interdict is by way of action where there is a dispute of fact.¹²⁸ Where there is no such dispute the procedure may be by way of motion.¹²⁹

In the Supreme Court an interim interdict is obtained by way of motion. If the matter is urgent the applicant may proceed with an ex parte application to obtain a rule nisi restraining the respondent's action forthwith. The respondent is afforded the opportunity of opposing the confirmation of the rule on the return day which is set out in the rule,¹³⁰ or he may in terms of the Rules of Court anticipate the return day.¹³¹ The Court may not issue a rule nisi operating as an interim interdict against the Government of the Republic, the South African Railways and Harbours Administration, The Administrator or Administration of any Province, any Minister, Administrator or other office of Government or Administration unless such department or official has received not less than 72 hours before the hearing, or

such lesser period as the Court may in all the circumstances of the case consider reasonable, a copy of the application and all Annexures thereto.¹³²

In the Magistrates' Court the procedure for an interim interdict is usually by way of ex parte application supported by affidavits.¹³³ The conditions relating to an interim interdict against the State, a Minister, Administrator, etc. apply equally to applications in the magistrates' courts.¹³⁴

4.2.2 A Mandatory Interdict (a Mandamus).¹³⁵

"The wide power possessed by the Court under our law of interdicting illegal acts implies the power ... of compelling the performance of a specific duty, at all events on the part of a public officer, by mandatory interdict or other form of 'mandament'. It also implies the power of correcting an illegality committed by such public officer, so long as it is capable of correction, if the rights of an individual are infringed by such illegality ... (Relief will be given) only where the existence and continued infringement of an absolute legal right have been clearly established."¹³⁵

A mandatory order is a summary remedy compelling a party to perform a positive and certain act (ad factum praestandum). The remedy is separate and distinct from a judgment or order for specific performance with which it may be compared.^{135a} As in the case of a prohibitory interdict the remedy is discretionary. The case law indicates that where the remedy concerns the performance of an act by a private individual it is referred to as a mandatory order and as a mandamus where the order is directed at a public body, government department, inferior court, administrative authority, etc.¹³⁶ Save for nomenclature, in practice there is little or no difference between a mandatory order and a mandamus. The term mandamus would appear to have been 'adopted' from English law.¹³⁷

The remedy, like a prohibitory interdict, is of a summary nature and the following has been granted inter alia under the following circumstances; compelling a Law Society to register articles of clerkship;¹³⁸ compelling the Minister of Lands to issue a certificate permitting the subdivision of certain land into agricultural holdings;¹³⁹ ordering the Registrar of Deeds to register a mortgage bond over certain fiduciary rights in an

estate;¹⁴⁰ directing the Income Tax Special Court to hear and consider an appeal against the re-assessment of tax;¹⁴¹ ordering the discharge of a detainee from a lunatic asylum on account of the invalidity of the summary reception order;¹⁴² ordering the Secretary of the Interior and Immigration to register a political party in terms of the Electoral Consolidation Act 1946;¹⁴³ ordering a licence authority to hear and consider an application for a trading licence;¹⁴⁴ ordering a property owner to demolish certain structures enclosing a verandah in breach of the local municipal regulations.¹⁴⁵ These examples are hardly exhaustive and it should be indicated that the law regarding the remedy may be observed also in many cases in which the Court refused to come to the assistance of an applicant.¹⁴⁶

a) The essential requirements for the grant of a mandatory interdict.

If the Roman Dutch law is to be properly followed, the essential requirements for the grant of this remedy are more onerous than those for the grant of a prohibitory interdict. According to Van der Linden an applicant must establish:

- i) an absolute right which is beyond any question of doubt (jus liquidissimum). It would appear that an applicant must establish something more than 'een liquide recht' which he must show in order to obtain a prohibitory interdict;¹⁴⁷
- ii) that the matter is one of the greatest urgency. Van der Linden refers to "... een summe urgent necessitas, ac periculum in more";¹⁴⁸
- iii) that there is no other (ordinary) remedy available to the applicant;¹⁴⁹
- iv) that he will suffer irreparable harm should the relief not be granted.¹⁵⁰

It would appear that some Courts consider the essential requirements similar to those necessary for the grant of a prohibitory interdict.¹⁵¹ Nonetheless in earlier decisions the Court seems to have adopted a stricter and seemingly more correct approach. Thus in Winterbach v Worcester Munisi-

pality¹⁵² the Court, per Buchanan ACJ, considered the grant of a mandamus 'a very serious exercise of discretion' and that the Court would do so only on the clearest proof of illegality. Further relief will not be granted against an authority unless the right which the applicant seeks to enforce is clear and certain.¹⁵³ The Court refused to grant an order which was not clear and which the respondent was unable to carry out fully.¹⁵⁴ It is not a bar to the grant of the remedy that 'the existence and continued infringement of the plaintiff's rights are in dispute'.¹⁵⁵

Finally the Court enjoys a discretion in regard to the grant of the remedy. As with prohibitory interdicts, where there is an alternative remedy available to the applicant, it is unlikely that the Court will come to his assistance.¹⁵⁶ Sight should not be lost of the fact that it is an essential requisite for the grant of the remedy that the applicant does not have the advantage of an ordinary and appropriate remedy (above). While the refusal by the Court to grant the relief sought on account of the availability of an alternative remedy may appear to be a discretionary matter, the basis for the refusal is that the applicant has failed to comply with an essential pre-requisite for the grant of the remedy. An illustration of the exercise of discretion by the Court is to be found in Haynes v Kingwilliamstown Municipality¹⁵⁷ which case relates to an action for specific performance. Specific performance is in certain respects comparable to an application for a mandatory order. The plaintiff in this case sought an order against the defendant municipality compelling it to release 250 000 gallons a day from a storage dam in terms of a contract between the plaintiff and the municipality. As a result of an unprecedented drought the municipality refused to do so. The Court, per De Villiers AJA, held:

"It is ... settled ... that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performances and leave the plaintiff to claim and prove his id quod interest. The discretion which a court enjoys although it must be exercised judicially, is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances."¹⁵⁸

After considering the respective interests of the parties with particular reference to the duty of the defendant to supply an adequate water supply to the inhabitants within the municipal area, the Appellate Division concluded that the Court a quo was correct in refusing to exercise its discretion in favour of the applicant.

b) The place of the review process in relation to the remedy.

As indicated above,¹⁶⁰ it is incumbent on an applicant to establish

- i) a clear right which must be shown beyond any doubt (jus liquidissimum);
- ii) that the matter is of extreme urgency;
- iii) that there is no other (ordinary) remedy available to the applicant;
- iv) that he will suffer irreparable harm should the relief not be granted;

in order to obtain the grant of the remedy. A mandatory order is often the appropriate remedy where an administrative authority fails or neglects to perform its duty in terms of its enabling Act or other legislative provisions. It may be the appropriate remedy also where as a result of a judicially recognised irregularity an authority fails to perform its functions properly or at all or where the performance of some positive act is essential to the proper fulfilment of its duties, e.g. in Herstigte Nasionale Party van Suid-Afrika v Sekretaris van Binnelandse Sake en Immigrasie¹⁶¹ the Court ordered the respondent Secretary to register the applicant as a political party in terms of the Electoral Consolidation Act 1946. This the respondent had previously refused to do as it had erroneously considered a copy of the original (reproduced) constitution as being unacceptable as an original specimen of the applicant's deed of foundation.

Apart from testing the validity of an administrative act in the course of an application for a mandatory order, an applicant may test such validity in an application for review or a declaration of rights coupled with an

application for a mandatory order compelling the required relief. Thus in Nkondo v Minister of Police and Another¹⁶² the applicant inter alia sought the following orders:

- i) declaring the arrest and detention of applicant's brother as being unlawful;
- ii) directing the respondents to release the applicant's brother from detention.

The applicant's brother had been arrested and detained under s 6 (1) of the Terrorism Act 1967. He had been a passenger in an aircraft from Maputo to Maseru. As a result of adverse weather conditions the aircraft was unable to land at Maseru and received permission to land in Bloemfontein. Before he left the Republic the applicant's brother had been arrested and detained. It was argued that the arrest was unlawful at international law as he had not freely entered the Republic and was entitled to immunity, having been forced to seek refuge here. He was arrested as he was about to enter Lesotho having travelled there in an Airways bus. The Court found that the arrest was not unlawful and accordingly the application for the mandatory order fell away.

Where an applicant seeks only a mandatory order it must be emphasised that not only must he establish the essential requirements for the remedy, he must clearly establish a judicially recognised irregularity.¹⁶³ All defences which would normally be available to a respondent in review proceedings are available to the respondent in applications for a mandatory order, e.g. legislative exclusion of the court's appeal or review jurisdiction,¹⁶⁴ unreasonable delay¹⁶⁵ under the appropriate circumstances, the fact that the administrative function is of a purely administrative nature,¹⁶⁶ etc.

c) Procedure.

Before considering the actual procedure for the grant of the remedy there are two aspects which require some comment. First, there is the question whether it is possible for the Court to grant an interim mandatory order or whether all mandatory orders are final. It is suggested that all mandatory orders, like spoliation orders, are final.¹⁶⁷ Unlike prohibitory interdicts both are ad factum praestandum.¹⁶⁸

Secondly, there is some doubt whether a magistrates' court has jurisdiction to grant a mandatory order. Section 46 of the Magistrates' Court Act provides that a judgment for specific performances which is not accompanied by an alternative order for payment of damages is beyond the jurisdiction of the Court. On the other hand s. 30 provides:

"30 (1) subject to the limits of jurisdiction prescribed by this Act, the Court may grant against persons and things ... interdicts and mandamenten van spolie."

If a mandatory order is not an interdict but a remedy sui generis as suggested above¹⁶⁹ a magistrates' court has no jurisdiction to entertain an application for such remedy. However regard should be had to the Magistrates Court Act which confers jurisdiction on the court in respect of claims for specific performance where the applicant seeks an alternative claim for damages.¹⁷⁰ In any event such claim would normally flow from a contractual relationship only. None the less if the mandatory order sought cannot be evaluated in money, or if it can and such value exceeds R1 500, the lower court has no jurisdiction. As with a prohibitory interdict if the review process is relevant a magistrates' court has no jurisdiction to entertain an application for a mandatory order as only a superior court enjoys a review jurisdiction.¹⁷¹

The correct procedure for a mandatory order is by way of motion. As the remedy is of a summary nature and the applicant should establish extreme urgency¹⁷² it would appear that action proceedings in order to obtain a mandatory order (properly so called and not a judgment for specific performance arising from a contractual relationship) would be quite irregular.

4.2.3 Mandament van Spolie (a Spoliation Order).

In South African law any person unlawfully deprived of the possession of any property is entitled by law to be restored to such possession. The remedy available to a deprived possessor is a mandament van spolie, the only possessory remedy recognised in our law.¹⁷³ Its origin is to be found in medieval canon law.¹⁷⁴ The nature of the remedy is contained in the maxim spoliatus ante omnia restituendus est, (often referred to as simply spoliatus ante omnia), i.e. irrespective of the equities or any other con-

sideration the fundamental rule is that property (unlawfully) spoliated must be restored to the possessor before the court will consider any claim, in regard thereto, whether by the true owner or any other claimant.

The case of Nino Bonino v De Lange¹⁷⁵ may be regarded as the locus classicus on the subject. In this case the Court, per Innes CJ, granted relief to a lessee who had been barricaded from the leased premises by the landlord, who claimed that the applicant had broken the terms of the lease. Spoliation orders have been granted by the Court inter alia under the following circumstances; to a licensed liquor firm whose stock had been removed by the local landrost in terms of an unlawful order despite the respondent's plea that the local military authorities had ordered him to prohibit future sales of liquor as this might undermine discipline among troops stationed in the district;¹⁷⁶ to a purchaser of goods under a hire-purchase agreement when the goods were unlawfully removed by the seller as a result of the former falling into arrears with payments;¹⁷⁷ to the possessor of a quantity of rice seized by a government official purportedly under certain statutory powers, but which in fact was seized for an ulterior purpose;¹⁷⁸ in favour of a group of persons illegally squatting on property belonging to the respondent local authority, after the latter had unlawfully demolished their dwellings and had thus ejected them from the property.¹⁷⁹

- a) The essential requirements for the grant of the remedy and the limited defences available to the respondent.

In order to obtain the grant of the remedy the onus is upon the applicant to establish on a balance of probabilities

- (i) that he was in peaceful and undisturbed possession of the property¹⁸⁰
- (ii) that he was unlawfully and without his consent deprived of possession by the respondent.¹⁸¹

Once having established these essential requisites the onus shifts to the respondent to whom only the following defences are available.¹⁸²

- (i) Defences relating to the applicant's possession. It is a good defence to show that the applicant was not in possession of the property¹⁸³
- (ii) Defences relating to the act of dispossession. Two separate aspects of this defence may be considered. The first is where the respondent pleads that the act per se is not a spoliation, for example, where the applicant has consented to the deprivation of possession¹⁸⁴ or has agreed to leave matters in statu quo and allow the determination of ownership to be settled by legal proceedings¹⁸⁵ or where the respondent's act was merely to set the machinery of the law into operation, for example by removing the applicant's animal and causing them to be impounded in terms of a pounds ordinance.¹⁸⁶

The second species of this defence is counter-spoliation. The defence is not lightly countenanced by the Court. It has been permitted only where the counter-spoliation takes place instante and forms part of the res gestae of the event.¹⁸⁷ The term 'res gestae' in so far as spoliation proceedings are concerned, may be described as the acts or events that form part of the transaction in issue.¹⁸⁸ On the other hand, a transaction is a group of facts so connected as to be referred to by a single legal term, for instance a crime, a contract, a wrong or any other subject of injury that may be in dispute.¹⁸⁹ Whether the respondent's act of spoliation is instante and forms part of the res gestae can be decided only on the merits of the particular case.¹⁹⁰

- (iii) Impossibility of restoration. A spoliation order will not be granted where the property has been destroyed.¹⁹¹ Where the property is no longer in the hands of the respondent but has been lawfully acquired by a bona fide third party, the court will also refuse a spoliation order.¹⁹² As in Roman-Dutch law, a counterclaim for spoliation by a respondent is not permitted.

There is no actual judicial decision involving a deprived thief or robber. This is not surprising, as an applicant for a spoliation order has merely to set up the two prerequisites, viz. peaceful possession and unlawful deprivation. The manner in which he came into possession is irrelevant in so far as spoliation proceedings are concerned. While there are no rationes decidendi based on the unusual position of a thief, there is a strong obiter dictum on the subject. In Yeko v Qana¹⁹³ the Appellate Division left little doubt as to the position of a thief deprived of possession:

'For, as Voet 41.2.16 says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the spoliatus has to prove is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.'

b) The review process in relation to the remedy.

Where an applicant seeks the remedy resulting from an administrative act the review process would appear to relate to the second essential prerequisite for the grant of the remedy, viz the unlawful deprivation of possession without his consent. There are not many cases in which an applicant sought a spoliation order resulting from what appears to be a lawful deprivation of the possession of property.¹⁹⁴ An important case, in which the review process is illustrated, is Fredericks and Another v Stellenbosch Divisional Council.¹⁹⁵ The applicants in this case had for some two years squatted illegally on property belonging to the respondent local authority. The respondent required the removal of the applicants and their dwellings from its property. At the time seven days written notice in terms of the Illegal Squatting Act 1951¹⁹⁶ was a pre-requisite to the removal or demolition of dwellings of illegal squatters. Without giving such notice the respondents demolished the dwelling and removed the building materials. Finding that the demolition was unlawful and that the applicants had established the two essential requisites for the grant of the remedy (above), the Court granted the relief sought. The Court, per Diemont J, ordered the respondent not only to return the building material removed by it but also to restore the dwellings to their former state.¹⁹⁷

c) Procedure.

While there appears to be no authority denying the right of an applicant to seek the remedy by way of action, it is submitted that the purpose of the remedy would be defeated by action proceedings. Apart from the delays and other impracticalities of action procedure, an applicant may find himself facing a vindicatory action in the form of a counterclaim which could not occur in spoliation proceedings.¹⁹⁸

Apart from a supreme court of first instance, a magistrates' court has jurisdiction to grant a spoliation order.¹⁹⁹ The latter court may grant a spoliation order only where the value of the property spoliated is not more than fifteen hundred rands.²⁰⁰ Where proceedings are instituted in the Magistrates' Court it is necessary that the applicant clearly indicates the value of the property.

The actual procedure in the Magistrates' Court is by way of ex parte application.²⁰¹ In the Supreme Court the procedure is usually by way of motion. As a spoliation order merely restores possession and specifically does not establish the rights of either party the order is final in nature and should not be granted pendente lite.²⁰²

Finally as with the other remedies considered herein where the review process is beyond the jurisdiction of the Magistrates' Court, the value of the property concerned is irrelevant.

4.2.4 Interdictum De Libero Homine Exhibendo (Habeas Corpus).

The right of an individual who has been unlawfully detained, to apply to court for his release is known to all civilised systems of law. Whether the remedy in South African law is actually derived from the Roman interdictum de libero homine exhibendo²⁰³ or from the English writ of habeas corpus is beyond the scope of this work. It is sufficient to indicate that, in the past, the Court has used the terms interchangeably and has expressed the view that the Roman Dutch (sic) and the English remedies are substantially the same.^{203a} In Principal Immigration Officer v Narayansamy²⁰⁴ Wessels J held that:

"Apart from any legislative enactment, there is an inherent right in every subject, and in every stranger within the Union, to sue out a writ of habeas corpus. This right is given not only by English law, but also by the Roman-Dutch law (De libero homine exhibendo, Voet (43.29). Prima facie therefore every person arrested by warrant of the Minister, or by any other person, is entitled to ask this Court for his release, and this Court is bound to grant it unless there is some lawful cause for his detention."²⁰⁵

The remedy has been granted ordering the release of a number of men captured during hostilities in Griqualand East and wrongfully held as prisoners of war in Cape Town.²⁰⁶ The remedy was also granted ordering the release of one G from police custody. G had previously been deported from the Transkei to Mafeking from where he had escaped to Basutoland (Lesotho). While in Basutoland he had been kidnapped by members of the South African Police and returned to the Transkei.²⁰⁷ Another case in which the remedy was granted is Cebekulu v Peppler NO.²⁰⁸ In this case the prison authorities were ordered to release a convict serving a sentence of imprisonment in default of paying a fine for possessing a dangerous weapon. The fine had subsequently been paid by the prisoner's family. The prison authorities refused to release him as he had been handed over to a farmer in terms of a contract of service, under the regulations governing the supply of prison labour. The Court held that the contract 'was not made by a free man (and) ... who at any time during the currency of his sentence was entitled to release, without qualification, on payment of his fine ...'^{208a} These examples are illustrative and not intended to be exhaustive.

It is apposite that according to Van der Linden the release of a person unlawfully detained was obtained by means of the mandament auctorisatie de facto.²⁰⁹ The learned jurist gives as an example the release of a person unlawfully held in prison.^{209a} It is suggested, en passant, that the interdictum de libero homine exhibendo was not part of Roman Dutch law.²¹⁰

a) The essential requirements for the grant of the remedy.

The essence of the remedy is the unlawful detention of the party concerned. The onus is thus upon the applicant to establish the unlawful detention. But as the applicant is often someone other than the detainee the establishing of the unlawful detention may be an onerous task. It is submit-

ted that the correct judicial approach to this problem is to be found in the early case of In re Jacobs²¹¹ where it was held that:

"In order to obtain the extraordinary remedy now applied for the onus is on the applicant to shew some probable ground for believing that he is wrongly imprisoned, or wrongly committed for detention ..." ²¹² (my italics)

Related to the essential requirements for the grant of the remedy is the question of the locus standi in judicio of an applicant other than the detainee himself. In Bozzoli and Another v Station Commander, John Vorster Square, Johannesburg²¹³ Snyman J, in considering the question of locus standi, found that as the actio popularis is no longer part of our law, the application must be made by "some interested person, such as a relative or friend, or some person who has a special interest." This interest he found to be:

"... above that of the ordinary member of the general public; in other words, not just a member of the popularis but some person who has a special interest in regard to that person who has been deprived of his freedom." ²¹⁴

This approach was found by the Appellate Division in Wood and Others v Ondangwa Tribal Authority and Another²¹⁵ to be too restricted. The following is a summary of the decision, by Rumpff CJ in that case:

- i) save for the interdict de libero homine exhibendo the actio popularis is not a part of our law²¹⁶;
- ii) that the court will permit a relation or friend to approach the court for relief.²¹⁷ Under these circumstances the applicant cannot be said to be acting 'on behalf of the public' and would not, therefore, institute what in Roman law as an actio popularis'²¹⁸ (my italics);
- iii) the Court was not prepared to restrict the remedy by defining the meaning of 'a friend'²¹⁹;
- iv) where the detainee on account of being imprisoned is unable to make the application himself and the court is satisfied that the applicant has good reason for making the application and that the applicant would have made

the application himself if he had an opportunity to do so the court will permit such person to apply for the release of the detainee. "In this sense an applicant would act in a way not dissimilar to the way in which a negotiorum gestor would act in our law, or a person permitted to act as a curator ad litem to an unknown, absent or inaccessible person."²²⁰

b) The review process in relation to the remedy.

Where a party has been detained or otherwise imprisoned as a result of an irregular administrative act or invalid subordinate legislation the appropriate remedy would be the interdict de libero homine exhibendo rather than the direct review of such action or legislation. When considering an application for the remedy under these circumstances the review process is essential as through this process the Court will decide the unlawfulness or otherwise of the detention. An example of detention based upon an irregular administrative act is the case of Ex parte Lang.²²¹ In this case the Court ordered the release of the detainee who had been detained under regulations made under the Public Safety Act 1953, which at the time of the detention had not been promulgated. An example of the release of a detainee on account of invalid delegated legislation may be found in the well-known constitutional law case of Madzimbamuto v Larnder-Burke NO. and Another NO.²²²

c) Procedure.

The remedy is obtained on application supported by affidavit. In urgent cases the Court may issue a rule on the respondent to show cause on minimal notice, e.g. less than two hours.²²³ By its very purpose the remedy is of a summary nature. Although stated in 1962 the following summary of the procedure relevant to the remedy, remains applicable:²²⁴

- i) the application is usually heard by a single judge;
- ii) irrespective of the cause of the detention the application is heard in the civil division of the court and not in criminal sessions;
- iii) as matters involving personal liberty, they are usually given priority over other matters on the roll;

- iv) the return period is made as short as possible (sometimes a matter of hours after the issue of the rule);²²⁵
- v) the rule may, if reasons of urgency or even convenience require it, be granted ex parte;²²⁶
- vi) although the respondent may usually reply by affidavit the Court may, in appropriate cases, hear oral evidence on the return day and dispose of the matter summarily.

4.2.5 Action for damages.

An action for damages, on account of being an illiquid claim, must be instituted by way of summons.²²⁷ Action by way of summons is also appropriate where the nature of the plaintiff's claim is not limited to application procedure, e.g. liquidation or review proceedings and where a dispute of fact is likely to arise.²²⁸

Where a party considers that he has suffered damages, as a result of action following an invalid or irregular administrative decision or invalid subordinate legislation, it is necessary for him to issue summons for damages basing his cause of action²²⁹ on the invalid administrative decision or subordinate legislation. Under these circumstances the Court will test the validity of the administrative decision or subordinate legislation before it is in a position to give judgment. In other words the plaintiff will have invoked the Court's review jurisdiction.

Possibly the most well-known case of a plaintiff instituting action by way of summons for damages arising from an (alleged) invalid administrative act is Union Government v Union Steel Corporation (South Africa) Ltd.²³⁰ The alleged invalid administrative act was the refusal of the Minister of Mines to issue a certificate in terms of the Iron and Steel Encouragement Act 1922.²³¹ The grant of such certificate entitled the recipient to the payment of certain bounties. The intention of the relevant statute was to encourage local industry. In terms of the Act the discretion to issue the certificate was conferred upon the Minister subject to his being satisfied as to the minimum output that an individual firm was capable of producing. The plaintiff furnished information prepared by experts clearly indicating that its plant was capable of producing not less than the statutory minimal

output. Despite this information the Minister refused to grant the certificate, stating that the information furnished was merely theoretical and that the bounty was payable only if the Minister was satisfied that the plant had actually produced the required output. The plaintiff issued summons against the Minister for the sum of the bounty alleging in its alternative claim 'that the data supplied to the defendant (Minister) by the plaintiff company in proof of such capacity are such that it is unreasonable and wrongful for the defendant not to be satisfied ...' The Appellate Division held that unreasonableness per se:

"... affords no grounds for a court's interference with the exercise of his (the Minister's) discretion ... emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is 'inexplicable except on the assumption of mala fides or ulterior motive'... or that it amounts to proof that the person on whom the discretion is conferred, has not applied his mind to the matter..."²³²

This judgment established the symptomatic unreasonableness rule²³³ which, subject to modification, remains applicable to all administrative decisions.

The right to issue summons against an administrative authority for delictual and/or contractual damages flowing from an invalid administrative act or invalid subordinate legislation is always available to an aggrieved party. Where the invalid administrative act is the result of a breach of statutory duty, the following rules would appear to be applicable:

- i) an authority is liable for damages if it fails to exercise an obligatory power²³⁴;
- ii) an authority is liable for damages if it exercises its powers (obligatory or permissive) negligently²³⁵;
- iii) where the statutory powers expressly or impliedly authorised an interference with private rights, the authority incurs no liability if its action, in terms thereof, cause damage which may not be attributed to negligence²³⁶;
- iv) an authority is not obliged to exercise permissive powers; mere omission on its part is not per se negligence.²³⁷

The following further rules, set out below, relate more pertinently to the actual breach of statutory duty, more particularly 'the requisites for a right to damages when the wrong alleged is a breach of statutory duty.'²³⁸ The Appellate Division approved the following statement by McKerron as to the law on the point,²³⁹ more particularly;

"To entitle a person to sue for breach of a statutory duty he must show that

- (1) the statute was intended to give a right of action
- (2) he was one of the persons for whose benefit the duty was imposed;
- (3) the damage was of the kind contemplated by the statute;
- (4) the defendant's conduct constituted a breach of the duty; and,
- (5) the breach caused or materially contributed to the damage."

- a) The essential requirements for the grant of judgment in an action for damages.

A plaintiff seeking damages resulting from invalid administrative action must establish both:

- i) the invalidity of the administrative action (the wrongful act) and
- ii) damages, which may be real (compensation) or nominal.²⁴⁰

The plaintiff must prove the essentials of his case on a balance of probabilities, a subject considered above.²⁴¹

- b) The review process in relation to the remedy.

The remedy sought by the plaintiff is judgment for the payment of his damages. The review process relates to the first essential requirement which he must establish viz. the invalidity of the administrative act (the wrongful act). In regard thereto the Court will test the validity of such act on the evidence before it and the law relative thereto. An advantage held by a plaintiff in action proceedings is that he may call viva voce evidence at the trial and has the right to cross-examine any witnesses called by the defendant. In (direct) review proceedings, by way of motion, the parties are limited to their papers and the testing of the veracity of witnesses by cross-examination is generally not permitted by the Court.²⁴⁶

c) Procedure.

Although a magistrate's court has jurisdiction to award not more than R1500 damages²⁴⁷ it is submitted that such court has no jurisdiction to entertain a matter in which the validity of an administrative act is in issue. This submission is founded on the fact that only a supreme court of first instance enjoys review jurisdiction.²⁴⁸ This submission is qualified by the fact that power has been conferred specifically upon the lower court 'to pronounce upon the validity of any statutory regulation, order or bye-law, i.e. delegated subordinate legislation.'²⁴⁹ This means that a magistrates' court would have jurisdiction to entertain an action for damages (up to R1500) where the damages are the result of invalid subordinate legislation. None the less such court does not have any jurisdiction to consider the validity of administrative action per se and accordingly would appear to have no jurisdiction regarding any action for damages arising from such cause of action. This would mean that such actions could be heard in the Supreme Court only.

The procedure relating to an action for damages may be divided roughly into three separate and distinct stages.²⁵⁰

- i) summons and pre-trial pleading stage
- ii) discovery and pre-trial pleading stage
- iii) the trial stage.

Although details of each stage is beyond the scope of this work it would not be inappropriate to make some observations regarding the first stage. The two most important pre-trial pleadings are the summons and plea. Apart from containing certain essential information (e.g. details of the court out of which it is issued), details of the relief sought and particulars of the claim on which such relief is sought are necessary. On the other hand the defendant in his plea obliged to answer all material allegations contained in the plaintiff's summons. The defendant may admit or deny or he may 'confess and avoid' any such allegation. A failure to deal with any material allegation is acknowledged as an admission of such allegation. Through these pleadings and any other pleading, e.g. a request and the furnishing of further particulars, the issues between the parties are clearly delineated. Should the summons or indeed any pleadings be vague and embarrassing or lack averments which are necessary to sustain an action

or defence, as the case may be, the opposing party may except to such pleading.²⁵¹ The Rules of Court provide that before a party may except to a pleading on account of its being vague and embarrassing the excipient must afford his opponent an opportunity of removing such cause of complaint.²⁵² The importance of an exception by which the review process may also be invoked, will be considered separately below.²⁵³ It is sufficient at this stage to point out that the validity or otherwise of administrative action may be raised in the plea as a defence. For example, in an action for damages the defendant may plead a valid administrative decision within the powers conferred upon it by legislation.²⁵⁴ The review process of the Court will be invoked in much the same manner as where the plaintiff relies on the invalidity of administrative action as considered above.

4.2.6 An Exception to Plaintiff's Summons or to Defendant's Plea.

As indicated under the previous remedy, a party may attack his opponent's summons or plea, as the case may be, by way of an exception. Although a pleading which is vague and embarrassing may be excepted to under certain conditions²⁵⁵ the court's inherent review jurisdiction is invoked by way of exception only where the excipient's cause of complaint is that the plaintiff's summons (and particulars), or the defendant's plea, discloses no cause of action or defence respectively.

An exception is a summary procedure concerned only with pleadings before the court which may have the effect of terminating a party's claim or defence. Where the cause of complaint goes to the root of the opponent's pleading the proper course is to except and not to permit the matter to go to trial.²⁵⁶ It is permissible to except to a part of a summons or plea although this may not settle the case as a whole.²⁵⁷ The law on this point was expressed by Innes C J in Barrett v Rewi Bulawayo Development Syndicate²⁵⁸ in these terms:

"Exception should not be taken to particular sections of a pleading, unless they are self-contained and amount in themselves to a separate claim or a separate defence as the case may be."

The notice of exception may not contain any allegations as to facts which do not appear in the pleadings. An exception is decided by the court on the pleadings before it, including the notice of exception. For the pur-

pose of the exception the court will accept as true the facts alleged by the respondent. The court will not permit the hearing of evidence and as indicated above the matter will be decided on the facts as alleged in the pleadings and the law relevant thereto.

An exception should not be equated with an exceptio of Roman law. The latter was an equitable substantive remedy or defence granted by the praetor. The exception in our law is a summary procedure which goes to the root of the claim or defence and if successful, the offending pleading is dismissed. The court may grant leave to the unsuccessful respondent to amend his claim or plea within such period as the court considers reasonable. Such leave will not be granted if it is apparent that there is no way in which the erring party may rectify his claim or defence.

A case in which the inherent review jurisdiction of the Court was invoked by way of exception is Minister of the Interior v Lockhat and others.²⁵⁹ In this case a proclamation in terms of the Group Areas Act No 77 of 1957 was attacked by the plaintiffs as being invalid on account of being discriminatory and substantially partial and unequal to members of the Indian Group to which the plaintiffs belonged. The plaintiffs had instituted action by way of summons for an order setting aside the proclamation as null and void.²⁶⁰ After further particulars had been requested and furnished by the plaintiff, the defendant Minister noted a series of exceptions against the plaintiff's claim. The most important exception related to the plaintiffs' allegation that the proclamation was invalid by reason of the substantial partiality and inequality. The exception in this regard read:

"The Defendant excepts (to the relevant paragraphs) as being bad in law, irrelevant and insufficient in law to sustain in whole or in part the plaintiffs' claim, and so vague and embarrassing as to be bad in law..."²⁶¹

Although reference is made, albeit in the alternative, to the particular claim being vague and embarrassing the exception goes to the cause of action.²⁶² In the course of his judgment Holmes J A found that Parliament envisaged that the Group Areas Act would

"... cause disruption and ... substantial inequalities
... (and that) the question before this Court is the

purely legal one whether this piece of legislation impliedly authorises, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of in this case. In my view ... it manifestly does .. To sum up ... the exception ... ought to have been allowed..."²⁶³

a) The essential requirements for the upholding of an exception.

Clearly a defendant cannot properly, plead to a summons which discloses no cause of action. Likewise a plea which discloses no defence cannot be said to be a proper pleading. There are no degrees of validity in so far as causes of action or defences are concerned. A cause of action or defence either exists or it does not. A decision on an exception attacking the summons or plea on the ground of no cause of action or defence, as the case may be, is a question of law for the court. If there is any onus on any party to an exception it will fall on the excipient to establish that no cause of action or defence may be read into the relevant pleading.²⁶⁴

b) The review process in relation to the remedy.

As an exception is concerned only with the pleadings, the Court (for purposes of deciding the exception) regards the allegations contained in the pleadings as being correct. It follows that an exception (and hence the review process) is limited to questions of law only. Thus a failure to bring a claim within the terms of a relevant statute e.g. the Motor Vehicle Insurance Act 1942 is a subject for an exception.²⁶⁵ On the other hand failure to bring a claim under subordinate delegated legislation, which must be proved by evidence, is not excipiable.²⁶⁶ Under these circumstances an objection raised by the defendant must be contained in his plea.²⁶⁷ Where the defence concerns the validity of an administrative act or subordinate legislation, as in Lockhat's case ²⁶⁸, the Court will exercise its review jurisdiction. It will test the validity of such act or subordinate legislation solely on the pleadings before it, in the light of the relevant law.

c) Procedure.

A party wishing to object to a summons or plea on the ground that same discloses no cause of action or defence does so by way of a notice of exception. The notice must not merely state the nature of the objection, e.g.

'it discloses no cause of action'. The excipient must go further and indicate clearly and concisely the grounds relied upon for such objection.²⁶⁹

The Rules of Court provide specifically that whenever an exception is taken there shall be no 'pleading over'.²⁷⁰ An exception is set down for specific hearing.²⁷¹ An exception, being itself a pleading,²⁷² may be excepted to should it be vague and embarrassing.²⁷³ Also an exception must contain a prayer for the relief sought.²⁷⁴

The Court may order an exception to stand over until the trial. This has occurred where the exception raises a point of law which may prove to be academic^{274a} or where it appears to the Court that the exception is so closely related to the merits and that no proper decision may be given until after the evidence is considered.²⁷⁵

As indicated above where the exception is successful the Court may afford the respondent the opportunity of amending his claim or defence where this is feasible. But for example where the pleading may be supported only by inadmissible evidence an amendment will not be permitted.²⁷⁶

Finally there is the question of costs. Although costs usually follow the successful party, any order as to costs remains within the discretion of the Court.²⁷⁷ The Court has penalised a successful excipient where the latter's notice of exception was faulty.²⁷⁸ On the other hand an unsuccessful excipient was not ordered to pay costs where the plea concerned had been carelessly drawn.²⁷⁹ Perhaps the most important aspect of costs relating to an exception occurs where the trial court gives judgment in favour of a party, having found that the matter could have been settled or finalised had the successful party proceeded by way of exception. Under these circumstances unless there is a sound and valid reason for the successful party not proceeding by way of exception, costs awarded will be limited to the costs which he would have incurred at the exception stage.²⁸⁰

4.2.7 Criminal Cases.

The review jurisdiction of the Court may be invoked in criminal cases where the accused attacks the validity of subordinate legislation which stipulates as criminal, certain conduct which is the subject of the charge against the accused, under the following circumstances:

- a) where the creation of a criminal offence is ultra vires the enabling Act;²⁸¹
- b) where the subordinate legislation is repugnant to an act of Parliament;²⁸²
- c) where the necessary formalities for the passing of the legislation has not been complied with;²⁸³
- d) where the subordinate legislation is vague and embarrassing;²⁸⁴
- e) in cases of delegated legislation only²⁸⁵ where the enactment is unreasonable in the special meaning attributed to the term in Kruse v Johnson,²⁸⁶ more particularly where the enactment:
 - (i) is partial and unequal in the sense of racial discrimination²⁸⁷ or in a more general sense;²⁸⁸
 - (ii) is manifestly unjust;²⁸⁹
 - (iii) discloses bad faith;²⁹⁰
 - (iv) involves such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.²⁹¹

The review jurisdiction of the Court may be invoked in criminal prosecutions also, where the implementation of subordinate legislation in the form of administrative action is invalid, e.g. on account of being unreasonable although the subordinate legislation per se remains valid. In R. v Abdurahman²⁹² the Court held that a regulation which provided for the reservation of separate coaches for different racial groups was not unreasonable per se. But where the implementation of the regulation resulted in special (first class) carriages being reserved for 'whites' only without any such coaches being reserved for 'non whites' only, the Court held that such im-

plementation was substantially partial and unequal. The implementation was held to be unreasonable and accordingly invalid. The Appellate Division per Centlivres JA ruled that:

"Many, probably most, regulations contain a complete rule of conduct in themselves and no question of executive action under them arises when their validity is being investigated. But in regulations of this kind now under consideration, where executive action is required to complete the operation of the regulation and create the rule breach of which is an offence, both must be taken together in order to see whether the total effect being unreasonable in the specialised sense, the limits of the enabling statute have been exceeded²⁹³ the real issue in the case was not whether the bye-law itself was ultra vires (for it clearly fell within the enabling statute) but whether the application of the bye-law resulted in partial or unequal treatment of members of different sections of the community...²⁹⁴"

a, b & c The review process and the essential requirements for upholding of the accused's objection to the charge together with the necessary procedure.

On account of the nature of a criminal case and the fact that an accused invokes the review jurisdiction of the court in order to establish an objection to the charge, viz, the invalidity of subordinate legislation or of an administrative act flowing therefrom, it will be appropriate to combine the analysis and consideration of the review process with the essential requirements for the upholding of the accused's objection together with the procedures by which the review process may be invoked in criminal cases.

There are two methods by which the accused may attack the validity of subordinate legislation. He may object formally to the charge based on such legislation as disclosing no offence²⁹⁵ or where the circumstances are appropriate he may raise the invalidity of subordinate legislation or administrative act at the termination of the prosecution or the defence case.²⁹⁶ Where the accused formally objects to the charge as disclosing no offence he is obliged to give reasonable notice to the prosecution of his intention to object and the grounds of his objection. Notice may be waived by the Attorney-General or the prosecutor. Further on good cause shown the

court may dispense with notice or it may adjourn the trial to enable the accused to give notice.²⁹⁷

As indicated above an accused may raise the invalidity of subordinate legislation²⁹⁸ or the administrative act on which the charge is founded at the termination of the case for the prosecution or defence. Where the accused's objection to the charge relates to an invalid administrative act it is particularly appropriate to object in this matter as certain aspects relating to the charge must be established by evidence, for example, the reservation of special railway carriages for different racial groups as in R. v. Abdurahman.²⁹⁹ As judicial notice may be taken of all legislation³⁰⁰ it is no longer necessary for the prosecution to prove subordinate legislation by furnishing a copy of the Gazette or Provincial Gazette to the Court. This means that where an accused's objection is concerned solely with the validity of subordinate legislation (other than in regard to the necessary formalities for passing such law) he should object formally before pleading to the charge.³⁰¹

Once the court is in the position to consider the objection the accused will raise the matter by way of argument. Although the general onus in a criminal case is upon the prosecution to prove its case beyond a reasonable doubt there would appear to be no obligation on the prosecution to prove the validity of subordinate legislation. This is substantiated by a number of factors. First, the court is permitted to take judicial notice of any legislation.³⁰² Secondly, any objection to such legislation must be raised by the accused who is obliged to attack the charge as disclosing no offence.³⁰³ It is incumbent upon the accused to give notice of his objection and also to specify the grounds on which he relies.³⁰⁴ Further, the presumption of due performance, i.e. the "omnia praesumuntur rite esse acta" rule in favour of the validity of official acts would appear to place the onus on the accused.³⁰⁵

A problem facing an accused who objects to subordinate legislation as being void for vagueness is that if such legislation is capable of an interpretation

"... which renders it valid, rather than giving it a meaning which is so extravagant or wide as to render it invalid"

the Court will lean in favour of a valid interpretation.³⁰⁶ This approach, which should be seen as persuasive rather than absolute, is based on the maxim 'ut res magis valeat quam pereat' (lit: the the thing may prevail rather than perish, that is that the Court should uphold the validity of the enactment rather than strike it down).³⁰⁷

These comments beg the question as to nature of the onus of proof upon an accused person. In R. v Nyande³⁰⁸ a strong bench, consisting of Murray and Ramsbottom JJ, held in regard to a proclamation alleged to be invalid on the grounds of unreasonableness:

"It is no light matter to attack, on the grounds of unreasonableness, the exercise by the Governor-General of a discretion vested in him by Parliament."

It is interesting to note that of the two Appellate Division cases cited by the Court in support of this statement one was a civil case, namely, Union Government v Union Steel Corporation.³⁰⁹ If decisions in civil cases may be regarded as authoritative regarding the onus on an accused who objects to the validity of subordinate legislation or administrative acts, the following statement by Holmes JA in National Transport Commission v Chettys Motor Transport (Pty.) Ltd.,³¹⁰ although relating pertinently to an alleged unreasonable decision, is apposite:

"... The degree of proof required is a preponderance of probability; but this is less easily envisaged in that one does not readily impute dereliction of duty to a responsible body."

It is suggested that the proper onus upon an objector is the ordinarily civil burden of proof viz. to prove his case on a balance (or preponderance) or probability³¹¹ and that the proviso introduced by the learned Judge of Appeal which relates to the omnia praesumuntur rite esse acta rule is an over-extension of the rule.³¹² Clearly the objector must make out a prima facie case before he may invoke the court's review jurisdiction.

A decided advantage of objecting to the charge at the termination of the prosecution case (where the validity of the charge depends upon the validity of an administrative act) is that the accused will have had the opportunity of testing the evidence of prosecution witnesses by way of cross-examination. An advantage which he would not have enjoyed had he instituted review proceedings by way of motion.³¹³ Once the objection is properly

before the Court, it will test the validity of the subordinate legislation or administrative act in the same way as it would in review proceedings.

Certain further aspects require consideration. First, the magistrates' courts enjoy statutory jurisdiction to test the validity of any statutory regulation, order or by-law,³¹⁴ despite being denied testing rights in regard to provincial ordinances, ordinances of the legislative assembly of the territory and statutory proclamations of the State President or of the Administrator of the territory. It is obliged to assume the validity of every such ordinance or proclamation.³¹⁵

In order to avoid an accused escaping criminal liability by taking technical objections to the charge, a number of provisions have been introduced in the Criminal Procedure Act 1977. First, should an objection be upheld by the Court, any defect in the charge may be cured by an amendment raised by the court mero motu or on application by the prosecution.³¹⁶ This provision applies equally to an objection to the charge as disclosing no offence where it is possible to cure the charge by way of amendment.³¹⁷ On the other hand the grant of an amendment is subject to the accused not being prejudiced in his defence.³¹⁸ In the past an objection to the charge as disclosing no offence has not been regarded as a technical point.³¹⁹ The Act further provides that where a charge is defective on account of the want of an averment, such charge may be cured if sufficient evidence has been led establishing the facts or matter which initially should have been contained in the charge.³²⁰ It would appear that this latter provision cannot cure a charge which discloses no offence unless the defect is of a formal or technical nature, e.g. the omission of an essential allegation which reduces the charge to a nullity. The Court will not lightly permit the introduction of a new charge after the accused has successfully objected to the original charge on the ground that it discloses no offence.³²¹ While the prosecution may not amend a charge indiscriminately there is little doubt that the present Criminal Procedure Act is more structured to counter objections than were the former Acts.³²²

4.3 Where the review process becomes the issue despite other relief (unrelated to the review process) being sought initially.

On occasion the Court has resorted to its inherent review jurisdiction where the relief sought initially is unrelated to such jurisdiction. These

decisions are of particular importance to this work as they show clearly that the Court is possessed of an overriding (and almost absolute) jurisdiction, subject to the limitations imposed upon it by legislation or by its own decisions.³²³ The Court has resorted to its inherent review jurisdiction only where the facts are clearly before it and a failure to grant such relief would permit irregularities to remain and injustice unredressed.

4.3.1 An Appeal (stricto sensu).

An appeal stricto sensu is an ordinary judicial appeal from a lower to a higher court. It may be described as a re-determination of a matter as set out on the record of the court a quo and of the law relevant to such matter.³²⁴ As indicated above an appeal is concerned with the correctness of the decision as based on the merits of the case while review is concerned only with the validity of the proceedings.³²⁵

An appeal against a decision is available only where legislation has made provision therefor. A Court enjoys no inherent appellate powers. The question arises whether the Court may exercise its inherent review jurisdiction when it is seised with an appeal. There is precedent which confirms that Court may, while considering an appeal, use its review powers in order to reach a just and proper decision.^{325a}

In R. v Kunene,³²⁶ while not actually deciding whether it could resort to its review powers while considering an appeal, the Court reviewed an administrative act which formed the basis of a criminal conviction.³²⁷ The accused had been charged and convicted of occupying and using land which had been declared a commonage in terms of a Proclamation made under the Native Trust and Land Act 1936. The accused had previously occupied the land. The Commissioner had provided alternative accommodation for the accused which the latter had refused to accept. In argument the accused alleged that the provision of alternative accommodation was invalid as the Commissioner had not applied his mind to the matter on account of the accommodation being unfit for human habitation. The accused further alleged that the decision was 'so unreasonable that it was ultra vires the purposes of the Proclamation'.³²⁸ These issues could not be raised by way of an

appeal against the conviction. The accused did not attack the validity of the Proclamation but the administrative decision by the Commissioner flowing therefrom. The Court found that the decision was not irregular and accordingly dismissed the appeal. Had the accused alleged the invalidity of the Proclamation as a defence to the criminal charge, he would have been unable to raise the issue before the magistrate as such matter is beyond the latter's jurisdiction.³²⁹ Once he had been charged and convicted there would appear to be no reason why the accused could not have raised the invalidity of the Proclamation per se by way of appeal. In considering such appeal the Court would have effectively exercised its review powers in so far as the validity of the Proclamation is concerned. In Kunene's case it was not the Proclamation which was attacked but the decision flowing therefrom.

The decision in R. v Kunene³³⁰ is supported by the important Appellate Division decision in R. v Parmanand.³³¹ Although the decision in Parmanand's case relates to the review of proceedings of inferior courts, i.e. review in terms of s24 of the Supreme Court Act 1959 the principles of law decided by the Court would appear to be applicable to common law review. Briefly the facts in Parmanand's case were that the accused had been convicted in the magistrate's court of receiving stolen property. Although he had prepared a substantial argument to present to the trial court, the latter had convicted him without affording him an opportunity of addressing it. Parmanand noted an appeal purely on the merits to the Natal Provincial Division. However before the hearing he gave notice that he intended applying at the hearing of the appeal for the amendment of his grounds to include that he had not been afforded an opportunity of addressing the trial court.³³² He supported this latter allegation by affidavits. The Natal Court, per Broome JP, held regarding the failure by the Court to afford Parmanand an opportunity to address it:

"In all the circumstances we are prepared to allow the appellant to amend his grounds of appeal in terms of the notice, but we point out that the effect of this indulgence is not to turn the present proceedings into review proceedings, and does not permit the appellant in arguing his grounds of appeal to refer to matters which do not appear from the record itself. The affidavit that was put up in support of his application is therefore not part of the record in the appeal and may not be referred to during the course of argument."³³³

The appeal was dismissed. On appeal to the Appellate Division, the latter court gave particular attention to the competency of the Provincial Division in the exercise of its appellate jurisdiction in regard to matters which may be raised only by review. The Court per Greenberg JA held:

"The question that I do propose to consider is whether it would have been competent to the Provincial Division to take into account, in the appeal proceedings, the information placed before it by way of affidavit. There is a well-recognised distinction between an appeal against a decision in a magistrate's court and a review of the proceedings in such a court; so far as it is relevant in the present case, apart from the difference in the form, in a appeal the Court ordinarily has regard only to the record of the proceedings in the inferior court, whereas in review proceedings other information can be placed before the Court. But in practice this distinction has not always been observed ... and it is open to the appeal Court in any case, if the circumstances warrant it, to grant relief in appeal proceedings where the proceedings ought to have been by way of review. Thus where there is only an appeal before the Court and it appears that there might be relief open to the appellant by way of review, it would not be proper for the Court to dismiss the appeal and consequently confirm the conviction, thus making it impossible for the appellant, in view of the law as laid down in R v D and Another, *supra*³³⁴ to get relief thereafter by way of review. In such a case the Court should at least postpone its decision until the appellant has had an opportunity to bring review proceedings; and if all the material necessary for a decision on review is before the Court, it would be a waste of time and expense to postpone the appeal and not to decide the matter without further proceedings, unless of course there are circumstances in which to do so might cause prejudice to the Crown ... If the facts showed that the appellant might have a good ground for review, the Court would have erred in dismissing the appeal at that stage."³³⁵

This decision was cited with approval by the Appellate Division in Coopers (South Africa) (Pty.) Ltd. v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH³³⁶. Although there could have been no review of the proceedings of the court *a quo*, as such court is considered a superior court³³⁷ the Appellate Division in approving the principles regarding appeal and review as

held in Parmanand's case (above) distinguished between an appeal against the merits and one which attacks the proceedings of the court (of the Commissioner of Patents) on an irregularity in the proceedings.³³⁸

There would appear to be no significant reason why the principles as decided in Parmanand's case should not apply to the proceedings of administrative authorities where the matter is before a Court on appeal, subject to such court enjoying an inherent review jurisdiction. In Mthembu v Chief Bantu Commissioner Natal³³⁹ the Natal Provincial Division held that the respondent, the Chief Bantu Commissioner of Natal, who enjoyed both an appellate and a review jurisdiction in regard to certain administrative decisions of officers of the local (Bantu) Affairs Administration when considering an appeal:

"... was entitled and indeed obliged to deal with and apply his mind to the question as to whether such irregularity had been committed ... he had before him all the material upon which he could come to a conclusion in proceedings of review provided under reg. 32, and there can be possibility of prejudice to anyone if he did."³⁴⁰

To summarise the situation, it is submitted that a Court which enjoys an appellate and a review jurisdiction is entitled and obliged to review the validity of the proceedings of the trial court or administrative authority where allegations of an irregularity in such proceedings are made, despite the fact that the matter is before the Court on appeal only. The exercise of its review power is subject to no prejudice being suffered by any of the parties and that the necessary information is before the Court. Where such information is not before the appeal Court, the matter should be adjourned so as to enable the appellant to institute review proceedings. It would appear that the power to review proceedings of inferior courts etc, relates to both civil and criminal causes.

- a) & b) The review process and the essential requirements for the granting of such relief.³⁴¹

The mere fact that allegations of irregularities in the proceedings of an inferior court or administrative authority are made is not sufficient to

set the review process into motion. As indicated above there are two essential requirements before this may occur:

- i) the necessary factual information should be before the Court; and
- ii) the respondent must not be prejudiced by the Court's resorting to its review powers.

Before considering the situation where these requirements are not complied with, it will be of advantage to examine each essential separately.

First, unless the factual situation is before the Court, either on the record per se or in the form of affidavits etc., the Court will not be able to consider the validity of the proceedings. Parmanand's case is particularly illustrative.³⁴² Parmanand had alleged that he had not been afforded the opportunity of addressing the trial court. There is no suggestion in the report that this appeared prima facie the record. In fact Parmanand had lodged affidavits of independent witnesses testifying to the facts. These affidavits were attached to a petition before the Appellate Division³⁴³ which held:

"Copies of these affidavits, of which I have quoted extracts, were served both on the 'Attorney-General' and on the clerk of the magistrate's court, Durban; nothing has been put before us to call into question the truth of what is said in them and there is nothing to warrant the idea that the position was not the same in regard to the affidavits put before the Provincial Division. And if this is so, then, if they showed that a gross irregularity had been committed in the magistrate's court, the appeal should not have been dismissed, unless it was clear that, despite the irregularity, there had not been a failure of justice."³⁴⁴

In regard to the question of prejudice, the Court will not exercise its review power without affording the respondent an opportunity of replying to the appellant's allegations. If necessary the Court will adjourn the matter to enable the respondent to reply. In Parmanand's case, the presiding magistrate had replied to the allegation that the accused had not been afforded an opportunity.³⁴⁵ He had not denied the allegation - on the contrary. All the necessary facts were at all times before the Provincial Division which should have heard the matter as a review. Despite possess-

ing no original jurisdiction to review the proceedings, the Appellate Division held that as it had the power to hear evidence it could consider the affidavits³⁴⁶ rather than remit the case to the Provincial Division.

If factual evidence is not before the Court, rather than dismiss the appeal and leave the appellant remediless the Court 'should at least postpone its decision until the appellant has had an opportunity to bring review proceedings ...'³⁴⁷ The actual review process is no different to that employed by the Court when considering common law review instituted by way of motion and the principles relating thereto apply under these circumstances, as indeed they do in the various methods of invoking the Court's inherent review jurisdiction.

c) Procedure.

The procedure to be adopted by an appellant in criminal and civil cases will be considered under the same procedural headings. For the sake of convenience only appeals from magistrates' courts to the relevant provincial division will be examined. In so far as the respective procedures are concerned the right of the appellant to appeal will be assumed.

i) Method of noting an appeal.

In respect of both criminal and civil cases, a notice of appeal is lodged with the clerk of the court within the time period stipulated by the relevant legislation. If an attorney has been engaged it is necessary to lodge a power of attorney authorising such attorney to note such appeal and act on his behalf.³⁴⁸ An appellant in a civil case shall at the time of delivery of the notice of appeal lodge with with Clerk of the Court the sum of R150 as security for the respondent's costs of appeal, unless the court of appeal otherwise orders.³⁴⁹

ii) Notice of appeal.

In terms of the Rules of the Magistrates' Court a civil appeal shall state:

- a) whether the whole or part only of the judgment is appealed against and if in part only, then what part, and
- b) the grounds of appeal including the finding of fact or rulings of law appealed against.³⁵⁰

While an accused who appeals against a criminal conviction should follow the same format as a civil notice of appeal, the relevant rule provides only that the notice of appeal, which must be in writing, shall set out clearly and specifically the grounds relied upon, whether of law or fact or both.³⁵¹

iii) Reasons for judgment.

In respect of both criminal and civil appeals the presiding magistrates is obliged to furnish his written reasons for the judgment. The respective rules regarding the content of the reasons for judgment in criminal and civil cases are substantially similar. In respect of civil cases the rule provides that the statement of reasons shall contain:

- a) facts found to be proved;
- b) the grounds upon which he (the magistrate) arrived at any finding of fact specified on the notice of appeal as appealed against; and
- c) his reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against.

The reasons for judgment become part of the record.³⁵²

iv) The procuring and furnishing of the record.

In both criminal and civil appeals the clerk of the court is obliged to furnish the record of the case.³⁵³ Certified copies of the record are required in civil cases by the Registrar of the Supreme Court. This is the responsibility of the appellant who is further obliged to furnish each respondent with two certified copies thereof.³⁵⁴ In a criminal case the required number of certified copies of the record must be forwarded to the Registrar by the Clerk of the Court. The ultimate responsibility for ensuring that all copies of the record on appeal are in all respects properly before the Appeal Court rests on the appellant or his attorney.³⁵⁵

iv) The setting down of the appeal for hearing.

In civil cases an appeal shall be prosecuted within the period stipulated by the Uniform Rules of Court. By prosecuting an appeal is meant an appli-

cation by the appellant in writing to the Registrar for a date of hearing.³⁵⁶ On receipt of a date the appellant must serve a notice of set down on the parties to the appeal, advising the Clerk of the Court accordingly.³⁵⁷ In terms of the Uniform Rules the Registrar is obliged to set down a criminal appeal for hearing 'on notice to all parties in accordance with such directions as he may receive from the Judge-President from time to time.'³⁵⁸ In practice however this Rule would appear not to be followed. Criminal appeals are set down by the Attorney-General who in turn gives notice to all parties.

v) Powers of the Court on appeal.

A court of appeal enjoys the following powers in respect of a civil appeal, and may:

- a) confirm, vary or reverse the judgment appealed from, as justice may require;
- b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the court from which the appeal is brought, with instructions in regard to the taking of further evidence or the setting out of further information;
- c) order the parties or either of them to produce at some convenient time in the court of appeal such further proof as shall to it seem necessary or desirable; or
- d) take any other course which may lead to the just, speedy and, the inexpensive settlement of the case; and
- e) make such order as to costs as justice may require.³⁵⁹

In terms of the Criminal Procedure Act 1977, apart from its powers to increase the sentence of an appellant or impose some other sentence in lieu thereof, the court of appeal enjoys the following powers and may:

- a) at any sitting hear any evidence and for that purpose summon any person to appear and to give evidence or to produce any document or other article;
- b) confirm, alter or quash the conviction, and in the event of the conviction being quashed, where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges; or
- c) confirm, reduce, alter or set aside the sentence or any order of the lower court; or
- d) set aside or correct the proceedings of the lower court; or
- e) generally give such judgment or impose such sentence or make such order as the lower court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or
- f) remit the case to the lower court with instructions to deal with any matter in such manner as the provincial division may think fit; and
- g) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with him or the proceedings in regard to him as to the court deems likely to promote the ends of justice.³⁶⁰

4.3.2 Statutory Review.

As indicated elsewhere this species of review defies precise definition or even explanation as it varies from statute to statute.³⁶¹ Depending on the particular statute the special review powers conferred upon the Court may

be more or less extensive than the Court's inherent review jurisdiction or its jurisdiction conferred under s 24 of the Supreme Court Act.³⁶²

In the classic JCI case³⁶³ Innes CJ viewed the then contemporary statutory review as conferring wider powers than the two other species of review. This is an unfortunate description. Although it may have been valid at the turn of the century, the description is not necessarily accurate today. For example in De Hart NO. v Kloppers and Botha NNO. and Others³⁶⁴ Trollop J saw the specific statutory review power as being that of appeal and review with the additional:

'... privilege or receiving fresh evidence, and entering upon and deciding the whole matter de novo ...'

On the other hand the statutory review jurisdiction conferred by the Liquor Act 1927³⁶⁵ was seen by Feetham JA in Loxton v Kenhardt Liquor Licensing Board³⁶⁶ as being sui generis '... a special type of jurisdiction which comes somewhere between the second and third species of review as described in the above quoted judgment ...' (i.e. JCI case). It is submitted that these descriptions are not as clear as statutory review powers should be regarded under one heading. Where classification is necessary the various forms of statutory review powers should be distinguished by reference to the actual power conferred. For the purposes of this work statutory review shall mean the various review powers conferred by statute, other than s. 24 review of the proceedings of inferior courts or s. 304 of the Criminal Procedure Act 1977.

The notion of the Courts inherent review jurisdiction being invoked or resorted to by the Court, while entertaining an application for the review of a specific decision etc. in terms of particular legislation, may appear extravagant. None the less Kruger v The Master and Another³⁶⁷ is precedent for this unusual situation. In this case the applicant, an insolvent, had instructed his attorneys to apply for his rehabilitation. In terms of the Insolvency Act 1936 as he had not been insolvent for four years, it was necessary for the applicant to obtain the necessary recommendation of the Master of the Supreme Court.³⁶⁸ The Master's recommendation is usually obtained only after service of the application for rehabilitation upon him. However, in this case the applicant's attorneys informed the Master that in

due course a formal application in terms of the section would be served upon him and he was requested to recommend the application when it was received by him.³⁶⁹ This informal communication is in no way irregular. In practice some attorneys notify the Master in advance that an application will be forthcoming. In Kruger's case before receiving the actual application the Master submitted his report refusing to recommend the application as 'insufficient reasons were advanced' by the applicant.³⁷⁰

The applicant then instituted the special statutory review procedure as provided by the Insolvency Act³⁷¹ in regard to the action by the Master. Simultaneously with this application for review the applicant applied for his rehabilitation. On receipt of both applications the Master responded to the application for rehabilitation by merely reiterating his original decision.³⁷² In regard to the application for review in terms of s.151 of the Act, the Master stated that he did not intend opposing the application and that he abided by the decision of the Court.³⁷³

The special review in terms of s.151 of the Insolvency Act is available to any person 'aggrieved by any decision, ruling, order or taxation of the Master ...' That the Master committed the following judicially recognised irregularities would appear to be beyond contention:

- a) he failed to apply his mind to the matter before him, and
- b) he arrived at a decision without affording the applicant the opportunity of presenting his case. In other words he breached the audi alteram partem rule.

The Court, per Slomowitz A J, found that the Master's refusal to recommend the application for rehabilitation was not justiciable in terms of the special review procedure provided by s. 151 of the Insolvency Act.³⁷⁴ However as the applicant had placed the matter before the Court by way of motion, and as the facts of the matter were before it, the Court was prepared to exercise its inherent review jurisdiction.³⁷⁵ Had the Court not resorted to its common law review powers the applicant may have been remediless. Accordingly the Court set aside the Master's refusal and recommended the applicant for rehabilitation. Thereafter the Court made the necessary order for the rehabilitation of the applicant. The correctness or otherwise

of the finding, that the Master's refusal to recommend the application is not justiciable in terms of s.151, is beyond the scope of this section.^{375a} None the less there can be little criticism of the principle that the Court may resort to its inherent review powers where for some reason an application for statutory review may not be entertained by it.

- a) & b) The review process and the essential requirements for its grants where the applicant initially institutes a form of statutory review.³⁷⁶
-

No difference exists between the review process exercised by the Court under these circumstances and that exercised by the Court when entertaining an application for common law review. The essential features and grounds are identical in all cases once the review process is resorted to.

It is however essential that the facts are before the Court before it may resort to its inherent review jurisdiction. In appropriate cases the Courts should, as it has held in regard to appeals,³⁷⁷ postpone the matter in order to afford the applicant an opportunity to place the necessary facts before it. In Kruger v The Master³⁷⁸ the necessary facts were before the Court and accordingly it was in a position to make the decision.

c) Procedure.

In Kruger's case the Court was prepared to consider the matter as an application for (common law) review on the papers before it:

"The matter in casu takes the form of an application for review as is provided for in Rule 53 of the Rules of Court. Procedurally therefore the application is properly before me."³⁷⁹

It is suggested that it is not necessary for the initial application to be by way of motion before the Court will entertain an application for review on the papers before it. This is clearly indicated in its attitude to review while being seised of an appeal initially.³⁸⁰ Subject to the facts being before the Court it may resort to its review powers despite the original application not being by way of motion in terms of Rule 53. This may be considered one of the essential dynamic features of the remedy.

4.3.3 The review of proceedings of Inferior Courts.

There are two species of (statutory) review procedure providing for the review of the proceedings of inferior courts:

- a) the review procedure in terms of s. 24 of the Supreme Court Act 1959 which is available in respect of both civil and criminal proceedings of any inferior court;
- b) the review procedure in terms of s. 304 of the Criminal Procedure Act 1977 in respect of criminal proceedings before a magistrates court or a regional court.

The essential features and procedures of each of the two species of review will be considered separately. Thereafter the review process, i.e. the resorting to its inherent jurisdiction by the Court, will be considered in respect of both species of review.

a) Review in terms of s. 24 of the Supreme Court Act 1959.

Section 24 review, which owes its origin to the Charter of Justice 1834,³⁸¹ and has a number of important features in common with common law review. This was observed by Innes C J in the JCI case.³⁸² Like common law review, s.24 review is concerned only with the validity of proceedings and not the substantive correctness of a decision.³⁸³

Section 24 provides the grounds upon which the proceedings of any inferior court may be brought under review, more particularly:

- a) absence of jurisdiction on the part of the court;
- b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- c) gross irregularity in the proceedings; and
- d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

These grounds are more limited than those adopted by the Court in respect of its inherent review jurisdiction.³⁸⁴ An important question is whether the Court, in entertaining an application for review in terms of s. 24, will go beyond the specific grounds set out in the Act. Despite a ruling in the affirmative in the early decision of The King v Higginson³⁸⁵ the Court subsequently ruled otherwise in two important cases which will be considered below under the heading of the review process.³⁸⁶

Apart from establishing an irregularity, as set out in the section, an applicant must show that he has suffered prejudice or a substantial wrong as a result of the irregularity.³⁸⁷

Although the law regarding the review of part-heard proceedings has been considered above³⁸⁸ it is apposite to set out a brief summary thereof:

- i) the Court has the power to entertain review proceedings (including s. 24 review) in respect of a case part heard before an inferior court;
- ii) the Court will not lightly review a pending case unless the applicant establishes that the (inferior) court has committed an irregularity as set out in Section 24 (of the Supreme Court Act 1959). Further the applicant must show that the irregularity has caused or may cause irreparable prejudice or grave injustice which may be avoided only by the Court exercising its review powers.

The Rules of Court provide that any application for s 24 review shall be by way of motion.³⁸⁹ The same rule is of application to common law review.³⁹⁰

When considering s. 24 review, the Court enjoys the same powers as to its judgment as it possesses in regard to common law review proceedings. In other words it may set aside or correct the proceedings. After setting aside the proceedings, the Court may remit the matter with instructions to the inferior court to deal with any aspect it considers necessary. The Court may remit the case to the tribunal a quo to be heard de novo before another presiding officer.³⁹¹

Finally it should be noted that s. 24 review is available in respect of any proceedings, civil or criminal, heard before any inferior court.³⁹²

- b) Review procedure in terms of s 304 of the Criminal Procedure Act 1977.
-

This type of review owes its immediate origin to certain repealed sections of the present Magistrates Court Act 1944.³⁹³ In terms of the Act certain sentences by a magistrate were subject to the automatic review (review as of course) by the court of appeal of the relevant provincial division or one of the judges thereof.³⁹⁴ The Act conferred on the Court powers enabling it to confirm, alter or quash the conviction or confirm, reduce, alter or set aside the sentence³⁹⁵ where it appeared to the Court that the proceedings a quo were not in accordance with Justice.³⁹⁶

The present Criminal Procedure Act 1977 limited the provisions of automatic review of certain sentences by a magistrate's courts. The Act introduced s. 304 review (which was previously s. 98(4) of the Magistrates' Court Act 32 of 1944. The relevant enactment provides:

s. 304

(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

In other words a judge of the relevant provincial division may mero motu review the proceedings of any criminal case in which a regional or magistrate's court has imposed any sentence, if he is of the opinion that the proceedings were not in accordance with justice. There is no restriction regarding the manner in which the matter has come to his notice. He may have read an account of the case in a newspaper or he may have been informed informally.

The Criminal Procedure Act 1977 also provides wider powers of review than previously. The Court, in addition to the right to hear evidence, may:

- "(i) confirm, alter or quash the conviction, and in the event of the convicted being quashed where the accused was convicted on one or two more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;
- (ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court;
- (iii) set aside or correct the proceedings of the magistrate's court;
- (iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or
- (v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial division may think fit; and
- (vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.³⁹⁸

These powers are considerably wider than those enjoyed by the Court when considering a review in terms of s. 24 of the Supreme Court Act 1959. On the other hand the power of the Court when considering s. 24 review is similar to its power when considering an application for common law review.^{398a}

In so far as the procedure is concerned, a dichotomy must be drawn between the automatic review of certain cases as provided for by s. 302 of the Criminal Procedure Act 1977 and the special review powers as conferred in s. 304(4). The powers of the reviewing Court remains the same in regard to both types of review.³⁹⁹ The Act provides that, in respect of cases subject to automatic review, the relevant Clerk of the Court must, within one week, furnish the Registrar of the relevant provincial division with:

- a) the record of the proceedings or a certified copy thereof;
- b) a statement by the presiding officer should the latter wish to append any comments;
- c) a written statement or argument furnished by the accused, same to have been lodged by the latter within a stipulated period.

On the receipt of these documents it is the duty of the Registrar to lay them in chambers before a judge of the division.⁴⁰⁰

No procedure is prescribed in respect of s. 304 review. Once the matter has come to the notice of a judge of the division he will call for the record. If he is of the opinion that the sentence or conviction are 'not in accordance with justice' he must lay the matter before the court of the provincial division for consideration by that court as a court of appeal (s. 304(2)). At this stage it will not be inappropriate to consider certain further informal procedures which have become the practice in most divisions. The Attorney-General or his deputy may submit his views regarding any case on review in terms of the Act. He usually does this by way of written memorandum. Copies of the actual papers (other than the record) of three cases, which will be considered below including S. v Taylor⁴⁰¹ and S. v Lubisi⁴⁰² are annexed hereto.⁴⁰³ The judge may request the Attorney-General to comment on any particular aspect or point of law.⁴⁰⁴ If the nature of the case warrants full legal argument the judge will order the case to be set down and argued before a court consisting of two judges. The Attorney-General or his representative will argue on behalf of the State and a counsel may be appointed to argue the case on behalf of the defence. Matters placed before the reviewing judge in terms of s. 302 of the Criminal Procedures Act i.e. automatic review are usually considered by the judge in chambers purely on the record and on representations of the Attorney-General where this is relevant.⁴⁰⁵

- c) The review process in respect of both forms of statutory review of the proceedings of inferior courts.

When entertaining an application for review in terms of s. 24 of the Supreme Court Act 1959 or the review proceedings in terms of s. 304 of the Criminal Procedure Act 1977, the Court may resort to its inherent review

jurisdiction where the initial form of review before it is not appropriate to the circumstances of the case. Precedent for this proposition may be found in a number of cases,⁴⁰⁶ including S. v Taylor⁴⁰⁷ and S. v Mame-tja⁴⁰⁸ considered above. The two latter decisions are important also as precedent for the review of the proceedings of part heard cases.⁴⁰⁹

Perhaps the most extraordinary use of its inherent review powers under these circumstances occurred in S. v Lubisi⁴¹⁰ where the Court set aside an acquittal in a criminal case before the magistrate's court. The accused who had been charged with stock-theft pleaded 'not guilty' to the charge and the case proceeded before magistrate H. At the conclusion of the State case the accused indicated that not only did he intend to give evidence, but also intended to call a certain witness. The case was duly remanded for this purpose and the accused who was in custody was released on his own recognizances. The accused failed to appear in court on the remand date and a warrant for his arrest was authorised. He was apprehended only some months later and brought before magistrate H who postponed the case to the following week for the completion of the trial.⁴¹¹ The record of the evidence of the initial hearing, for some unexplained reason, became detached from the charge sheet and was mislaid. On the final trial date, also for some unexplained reason, a new charge sheet was drawn up and the matter was heard before another magistrate R. The new charge sheet indicated only that the accused had previously pleaded 'not guilty' to the charge. It contained no indication that the matter was part heard. To complicate the matter still further a different prosecutor with no knowledge of the previous history of the case appeared. As he had no witnesses available, this prosecutor requested that the case be withdrawn. The magistrate R pointed out that as the accused had pleaded he was entitled (by reason of the withdrawal) to a verdict and accordingly acquitted the accused.⁴¹²

Magistrate R on learning of the true situation submitted the case to the Court requesting that the proceedings before him be set aside so that the proceedings before magistrate H could be concluded.⁴¹³ Unfortunately neither the reported judgment nor the record of the case indicates the nature of magistrate R's communication.⁴¹⁴ Together with the initial comments of the Attorney-General the matter was placed by the Registrar before Le Roux J in terms of s 303 of the Criminal Procedure Act.⁴¹⁵ The possible setting

aside of an acquittal was a matter of some concern to the learned judge who took up the matter informally with the Attorney-General.⁴¹⁶ Thereafter the matter was considered by the learned judge together with Van Dyk J.

Two difficulties faced the review Court,

- a) the question of procedure;
- b) that no precedent for the setting aside of an acquittal appeared to exist.⁴¹⁷

From the reported judgment it would appear that the Court found the answer to both problems in its inherent review jurisdiction. The Court, per Le Roux J, stated:

"I have come to the conclusion that there exists an inherent power in a Supreme Court to correct the proceedings of an inferior court at any stage if it appears to be in the interests of justice."⁴¹⁸

The Court could not be referring to any review power other than its inherent review jurisdiction. Review in terms of s.304 of the Criminal Procedure Act 1977 was inapplicable as no sentence had been passed. Neither was s. 24 review applicable as:

- a) the matter was not before the Court by way of motion;⁴¹⁹
- b) no irregularity in terms of s. 24 had been committed.⁴²⁰

The use of its inherent review jurisdiction by the Court to set aside an acquittal is a matter of some contention. While the setting aside of an acquittal has far reaching effect any may even lead itself to abuse, there are circumstances in which a grave miscarriage of justice may be avoided only by the Court taking such action, e.g. where it is established that a presiding officer accepted a bribe and acquitted persons who, on the evidence, were clearly guilty of the offence. Another example would be an acquittal, before any evidence has been led, founded on an incorrect technical point or some dishonesty on the part of the court, the prosecution or the investigation officer.⁴²¹

Finally in regard to Lubisi's case it is unfortunate that an extra-ordinary case of this nature was not argued fully before a Full Bench of the Division. None the less until the Appellate Division has ruled on the subject or until legislation is passed by Parliament the setting aside of an acquittal granted by an inferior court (by way of the Court's inherent review jurisdiction) remains an open question.⁴²²

Annexure 4

Copies of the review papers in

S. v Taylor

1976(4)SA 185(T)

(see the text relating to note 401 on page 341 above)

more particularly:

- a) A copy of a letter from the Magistrate, Randfontein to the Registrar of the Supreme Court, dated 2nd April 1976 (p. 343(ii)).
- b) A copy of a written statement by Mrs C E Nadin regarding the accused J E Taylor (p. 343(iii)).
- c) A clear copy of Mrs Nadin's statement.
- d) A memorandum from the Deputy Attorney General, Transvaal to the reviewing judge (undated) (pp. 343(iv) - 343(v)).

Vglw. Nr. Ref. No.

1/4/13

NAVRAE/ENQUIRIES

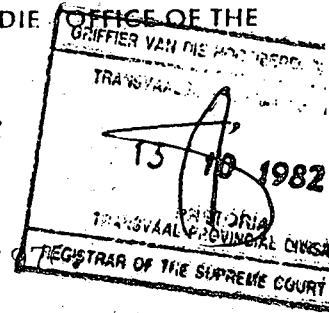
Tel. No. 1264

The Registrar,
Supreme Court,
Johannesburg.
2000.

The Registrar,
Supreme Court
Johannesburg
2000

KANTOOR VAN DIE OFFICE OF THE

1700.
2nd April, 1982

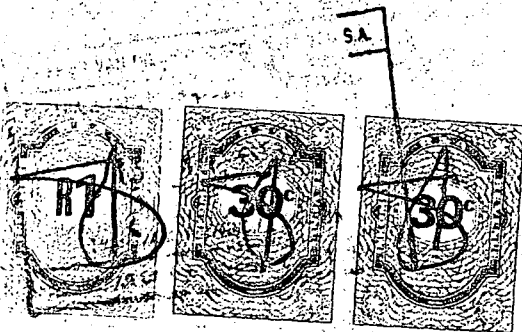


RE: STATE vs J.E. TAYLOR - CASE NO. 1185/76

1. Attached please find the record of the above case for review in terms of section 98 (4) Act. 32 of 1944.
2. The presiding Magistrate respectfully requests the honourable Reviewing judge to quash the conviction as he would not have convicted the accused if the evidence of Mrs. C.E. Nordin had been led prior to the closing of the defence case.

[Signature]
(M.C.) E. DE CURIE

PRESIDING MAGISTRATE JOHANNESBURG



1. Attached please find the record of the above case for review in terms of section 98(4) Act. 32 of 1944.
2. The presiding Magistrate respectfully requests the honourable Reviewing judge to quash the conviction as he would not have convicted the accused if the evidence of Mrs C.E. Nordin had been led prior to the closing of the defence case.

3, Mrs. Christall Williams, to the following testimony on behalf of my son John David Taylor.

My son is employed as a heavy duty welder, in a weldment (welder) for the South African Company, which mainly supplies the mining industry. Three years ago when he started with the company there were only 11 welders of one model in the country supplied to 3 customers. Now there are 42 welders of 1 model supplied to 11 customers, and he is the only person handling this section. Frequent gains are made at times due to unavailability of needed equipment that he was prepared to hand in his resignation five weeks ago. He was persuaded to remain and was promised an appointment, but till now no appointment has been provided. Due to lack of cooperation of others in control he has been living in a constant state of frustration, and yet at almost 63 years of age, what could he go for employment? I personally have been responsible for persuading him not to hand in his resignation again.

Saturdays he is not supposed to work. On Saturday the 27th of March 1976 he had an important appointment at 9 a.m. He was unable to keep this appointment at the set time at the company plant at 9 a.m. An emergency had arisen at one of the mines due to a breakdown. Again only he could interpret their needs, and know where to get the goods. He postponed his appointment for later on in the morning. After delivering the needed equipment to the mine, and on route to keep his appointment, he quickly went into Checkers to buy a few necessary items. Not bothering to take a basket, all he wanted were buns, soap, cottage cheese, and tinned Telve. He took the buns, forgot the milk, pocketed the aftershave, so as to make sure not to drop it and break it. Paid for the other items, forgot the aftershave, rushed for his appointment, was stopped by Mr. Kruger, and only when told not to touch his pockets, he remembered the aftershave. He offered to pay for it but it was too late, he was accused of shoplifting. After coming home and breaking down completely after telling my mother, he remained in a complete state of shock. After initially discussing it with my mother and then with me he refused to speak about the subject and hardly speaks when spoken to on any subject. I became so worried that I phoned Mr. Kruger that evening and he went to see my father. He then gave my father encouragement and led him to believe that the charge against him would be withdrawn. He then conveyed the same impression on Sunday morning before the court case. Again my father received a further shock when Mr. Kruger took the witness stand, and delivered his statement. At that time my father only realized that the charge had not been withdrawn. Being completely ignorant of court proceedings, as this was his first time ever in a court he thought that Mr. Kruger was just going to say "Your Honor I think we would like to withdraw the charge". This did not happen and added to his shocked condition to such an extent that he was completely bewildered and unable to defend himself. I would also like to mention that in his normal course of work he daily carries around ~~some tools which are of the same weight and bulk as the shaving bottle~~. He has just been told about his forgetfulness by his father, that his memory, but I think it is due to constant pressure and frustration. His family is especially concerned about the state of shock he is in as he is a very healthy and strong man. It is a very rare cause for concern. This whole procedure is almost unbearable especially since he has to wait for sentence to be passed only on the 20th of April. If the matter could be finalised as quickly as possible he would not have such a difficult time. He is not just on his last, only mother too.

I, Mrs. Chrisouli Elizabeth Nordin wish to give the following testimony on behalf of My Dad John Edward Taylor.

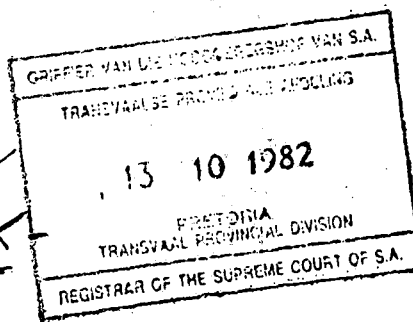
My Dad is employed as a heavy duty machinery Inside Salesman (spares) for a large South African Company which mainly supplies the mining industry. Three years ago when he started with the company there were only 11 machines of one model in the country supplied to three customers. Now there are 48 machines of 4 models supplied to 14 customers, and he is the only person handling this section. Pressure gets so great at times due to unavailability of needed spares that he was prepared to hand in his resignation five weeks ago. He was persuaded to remain and was promised an assistant, but till now no assistant has been provided. Due to lack of co-operation of others in control he has been living in a constant state of frustration, and yet at almost 63 years of age, where could he go for employment? I personally have been responsible for persuading him not to hand in his resignation again.

Saturdays he is not supposed to work. On Saturday the 27th of March 1976 he had an important appointment at 9 a.m. He was unable to keep this appointment at the set time as the company phoned at 8 a.m. An emergency had arisen at one of the mines due to a breakdown. Again only he could interpret their needs, and know where to get the spares. He postponed his appointment for later on in the morning. After delivering the needed equipment to the mine, and en route to keep his appointment, he quickly went into Checkers to buy a few necessary items. Not bothering to take a basket. All he wanted were rusks, Nespray, Cottage cheese and After Shave. He took the rusks, forgot the milk, pocketed the Aftershave, so as to make sure not to drop it and break it. Paid for the other items, forgot the After Shave, rushed for his appointment, was stopped by Mr. Kruger, and only when told not to touch his pockets, he remembered the After Shave. He offered to pay for it but it was too late, he was accused of shop-lifting. After coming home and breaking down completely after telling my Mother, he remained in a complete state of shock. After initially discussing it with my Mother and then with me he refuses to speak about the subject and hardly speaks when spoken to on any subject. I became so worried that I phoned Mr. Kruger that evening and he went to see my Father. He then gave my Father encouragement and led him to believe that the charge against him would be withdrawn. He again conveyed the same impression on Monday morning outside the courtroom. Again my Father received a further shock when Mr. Kruger took the witness stand, and delivered his statement. At that time my Father only realized that the charge had not been withdrawn. Being completely ignorant of court proceedings, as this was his first time ever in a court he thought that Mr. Kruger was just going to say "Your Honour, Checkers would like to withdraw the charge". This did not happen and added to his shocked condition to such an extent that he was completely bewildered and unable to defend himself. I would also like to mention that in his normal course of work he daily carries around tools which are of the same weight and bulk as the shaving lotion. In the past he has joked about his forgettorry being better than his memory, but I know is is due to constant pressure and frustration. The family is especially concerned about the state of shock he is in as he has previously had thrombosis attacks it is even more cause for concern. This added pressure is almost unbearable especially since he has to wait for sentence to be passed only on the 20th of April. If the matter could be finalised quickly as possible we would very much appreciate it, as the strain is telling not just on him but on my Mother too.

To the Honourable the Reviewing Judge,
Review case no 368/76

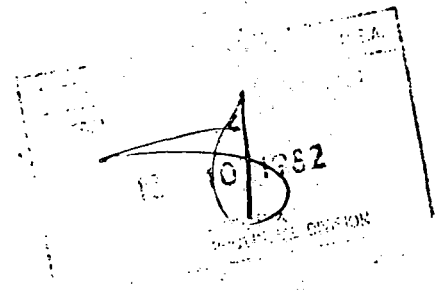
THE STATE versus JOHN EDWARD TAYLOR

1. It appears from the record of the case that this is a case where the record has been forwarded by the Magistrate for the purposes of review before sentence has been delivered but after conviction.
2. It is the view of Hiemstra: "Suid-Afrikaanse Strafproses-reg" on page 542 that, although the relevant section (97 of Act no 32 of 1944) is clearly meant (by the wording of it) to apply only to cases where an accused has already been sentenced, it has, however, become practice to deal, for convenience sake, with matters like the present on review. This has become the practice, even more so, in cases where it is clear that, if a sentence is in fact imposed, it will in any event have to be set aside afterwards.
3. In various cases there were different views concerning this matter. See for example:
 - (i) R v Smit 1948 (4) SA 266 (CPD). ✓
 - (ii) R v Xegwana 1940 EDL 315. ✓
 - (iii) R v Stoffels 1942 CPD 40.
 - (iv) R v Mpati 1957 (2) SA 517 (OPD). ✓
 - (v) R v Masemula 1959 (4) SA 285 (TPD). ✓
 - (vi) S v Dawids 1961 (3) SA 913 (CPD).
 - (vii) S v Stokel 1966 (1) SA 143 (TPD).
4. The last mentioned case was authority in the Transvaal for the contention that review is impossible before sentence has been imposed. None of the cases quoted above, was, however, referred to in this case, even though the approach of the Cape Provincial Division in the Smit case was followed in the previous Transvaal case in point namely R v Masemula (supra).



5. In the recent Transvaal case: State versus Johannes Mashai (delivered on the 14th September 1973) the Court followed the approach of the Court in the Masemula case.
6. The approach adopted in the Mashai and Masemula cases (supra) seems to me, with respect, to be correct, as it seems to be senseless that sentence should first of all be imposed, when it is clear that it will, eventually, have to be set aside. The same, in my opinion, applies to the present case under review, because of the circumstances present in this case.
7. In view of the practice that originated from some of the cases mentioned above and as it would seem fair and correct in the present circumstances, it is my opinion that the conviction should be set aside.

M.T. Van der Merwe
M.T. VAN DER MERWE
DEPUTY ATTORNEY GENERAL



Annexure 5

Copies of the review papers in

S. v Mametja

1979(1)SA 767(T)

(see the text relating to note 408 on page 341 above)

more particularly:

- a) A copy of the letter from the Magistrate, Nabhuo to the Registrar of the Supreme Court dated 16th October 1978 (p. 343(vii)).
- b) A memorandum from the Deputy Attorney General, Transvaal to the reviewing judge (undated) (pp. 343(viii) - 343(xi)).



REPUBLIC OF SOUTH AFRICA

REPUBLIEK VAN SUID-AFRIKA

TIRELO YA PUŠO YA LEBOWA/LEBOWA-REGERINGSDIENS/GOVERNMENT SERVICE

No. ya Tšhupetšo 4/3/9
Verw. Nr./Ref. No.

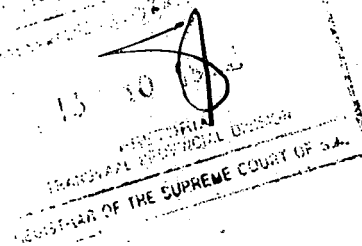
DINYAKISISO A.N. Ramoba
NAVRAE/ENQUIRIES

No ya Thelefomo Kgagara 28
Tel. Nr./No.

OFISI YA/KANTOOR VAN DIE/OFFICE OF THE

Magistrate Naphuno
Private Bag X4027
TZANEEN.
0850.

1978/16/10.



The Registrar
Supreme Court of S.A
TP Division
PRETORIA.
0001.

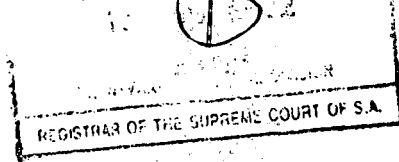
REVIEW: STATE V. HACKSON MAMETJA CASE 492/78.

With greatest respect I submit this case for review of the
conviction for reasons stated in record of proceedings.

MAGISTRATE: NAPHUNO.

THE HONOURABLE THE REVIEWING JUDGE

THE STATE versus HACKSON MAMETJA
SUPREME COURT REFERENCE NO. B 1640/78



1. The accused was charged with the offence of a contravention of Section 2(9) of Act No. 38 of 1927 - obstructing the proceedings of a meeting.
2. Before evidence was led, the Magistrate recused himself from the trial of the case due to pre-knowledge of the facts of the case.
3. Another Magistrate heard the case and convicted the accused.
4. When the Magistrate who had recused himself was asked to sentence the accused in terms of Section 275 of Act No. 51 of 1977 he was not satisfied with the conviction and sent the case on review on the following grounds:
 - (a) It was not proved that the said meeting was lawful.
 - (b) It was not proved that the chief was one of the category of chiefs referred to in Section 2 of Act No. 38 of 1927
5. At the outset, it is not clear under which section the case was sent on review before the sentence was imposed as it is clear that Sections 302 and 304 (4) of Act No. 51 of 1977 only deals with review after sentence and Section 24(1) of Act No. 59 of 1959 only makes provision for a limited number of grounds on which the Honourable Court may take the proceedings into review.

A full discussion of the problem appears in 1976 THRHR 143 by CF Kloppe: „Hersiening van Landdroshofverrigtinge voor Vonnis” Suffice to say that I am of the prima facie opinion that in terms of its inherent jurisdiction this Honourable Court may review this case if the Court is of the opinion that fair

/.....

adjudication has not taken place. It would in any case be detrimental to the accused to have the case referred back to the Magistrate for the imposition of sentence which in terms of Section 32(2) of Act No. 38 of 1927 is a maximum sentence of R50 or three months' imprisonment and is therefore not a reviewable sentence.

6. From the evidence it is clear that the accused did interrupt the proceedings at a meeting where his chief and a Magistrate were present. Furthermore, the Magistrate was the chairman at this meeting.

7. As to the lawfulness of this meeting it is submitted that nothing indicates that this was an unlawful meeting. The evidence indicates that before the accused interrupted the meeting, there was a general discussion about business. Furthermore it is also clear that the meeting had been arranged to discuss the chief's complaint against the accused as his representative. Under the circumstances I am of the opinion that this was a lawful meeting.

8. It is further conceded that the charge sheet is faulty because it does not contain any reference to a wilful obstruction of the proceedings of a meeting lawfully convened by a chief as one of the category of chiefs referred to in Section 2 of Act No. 38 of 1927.

It is however submitted that this defect in the charge sheet is not fatal as foreseen in

R v Phakane 1956 (3) SA 638 E

R v Buthelezi 1957 (4) SA 167 N

R v Ezekiel 1959 (1) SA 95 T

Section 88 of Act No. 51 of 1977 reads:

"Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred."

See with regard to the fore-runner of the abovementioned section (Section 179 bis of Act No. 56 of 1955):

S v Khuzwayo 1969(1) SA 70 N at 71 D where it was decided that a failure to mention that the chief was appointed in

/.....

terms of Section 2 of Act No. 38 of 1927, can be cured by the evidence.

In any case, the court would be entitled to amend the charge sheet in terms of Section 86(1) of Act No. 51 of 1977, if the relevant amendment will not prejudice the accused in his defence. This Honourable Court may also amend the charge sheet on review in terms of Section 304(2)(c)(iv) of Act No. 51 of 1977.

It has been held that such an amendment is in order where it is clear that the accused's defence would have been the same if the charge had been correctly formulated from the outset of the trial. Then there can not be any prejudice to the accused.

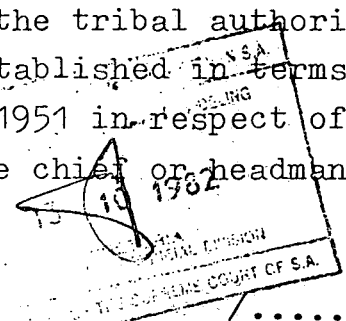
R v Alexander 1936 AD 445 at 461

S v Coetzee 1976(2) SA 769 A at 772 - 3

S v Kearney 1964(2) SA 495 A at 503 D

In casu the accused did not indicate any defence but was satisfied to attack the insufficiency of the evidence and the charge sheet after the State had closed its case. I am therefore of the opinion that an amendment of the charge sheet will not be prejudicial to the accused.

9. (a) The only question that remains to be answered is whether it has been proved that the accused obstructed the proceedings of a meeting convened by a officer, chief or headman as described in Section 2(9) of Act No. 38 of 1927. It is clear from Section 2 of the said Act that only appointed officers or recognised or appointed chiefs or headmen are involved when Section 2(9) is concerned.
- (b) It is, however, submitted that the chief concerned in this case, is a recognised or appointed chief for the purpose of the Act:
- (i) It is clear from the evidence that the meeting was held at the offices of the tribal authority. Such tribal authority is established in terms of Section 2 of Act No. 68 of 1951 in respect of a Bantu area assigned to the chief or headman of the tribe concerned.



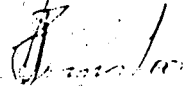
(ii) The chief or headman mentioned above is described in Section 1 of Act No. 68 of 1951 as a person duly appointed as a headman or chief under sub-section 8 of Section 2 of the Bantu Administration Act No. 38 of 1927. Thus there cannot be a tribal authority unless there is also a duly appointed chief or headman.

(iii) Furthermore, Section 2(8) bis of Act No. 38 of 1927 specifically implies that no chief or headman shall be recognised, appointed or deposed except after consultation with the appropriate authority established under Section 2 of Act No. 68 of 1951. Where a tribal authority has therefore been established, the tribal authority has to be consulted about the appointment, recognition or deposition of a chief.

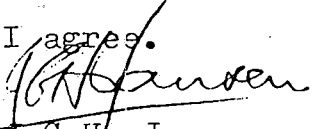
(iv) The accused himself needed an appointment certificate to act as a representative of the chief. This implies that the chief is an appointed or recognised chief.

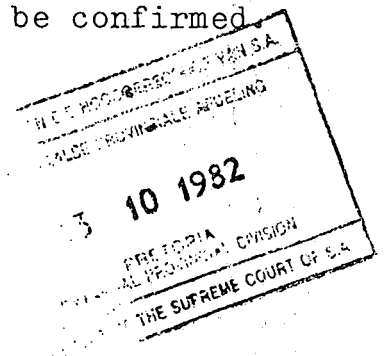
(v) It was never alleged during the trial that the chief had not been duly appointed.

10. Where the evidence further establishes that a meeting was convened by the chief to discuss business and the accused's conduct as representative of the chief of the tribal authority. I am of the opinion that a prima facie case was established to which the accused did not offer any defence. I am therefore of the opinion that the conviction should be confirmed.


E. Prinsloo
STATE ADVOCATE

I agree.


J.C.H. Jansen
DEPUTY ATTORNEY-GENERAL



Annexure 6

Copies of the review papers in

S. v Lubisi

1980(1)SA 187(T)

(see the text relating to note 410 on page 341 above)

more particularly:

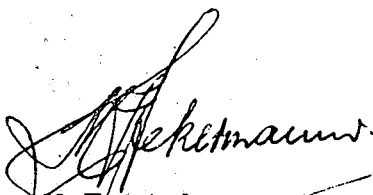
- a) A memorandum from the Deputy Attorney General to the reviewing judge dated 29th August 1979 (p. 343(xiii)).
- b) An additional memorandum from the Deputy Attorney General, Transvaal (undated) (pp. 343(xiv) - 343(xvi)).
- c) A manuscript memorandum from the reviewing judge, Mr Justice Le Roux, to the Attorney General dated 7th September 1979 (p. 343(xvii)).
- d) A clear copy of the manuscript memorandum mentioned in (c) above.

THE HONOURABLE JUDGE OF REVIEW

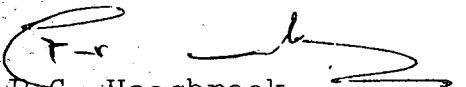
THE STATE versus FERNADO LUBISI : STOCK THEFT
CASE NUMBER 69/567/78

1. I am of the opinion that the Magistrate's request should be acceded to.
2. Although Section 304(4) of the Code only makes provision for review after sentence has been passed, this general rule has been relaxed in the past, because of considerations of expediency and fairness.

R vs Smit 1948 (4) SA 266 (C)
R vs Masemula 1959 (4) SA 285 (T)
See also S vs Stokel 1966 (1) 143 (T) at 144 B - D
3. A condonation of the administrative error on the part of the State will not amount to unnecessary harassment of the accused. The error would not have occurred if not for the accused's failure to attend Court on 11 April 1978.
4. It is my respectful submission that the acquittal by Mr. van Rooijen be set aside and the case be referred back to Mr. Hawkins for the continuation of the part-heard matter.


M.F. Ackermann
STATE ADVOCATE

I agree.


P.G. Haasbroek
DEPUTY ATTORNEY-GENERAL

PRETORIA
29 August 1979

THE HONOURABLE THE REVIEWING JUDGE

THE STATE versus FERNADE LUBISI: STOCK THEFT CASE
NUMBER 69/567/78

In addition to my written opinion of 29 August 1979, I wish to mention the following reasons why the Magistrate's request should be acceded to:

- (1) The present case is to be discerned from the review case of State versus Johannes Masekoameng (H454/78 of 23 October 1978). In the latter instance the Magistrate, being of the erroneous view that there was no evidence to justify a conviction, stopped the proceedings during the State case and discharged the accused. Although the Magistrate's actions constituted an irregularity, they were not set aside on review because:

" In regard to possible review proceedings, even if an irregularity was committed by the Magistrate in not calling upon the prosecutor to address him on the question of discharge, I am not convinced that section 24(1)(c) of the Supreme Court Act 59 of 1959, is available to the State as an "aggrieved" party. The remedies available to the prosecution are narrowly circumscribed and should not be extended to cases of possible prejudice to the State in the same way as irregularities may affect an accused found guilty after an unfair trial."

In the Masekoameng-case a re-trial de novo was sought. In the present matter, the second proceedings are, apart from being irregular, also judicially incompatible. It should therefore be disregarded:

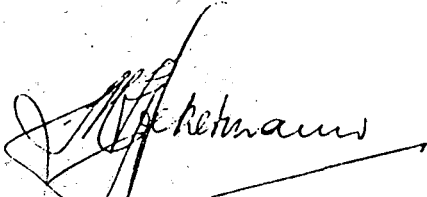
(i) The/.....

- (i) The Criminal Procedure Act provides for only two instances where a part-heard matter can be adjudicated by another Magistrate - Sections 118 and 275, none of which has any application in this case.
- (ii) The first proceedings have not been set aside nor can it be. There are no grounds for these uncompleted proceedings to be merely disregarded.
- (2) The setting-aside of the second proceedings would not be in favour of the State, in that it would only amount to the continuation of a fair, proper but uncompleted trial in which as yet no decision has been reached.
- (3) It should be added that in any event the accused will have to be brought before the first Magistrate to explain his absence from Court on 11 April 1978. Although there was an administrative error on the part of the prosecutor, this would not have happened if not for the accused's failure to attend Court.

My respectful submission is that, although there was actually no need for review and that, because of the incompatibility of the second proceedings, the first Magistrate could have merely proceeded with the first procee-

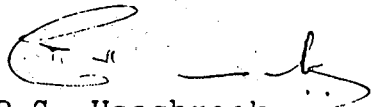
dings, the/....

dings, the second proceedings should be set aside.

A handwritten signature in dark ink, appearing to read 'M.F. Ackermann', with a long horizontal flourish extending to the right.

M.F. Ackermann
STATE ADVOCATE

I agree.

A handwritten signature in dark ink, appearing to read 'P.G. Haasbroek', with a long horizontal flourish extending to the right.

P.G. Haasbroek
DEPUTY ATTORNEY-GENERAL

1.9.

All the cases quoted in your opinion (and all the cases I could find of R. v. Hurlock, 1945 E.O.L. 258; R. v. Xegwana, 1940 E.O.L. 315; R. v. Stoffels, 1942 C.P.D. 40; S. v. Doodes, 1961(3) S.A. 713; S. v. Senalala, 1962(2) S.A. 105; S. v. Hlongwa, 1963(1) S.A. 14) deal with the situation where the accused was wrongly convicted. I could find no instance where a court on review exercised its discretionary powers to the detriment of the accused where he had been wrongly acquitted.

It has always been the policy in this division to exercise the powers on review in favour of an accused person - never against him in favour of the State. You are in fact contending for an extension of this rule - can it be done & have you any examples or comments of the application of the principle in reverse? Please advise.

T. J. H. A. →
7/9/79.

All the cases quoted in your opinion (and all the cases I could find e.g. R. v Hendricks, 1945 E.D.L.258; R v Xegwana, 1940 E.D.L.315; R v Stoffels, 1942 CPD 40; S v Dawids, 1961 (3) SA 913; S v Sekalala, 1962 (2) SA 105; S v Hlongwa, 1963 (17 SA 14) deal with the situation where the accused was wrongly convicted. I could find no instance where a court on review exercised its discretionary powers to the detriment of the accused where he had been wrongly acquitted.

It has always been the policy in this division to exercise the powers on review in favour of an accused person - never against him in favour of the State. You are in fact contending for an extension of this rule - can it be done and have you any examples or comments of the application of the principle in reverse?

Please advise.

7.9.79.

FOOTNOTES TO CHAPTER FOUR

1. See page 79 et seq above; see also Changuion and Others v Secretary of the Interior 1971 (1) SA 9 (AD).
2. Fredericks and Others v Divisional Council of Stellenbosch 1977 (3) SA 113 (C).
3. See page 304 below.
4. 1982 (1) SA 754 (W); see page 333 below.
5. Ibid.
6. See page 86 above.
7. See Chapter Two 'The Principal Features of Review' and Chapter Three 'The Grounds of Review'.
8. See page 86 above.
9. See page 81 above.
10. See page 83 above.
11. See page 79 above.
12. See page 84 above.
14. See page 88 above.
15. See page 90 above.
16. See page 95 above.
17. See page 97 above.
18. See page 99 above.

19. See page 105 above.
20. See page 110 above.
21. See page 113 above.
22. See page 117 above.
23. See page 119 above.
24. See page 121 above.
25. See page 126 above.
26. See page 134 above.
27. See page 137 above.
28. See page 140 above.
29. Cf. Padayache v Veerapan and Another 1979 (1) SA 992 (W) at 999 - 1000G) and the cases cited therein.
30. Reinecke v Incorporated General Insurances Ltd. 1974 (2) SA 84 (AD).
- 30a. Anglo African Shipping Co (1936) Ltd. v Harris 1977 (2) SA 213 (W).
31. South African Reserve Bank v Photocraft (Pty.) Ltd. 1969 (1) SA 610 (C).
32. South African Mutual Life Assurance Society v Durban City Council 1948 (1) SA 1 (N).
33. Netherlands Bank of South Africa v Stern NO. and Another 1955 (1) SA 667 (W).
34. Kristal v Lusam Mansions (Pty.) Ltd. 1947 (1) SA 122 (W).

35. Ross v Silberman 1963 (2) SA 296 (W); S A Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd. 1977 (3) SA 642 (AD); Alexander and Another NNO. v Standard Merchant Bank Ltd. 1978 (4) SA 730 (W).
36. Ex parte Ginsberg 1936 TPD 155.
37. Roodt en 'n Ander v Sekretaris van Binnelandse Inkomste 1974 (1) SA 525 (AD).
38. Bryant v Minister of Justice 1943 TPD 205.
39. Ex parte Morris 1954 (3) SA 153 (W); Joubert v Ruddock and Others 1968 (1) SA 95 (E); Ex parte Estate Porter 1978 (4) 226 (E).
40. Ex parte Nell 1963 (1) SA 754(AD).
41. British Chemicals and Biological (SA) (Pty.) Ltd. v South African Pharmacy Board 1955 (1) SA 184 (AD); Ex parte Pretorius 1963 (1) SA 57 (O); Ex parte Prokureur-Generaal Transvaal 1978 (4) SA 15 (T).
42. Bayat and Others v Hansa and Another 1955 (3) SA 547 (N); Netto v Clarkson and Another 1974 (1) SA 66 (D).
43. The features as set out in the text do not follow in enactment seriatim.
44. Adbro Investment Co Ltd. v Minister of the Interior and Others 1961 (3) SA 283 (T) at 285 C-D.
45. 1963 (1) SA 754 (AD) at 758 H et seq.
46. See also, Durban City Council v Association of Building Societies 1942 AD 27 at 32 - 33; Graaf Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (AD) at 424-425.

47. Durban City Council v Association of Building Societies (note 46) at 33-34; Graaf-Reinet Municipality v Van Ryneveld's Pass Irrigation Board (note 46) at 424-425; Ex Parte Nell (note 40) at 758-759F.
48. Note 46 at 33-34.
49. Durban City Council v Association of Building Societies (note 46) at 33; cf. Becker v Commissioner of Inland Revenue 1945 WLD; Ross v Silberman 1963 (2) SA 296 (W).
50. Lawson and Kirk (Pty.) Ltd. v Phil Morkel Ltd. 1953 (3) SA 324 (AD) at 333; cf. Standard Bank of South Africa Ltd. v Trust Bank of Africa Ltd 1968 (1) SA 102 (T); cf. also Shaban v Culemborg Banking Corporation Ltd 1962 (2) SA 450 (W) at 451.
51. Ex parte van Schalkwyk NO. and Hay NO. 1953 (3) SA 324 (AD) at 333; cf. Standard Bank of South Africa Ltd. v Trust Bank of Africa Ltd. 1968 (1) SA 102 (T); cf. also Shaban v Culemborg Banking Corporation Ltd. 1962 (2) SA 450 (W) at 451.
52. 1918 AD 426 at 441.
53. See, inter alia : Trustees, J C Poynton Property Trust v Secretary For Inland Revenue 1970 (2) SA 618 (T) at 619-620; Edelor Ltd. v Champagne Castle Hotel Ltd. 1972 (3) SA 684 (N) at 689; South African Mutual Life Assurance Society v Anglo Transvaal Collieries Ltd 1977 (3) SA 642 (AD) at 658.
54. Garment Workers Union, Western Province and Another v Industrial Registrar and Another 1967 (4) SA 316 (T) at 318.
55. Ex parte Noriskin 1962 (1) SA 856 (D).
56. Wolf NO. v Schulenberg and Others 1956 (2) SA 727 (T) at 730; cf. Docrat v Minister of Interior 1956 (1) SA 40 (N).
57. Hitchins v Raff and Another 1936 WLD 72 at 74 et seq.

58. Levin's Executor v Seliger 1941 WLD 49.
59. Hadiaris v Freeman and Freeman 1948 (3) SA 720 (W).
60. Adbro Investments Co Ltd. v Minister of the Interior (note 44); see also Reinecke v Incorporated General Insurances Ltd. 1974 (2) SA 84 (AD).
61. Mabukane v Port Elizabeth Divisional Council 1957 (4) SA 293 (E); cf. Attorney-General of Natal v Johnstone & Co Ltd. 1946 AD 256.
62. Clement v Minister of Justice 1948 (2) SA 971 (T); Central African Examiner (Pvt.) Ltd. v Howman and Others NO. 1966 (2) SA 1 (SR) at 13-14.
63. For the full wording of the subsection see page 288 above.
64. Note 50 at 451.
65. Helgesen v South African Medical and Dental Council 1962 (1) SA 800 (N) at 812 et seq; Safari Reservations (Pty.) Ltd. and Another v Zululand Safaries (Pty.) Ltd. 1966 (4) SA 165 (D) at 171; Standard Bank of South Africa Ltd. v Trust Bank of Africa Ltd. 1968 (1) SA 102 (T).
66. See page 579 et seq below, where the writer considers the history of the remedy and its place in the origin of the Courts' inherent review jurisdiction; cf. Safkor Forwarding (Johannesburg) (Pty.) Ltd. v National Transport Commission 1982 (3) SA 654 (AD) at 675 in which case the Appellate Division held that rule nisi procedure with or without the grant of interim relief may be utilised in appropriate cases in connection with the review procedure as set out in Rule 53 of the Uniform Rules of Court; cf. also, Estate Agents Board v Lek 1979 (3) SA 1048 (AD)-although the procedure in this case was a form of statutory appeal it may be compared with review proceedings; Trollip JA (at 1066 H) referred to the statutory appeal as being declaratory in nature.

67. See the cases referred to in note 41.
68. See note 42.
69. Rule 53(1)(b) of the Uniform Rules of Court; cf. text at pages 97-99 above.
70. See pages 113 - 116 above.
71. See Safkor Forwarding (Johannesburg) (Pty.) Ltd. v National Transport Commission (note 66) at 675c et seq.
72. Davidson v Honey 1953 (1) SA 300 (AD) at 308 - 309.
73. Hattingh v Ngake 1966 (1) SA 64 (O); cf. Abro Investment Co Ltd. v Minister of the Interior (note 44) at 349 - 350.
74. Webb v Beaver Investments (Pty.) Ltd. 1950 (1) SA 491 (T)
75. S A Mutual Life Assurance Society v Durban City Council 1948 (1) SA 1 (N).
76. S. 20 (1)(a) of the Supreme Court Act 1959.
- 76a. S. 20 (3).
77. S. 21 (a).
78. S. 21 (3).
79. S. 21 (1).
80. Jones and Buckle The Civil Practice of the Magistrates' Court in South Africa (7 ed) by Baker, Erasmus and Farlam (hereafter referred to as Jones and Buckle), Vol 1 at 67.
81. Limbada v Dwarka 1957 (3) SA 60 (N) at 6ZA et seq; CD of Brinam (Suburban) Ltd. and Others v Falcon Investments Ltd. 1973 (3) SA 838 (W) at 853 D et seq; cf. Grundling v Beyers and Others 1967 (2) SA 131 (W) at 155 B et seq.

82. Setlogelo v Setlogelo 1914 AD 221 at 227.
83. Johannesburg City Council v Tuckers Land Holdings Ltd. 1971 (2) SA 478 (W); CD of Birnham (Suburban) Ltd. and Others v Falcon Investments Ltd. 1973 (3) SA 838 (W) at 853 D et seq.
84. Free State Gold Areas Ltd. v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another 1961 (2) SA 505 (W).
85. Zuurbekom Limited v Union Corporation Ltd. 1947 (1) SA 514 (AD).
86. Xaba and Others v Bantu Affairs Commissioner 1968 (1) SA 193 (N).
87. Bamford v Minister of Community Development and State Auxiliary Services 1981 (3) SA 1054 (C).
88. Ebrahim v Twala 1951 (2) SA 490 (W); cf. Reserve Bank of Rhodesia v Rhodesian Railways 1966 (3) SA 656 (R).
89. Inter alia, Wynberg Municipality v Dreyer 1920 AD 439, Regal v African Superslate (Pty.) Ltd. 1963 (1) SA 102 (AD); Helios Ltd. v Letraset Graphic Art Products (Pty.) Ltd. 1973 (4) SA 81 (T); Minister of Health v Orangia Medical Supplies Ltd. 1946 AD 1033; Erasmus and Others NNO. v S A Associated Newspapers Ltd. 1979 (3) SA 447 (W).
90. Minister of Agriculture v Grobler 1918 TPD 483.
91. Elkan and Chaplin v Minister of Mines 1912 TPD 747.
92. Setlogelo v Setlogelo (note 82) at 227; Jones and Buckle Vol 1 at 71 et seq.; it should however be noted that the essential requirements for the grant of an interim (interlocutory) interdict are less onerous in that:

(i) a prima facie right, which may be open to some doubt;

(ii) a well-grounded apprehension of irreparable injury if the application is not granted and that the respondent will not suffer irreparable harm if the application is granted;

(iii) the balance of convenience favours the grant of the relief;

(iv) that the applicant has no other satisfactory remedy.

93. Jones and Buckle, Vol 1 at 71.

94. See, inter alia : Nienaber v Stuckey 1946 AD 1049 at 1054; Free State Gold Areas Ltd. v Merriespruit (Orange Free State) Gold Mining Co Ltd. and Another (note 84) at 524 C - D.

95. See Jones and Buckle (note 92) at 74 - 76; Webster v Mitchell 1948 (1) SA 1186 (W) at 1189 - 190; Ndauti v Ngami 1948 (3) SA 27 (W) at 35; cf. Gool v Minister of Justice and Another 1955 (2) SA 682 (C) at 687H et seq.

96. Inter alia : Olympic Passenger Service (Pty.) Ltd. v Ramlagan 1957 (2) SA 382 (D) at 382 A-H; Eriksen Motors (Welkom) Ltd. v Protea Motors Warrenton and Another 1973 (3) SA 685 (AD); Polakow Brothers (Pty.) Ltd. v Gershlowitz 1976 (1) SA 863 (E) at 867 H. For cases regarding the interests of third parties see, inter alia : Molteno Bothers and Others v South African Railways and Others 1936 AD 321; Miller v Spamer 1948 (3) SA 772 (C); Barnard v Thelander 1977 (3) SA 932 (C).

97. Note 96 at 383 E - F.

98. Inter alia : Beecham Group Ltd. v B-M Group (Pty.) Ltd. 1977 (1) SA 50 (T) at 54 H.

99. Pretoria Estate and Market Co Ltd. and Another v Rood's Trustees 1910 TS 1080 at 1084; Albert v Windsor Hotel (East London) (Pty.) Ltd. (in liquidation) 1963 (2) SA 237 (E) at 240 E et seq.

100. Jones and Buckle, Vol 1 at 76 - 78.

101. Burgers and Others v Joubert and Others (1866) 1 Roscoe 351.
102. Rossouw v Minister of Mines and the Minister of Justice 1928 TPD 741.
103. Von Moltke v Cota Areosa (Pty.) Ltd. 1975 (1) SA 255 (C).
104. Note 103 at 258 D - E.
105. Setlogelo v Setlogelo (note 82) at 227; Free State Gold Areas Ltd. v Merriespruit (Orange Free State) Gold Mining Co Ltd. (note 84) at 518.
106. Free State Gold Areas Ltd. v Merriespruit (Orange Free State) Gold Mining Co Ltd. (note 84) at 518.
107. Maeder v Perm-Us (Pty.) Ltd. 1939 CPD 208 at 213; Condé Nast Publications Ltd. v Jaffe 1951 (1) SA 81 (C) at 86; Francis v Roberts 1973 (1) SA 507 (RAD) at 512 G - 513 F.
108. Matthijs Hendrik Marais v Osborne H C Davey and George Seymour (1880) 1 NLR 141.
109. W R Willets and Others v Mayor and Council of East London (1892) 6 EDC 232 at 233 - 234.
110. Celliers v Lehfeldt 1921 AD 509 at 513 - 514.
111. See cases cited in note 107.
112. Transvaal Property & Investment Co Ltd. and Reinhold & Co v S A Townships Mining & Finance Corp Ltd. and The Administrator 1938 TPD 512 at 520 - 521; Johannesburg Consolidated Investment Co Ltd. v Mitchmoor Investments (Pty.) Ltd. and Another 1971 (2) SA 397 (W) at 404 E et seq; Beecham Group Ltd. v B - M Group Ltd. 1977 (1) SA 50 (T) at 54 E and 57 H. The legal position of an applicant for an interdict where a statute provides other remedies was considered in

inter alia : Estate Agents Board v Fred D Ackermans Properties (Pty.) Ltd. and Others 1979 (2) SA 987 (C) at 990 E; cf. Smalberger and Another v Cape Times Ltd and Others 1979 (3) SA 457 (C) at 461 b et seq.

113. See Harms, Interdicts, 11 LAWSA 293 at 297, (Para. 319).
114. Free State Gold Areas Ltd. Case (note 84) at 518 and 524-525.
115. Martin v Kiesbeempte Newcastle Afdeling 1958 (2) SA 649 (D) at 654 E et seq.
116. Scott v Theron en Andere 1976 (1) SA 612 (O) at 622; Francis v Roberts 1973 (1) SA 507 (R, AD) at 512 A - F; Nathan : Interdicts (1939) 32.
117. See page .
118. See page 294 above.
119. See page 295 above.
120. See page 295 above.
121. Ncongwane v Molorane 1941 OPD 126 at 129 - 130; Maroudus v Curich 1924 WLD 24 at 250; Cowen and Hammond v Campbell 1906 TH 191 at 194.
122. Inter alia : Sandell and Others v Jacobs and Another 1970 (4) SA 630 (SWA) at 632 C et seq.
123. This is the rule in Patz v Greene 1907 TS 427 at 433; see also Dalrymple v Colonial Treasurer 1910 TPD 372 at 391; Roodepoort-Maraiburg Town Council v Eastern Properties Ltd. 1933 AD 87 at 94 and 101; Modern Appliances Ltd. v African Auctions and Estates (Pty.) Ltd. 1961 (3) SA 240 (W); Johannesburg City Council v Knoetze & Sons 1969 (2) SA 148 (W) at 154; cf. Salisbury Bottling Co (Pvt.) Ltd. v Central African Bottling Co (Pvt.) Ltd. 1958 (1)

SA 750 (FC); cf. also Chassay Brothers (Pvt) Ltd. v Controller of Customs and Excise of the Federation and the Minister of Finance 1956 (3) SA 502 (FC); see also the article by Rabie, Locus Standi ten opsigte van 'n Interdik', 35 THRHR (1972) 375.

124. See page 31 above.

125. Cf. Jones and Buckle, Vol 1 at 68.

126. See s. 86 of the Magistrates' Court Act No 32 of 1944 and the commentary thereon in Jones & Buckle, Vol 1 at 287 et seq; see also s 20 (2) (b) of the Supreme Court Act No 59 of 1959.

127. S. 30 of Act No 32 of 1944; Weepner v Kriel 1977 (4) SA 212 (C) at 218.

128. For an explanation of a dispute of fact and the approach by the Court to such dispute in motion proceedings see Room Hire Co (Pty.) Ltd. v Jeppe Street Mansions (Pty.) Ltd. 1949 (3) SA 1155 (T); see also Findlay, 'Application v Trial', 68 SALJ (1951) 20.

129. Nolte v Johannesburg Consolidated Investment Co Ltd. 1943 AD 295 at 318; Van den Berg v Rand Water Board 1945 AD 691 at 707; Stellenbosch Farmers' Winery Ltd. v Stellenvale Winery (Pty) Ltd. 1957 (4) SA 234 (C).

130. SAB Lines (Pty.) Ltd. v Cape Tex Engineering Works (Pty.) Ltd. 1968 (2) SA 535 (C).

131. Rule 6 (8) of the Uniform Rules of Court.

132. Section 35 of Act No 62 of 1955; see Cassim v The Master and Others 1960 (2) SA 347 (N); Freinkel v Scheepers 1961 (1) SA 271 (W); Mkhize v Swemmer and Others 1967 (1) SA 186 (D).

133. Rule 56 of the Rules to the Magistrates' Court Act 1944.

134. See text relating to note 132.

135. Moll v Paarl Civil Commissioner and Another, 14 SC 463 at 467 - 468 (7 CTR 454); Research into this remedy would suggest that the remedy is not (strictly) an interdict although it is often classed under the heading of interdicts. The remedy originates from the Roman Dutch law mandament van auctorisatie de facto (see Van der Linden Judicieele Practijc 2.19.3). It differed from the mandament poenaal (prohibitory interdict) in that the latter restrained events in futurum and was ad non faciendum while a mandament auctorisatie de facto was ad factum praestandum. The latter could be granted only by the full court and not by a commissioner. As indicated in the text the essential requirements of its grant were more onerous than a mandament poenaal more particularly in that:

- (a) the applicant was obliged to prove his right beyond any doubt (jus liquidissimum);
- (b) that the applicant's cause was extremely urgent - Van der Linden speaks of "... een summe urgent necessitas, as periculum in mora";
- (c) that there is no other (ordinary) remedy available to the applicant;
- (d) that the applicant will suffer irreparable harm or prejudice (onherstelbaar nadeel) if the order is not granted.

There appears to be no like remedy among the interdicts of Roman Law. Further the term mandamus was not used in Roman-Dutch Law and appears to have been adopted from English law. A mandament auctorisatie de facto was granted by the High Court of the Zuid-Afrikaanse Republiek in Ex parte Bosman and the Church Council of the Dutch Reformed Church of Rustenburg (1886) 2 SAR 112.

135a. An order for specific performance (properly so called) may be said to be based on a contractual relationship between the parties (see Jones and Buckle, Vol 1 pp 154 - 156). Where there may be some doubt as to the ability of the defendant to perform the Court will

grant the order with an alternative judgment for damages (Farmers Co-operative Society v Barmy 1912 AD 350). Although the Court has a discretion to order a final or absolute decree (Wood v Walters 1921 AD 303) it will generally grant the alternative order for damages (Shill v Milner 1937 AD 101). On the other hand the court will inevitably grant judgment ordering payment of moneys due (Gokal v Moti 1941 AD 315) and usually orders specific performance in regard to the transfer of immovable property (Cole v Stuart 1940 AD 339). The Plaintiff must allege in the particulars to his summons that the contract has been broken or that the defendant has failed to perform in terms of the latter's obligation (Geyser v McDonald (1890) 3 SAR 174 and he should allege his own willingness to carry out his own obligations and tender to do so Atkey Ltd. (in liquidation) v Geen 1923 CPD 262; S A Cooling Services (Pty.) Ltd. v Church Council of the Full Gospel Tabernacle 1955 (3) SA 541 (D) at 543 H et seq. Further differences between the two remedies are beyond the scope of this work.

136. In Cape Town Municipality v Abdulla 1974 (4) SA 428 (C) at 437 B, an order compelling the respondent to demolish certain structures was referred to by the Court as a mandatory order - while in Ex parte Vickerman 1935 CPD 429 an order compelling the Registrar of Deeds to register certain immovable property was referred to as a mandamus.
137. See page 493 below.
138. Ex parte Rosettenstein 1906 TS 107.
139. Brink v Minister of Lands 1937 TPD 150.
140. Van der Walt v Registrar of Deeds 1935 CPD 463.
141. Estate Brownson v President and Members, Income Tax Special Court and Another 1933 WLD 116.
142. Day v Minister of Justice and Another 1913 TPD 853.
143. Herstigte Nasionale Party van Suid-Afrika v Sekretaris van Binnelandse Sake en Immigrasie 1979 (4) SA 274 (T).

144. Johannesburg Municipality Council v Maserowitz 1914 TPD 439; Pillay v Umkomaas Licensing Officer 1930 NPD 111 at 117; Wing Lee Ltd. v Johannesburg City Council 1931 AD 45.
145. Cape Town Municipality v Abdulla (see note 136).
146. See, inter alia : Aziz v Vryburg Municipality 1954 (1) SA 427 (GW); Anglo-American Corporation v Sierzputowski 1973 (3) SA 709 (T); Lipschitz v Watrus NO. 1980 (1) SA 662 (T).
147. Van der Linden, Judiciele Practijq, 2.19.3 and cf. 2.19.1.
148. See note 135 above, Van der Linden, Judiciele Practicq, 2.19.3.
149. Ibid; cf. the text relating to the absence of similar protection by means of some other ordinary remedy in regard to a prohibitory interdict at page 296 above.
150. Ibid; cf. the text relating to an injury committed or reasonably apprehended at page 295 above.
151. See, inter alia : Lipschitz v Watrus NO. (note 146) 673 C - D.
152. (1897) 14 SC 351.
153. Greene v Trading on Mining Areas Board 1907 TS 1053 at 1058 et seq.
154. Transvaal Property and Investment Co Ltd. and Ditcher v Pretoria Municipality 1921 TPD 261 at 269 et seq.
155. NG Kerk van Natal (Voortrekker Gemeente) v Administrator Natal and Another 1954 (4) SA 763 (N) at 770B; cf. Moll v Civil Commissioner of Paarl (1897) 14 SC 463 at 468 referred to by Broome JP in the NG Kerk case (above) at 770 D.
156. See the text relating to note 152; see also Jones and Buckle, Vol. 1, 81.
157. 1951 (2) SA 371 (AD).

158. At 378 F - G.
159. At 381 B - E.
160. See page 300 above.
161. Note 143.
162. 1980 (2) SA 896 (0).
163. Winterbach v Worcester Municipality (note 152).
164. See page 134 above.
165. See page 95 above.
166. See page 137 above.
167. For the law regarding the finality of spoliation orders see Mans v Marais 1932 CPD 352 at 356; Nienaber v Stuckey 1946 AD 1049 at 1053.
168. Cf. Jones and Buckle, 67 where the learned writers are of the opinion that a mandatory order may be either interim or final. Advocate Farlam SC has suggested to the writer that an example of an interim mandatory order is the situation of a lower riparian landowner, whose water supply has been curtailed or has been otherwise infringed by an upper landowner, and who applies to court for an interim order compelling the respondent to permit the free flow of water pending the decision of an action. However such order is in fact no more than a prohibitory interdict (seen positively) the essence of which is the restraining of the respondent from interfering etc. with the flow of water pending a decision in the main action.
169. See note 135.
170. Cf. Francis v Roberts (note 116) at 509 F - 511 C.
171. See page 298 above.

172. See page 302 above.
173. Taitz, 'Spoliation Proceedings and the Grubby-handed Possessor', 98 SALJ (1981) 36 and 'A Spoliation Order is a Robust and Unique Remedy', 99 SALJ (1982) 351.
174. Decr. Grat. 3.1.3 and C.18 x de restit. spol. (2.13) as cited by Price, The Possessory Remedies in Roman-Dutch Law (1947), 55; cf. Nino Bonino v De Lange 1906 TS 120 at 121.
175. Note 174.
176. White and Tucker v Rudolph 1879 Kotze 115.
177. Sallam v Stansfield Ratcliffe & Co (1930) 15 PH (1) F 39 (C); cf. Dawood v Robb & Co 1933 CPD 178; Wicomb v Rosen 1936 CPD 502.
178. Van Eck NO. and van Rensburg NO. v Etna Stores 1947 (2) SA 984 (AD); cf. Dönges NO. v Dadoo 1950 (2) SA 321 (AD) in relation to the seizure of a passport.
179. Fredericks and Another v Stellenbosch Divisional Council 1977 (3) SA 113 (C), this case is considered below at p 307.
180. Nienaber v Stuckey 1946 AD 1049 at 1056 et seq; Yeko v Qana 1973 (4) SA 735 (AD) at 739 G - H; Bennett Pringle (Pty.) Ltd. v Adelaide Municipality 1977 (1) SA 230 (E); cf. Mankowitz v Loewenthal 1982 (3) SA 758 (AD) in which case the applicant was unable to establish traditio of the property and there/or possession; see also, Meyer v Sentraal Westelike Ko-op Maatschappy Beperk 1943 OPD 93.
181. Nino Bonino v De Lange (note 175) at 122; Sillo v Naude 1929 AD 21 at 26; Yeko v Qana (note 180) at 739 D - E.
182. The defences as set out in the text are an extract from Taitz, 'Spoliation Proceedings and the Grubby Handed Possessor' (note 173).

183. See, inter alia : Yeko v Qana (supra) at 739D; Meyer v Sentraal Westelike Ko-operatiewe Maatskappy 1943 OPD 93; Mandelkoorn v Strauss 1942 CPD 493; Industrial and Commercial Workers Union v Rauch 1929 NPD 192; Wocke v Goedhals 1917 OPD 64; cf. Meyer v Glendinning 1939 CPD 84.
184. Heesen v Bourne & Co Ltd. 1962 (3) SA 182 (D) at 184 - 5; Nongcingame v Mbwa and Ganan 1913 EDL 412 at 419; cf. Nino Bonino v de Lange 1906 TS at 123 - 4.
185. Otto v Viljoen (1891) 4 SAR 45.
186. Sillo v Naude 1929 AD 21 at 26.
187. Mans v Loxton Municipality 1948 (1) SA 966 (C) at 976 - 8; Meyer v La Grange 1952 (2) SA 55 (N) at 59 C - D.
188. Hoffmann The South African Law of Evidence 2 ed (1970), 100; (3 ed) 106.
189. May South African Cases and Statutes on Evidence 4 ed (1962), para 304.
190. Mans v Loxton Municipality (supra) at 977 - 8; cf. de Beer v Firs Investments Ltd. 1980 (3) SA 1087 (W) at 1090 E - 1092 F.
191. Potgieter v Davel 1966 (3) SA 555 (O); cf. Fredericks v Stellenbosch Divisional Council 1977 (3) SA 113 (C); see also Blecher, 'Spoliation and the Demolition of Legal Rights' 95 SALJ (1978) 8.
192. Burhman v Neumeyer 1917 TPD 630; Louw v Hermann 1922 CPD 252; Chitiz v Loudon 1946 WLD 375; Jivan v National Housing Commission 1977 (3) SA 890 (W).
193. 1973 (4) SA 735 (A) at 739 G - H.

194. Example Van Eck NO. and Van Rensburg NO. v Etna Stores (note 178); Dönges NO. v Dadoo (note 178).
195. Note 179.
196. S. 3 B(2) of Act No 52 of 1951.
197. Frederick's case (note 179) at 117 D et seq; for comment on the nature and correctness of the order granted, see Blecher, 'Spoliation and the Demolition of Legal Rights' 95 SALJ (1978) 18; cf. 'Die Moontlikheid van Besitsherstel as Wesenselement vir die aanwending van die mandament van spolie' by M J de Waal, unpublished LLM Thesis University of Stellenbosch 1982, inter alia, 111 et seq
198. See Taitz, 'A Spoliation Order is a Robust and Unique Remedy' (note 173), at 354; cf. Sitterding v Hermon Piquetberg Lime Co Ltd. 1921 CPD 439 at 445.
199. S. 30 (1) of the Magistrates Court Act 32 of 1944.
200. S. 29 (1) (f) of the Magistrate's Court Act 1944; see Sellars NO. v Grobler NO. en Andere 1961 (3) SA 583 (T) at 585; Potgieter v Davel 1966 (3) SA 555 (O) at 557.
201. Rule 56 (G) of the Rules of Magistrates Court Act 1944.
202. Mans v Marais 1932 CPD 352 at 356.
203. The interdictum de libero homine exhibendo was a Roman remedy and formed one of the actiones populares. The interdict was available against any person who kept and detained a free man without just cause or title. The remedy was available even where the detainee was himself unaware of his (proper) status in law (D. 43.29.4). The remedy does not appear to have been part of Roman-Dutch law. It is not mentioned in the authoritative treatises on Roman-Dutch procedural law e.g. Van der Linden, Judiciele Practicq; Merula, Manier van Procedeeren. Further Groenewegen states emphatically

that the actiones populares were not part of Roman Dutch Law (Groenewegen De Legibus Abrogatis ad D.47.23). One would have expected him to have indicated that the interdictum de libero homine exhibendo was an exception had this been the position. It should further be noted that the remedy in Roman Dutch law for the release of a person unlawfully held was the mandament autorisatie de facto (Van der Linden Judicieele Practicq 2.19.3 see note 135). This view is supported by the Henry Commission of Inquiry (1828) into the administration of justice of the Dutch Colonies which later become British Guiana (see page 524 (xxi) - (xxii) above). In reply to the 60th question of the Commission, more particularly:

"Is there any process or mode of proceeding in this colony similar to the writ of habeas corpus either by statute or common law; or what remedy has the subject against illegal imprisonment or improper length of confinement before trial or dealy in the proceedings"?

Before the Commission were the representatives of the Raden van Justitie of Demerara-Essequibo and of Berbice. The President of the Raad of Demerara-Essequibo gave the following answer to the question:

"The writ authorization (sic) de facto which is very similar to the Habeas Corpus. In cases of lengthened imprisonment before trial, the party may apply to the Court for relief" (see the report of the Common Law Commission (1914) 15, a copy of which is annexed to the text of Chapter Eight hereof).

It would appear that our Courts have not properly examined the Roman-Dutch law when deciding that the interdictum de libero homine exhib-endo was a Roman-Dutch remedy. See inter alia: In re Willem Kok and Nathaniel Balie 1879 Buch 45 at 65; In re Cakijana and Tobelo (1908) 29 NLR 190 at 198; In re Fourie (1900) 17 SC 173 at 185; Principal Immigration Officer v Narayansamy 1916 TPD 274 at 276). In an article on the subject "Actiones Populares and the Problem of Standing in Roman, Roman-Dutch, South African and American Law" (1978 Acta Juridica 191 at 194) Van der Vyver cites Voet (43.29) as

authority for the proposition that the interdictum de libero homine exhibendo was part of Roman-Dutch law. This is incorrect as Voet does not state that the remedy was part of Roman-Dutch law. The relevant section (43.29) is no more than Voet's commentary on the Roman law. However as indicated in the text the origin of this remedy is beyond the scope of this thesis.

- 203a. See the cases cited in the previous footnote. A further problem exists regarding the nature and origin of the remedy. A writ of habeas corpus is a prerogative writ and its grant is limited to the successors of the Court of the Queens Bench and Court of Chancery in England (see pages 520-521 and 524 below) or where the power to grant such remedy has been conferred by legislation. No such legislation exists in South Africa.
204. 1916 TPD 274 at 276.
205. This statement as to the law would appear to have been approved by the Appellate Division in Wood and Others v Ondangwa Tribal Authority and Another 1975 (2) SA 294 (AD) at 309D; cf. Bozzoli and Another v Station Commander, John Vorster Square, Johannesburg 1972 (3) SA 934 (W) at 934 H and 935 H - 936 A.
206. In re Willem Kok and Nathaniel Balie (note 203).
207. Ganyile v Minister of Justice and Others 1962 (1) SA 647 (E). See also Kentridge, 'Habeas Corpus Procedure in South Africa' (sub-titled 'A further comment on the Ganyile case'), 79 SALJ (1962) 283.
208. 1947 (4) SA 580 (W).
- 208a. At 581.
209. See note 203.
- 209a. Van der Linden, Judicieele Practicq 2.19.3.
210. See note 203.

211. (1885) 3 HCG 294 at 301.
212. See also, In re Willem Kok and Nathaniel Balie (note 203) at 60; In re Marechane (1882) 1 SAR 27 at 31; Ex parte Zimba (1890) 7 SC 364.
213. Note 205 at 935 E - G.
214. At 935 F - G.
215. Wood's case (note 205) at 305 F - 312 A.
216. At 305 G - 306 F.
217. At 306 G.
218. At 311 E - F.
219. At 311 A.
220. At 311 G.
221. An unreported decision of the Witwatersrand Local Division, per Ludorf J dated the 30 March 1960 (Case No 366/1960). This and similar cases are referred to by Kentridge, (note 207) at 286).
222. 1968 (2) SA 284 (RAD).
223. Ex parte Hathorn 1960 (2) SA 767 (D).
224. Kentridge (note 207) at 287.
225. Ibid, with particular reference to footnote 24, wherein the learned author refers to various cases including Ex parte Hathorn (note 223) and the Ganyile case.

226. Kentridge (note 207 at 286 - 287 more particularly his footnotes 21 and 25) points out that in the series of cases heard in the Transvaal Provincial Division in 1959 relating to persons being wrongfully held or otherwise detained against their will by private employers, the Court will issue a rule nisi without notice.
227. Room Hire Co (Pty.) Ltd. v Jeppe Street Mansions (Pty.) Ltd. 1949 (3) SA 1155 (T) at 1159 et seq; see Findlay, 'Application versus Trial', 68 SALJ (1951) 20 at 24. See also R Bakers (Pty.) Ltd. v Ruto Bakeries (Pty.) Ltd. 1948 (2) SA 626 (T); cf. Frank v Ohlsson's Cape Breweries Ltd. 1924 AD 289 at 294 et seq.
228. Inter alia : Frank v Ohlsson's Cape Breweries Ltd. (note 227) at 294. See also Adbro Investments Co Ltd v Minister of Interior 1956 (3) SA 345 (AD) at 352 E.
229. McKenzie v Farmers Co-operative Meat Industries Ltd. 1921 AD 16 at 23; Dusheiko v Milburn 1964 (4) SA 648 (AD) at 656.
230. 1928 AD 220; see page 246 above.
231. Act No 41 of 1922.
232. Union Steel case (note 230) at 236 - 237.
233. See page 246 above.
234. Johannesburg Municipality v African Realty Trust Ltd. 1927 AD 163.
235. At 173 et seq.
236. At 172 et seq.
237. Cape Town Municipality v Clohessy 1922 AD 4 at 7; cf. Halliwell v Johannesburg Municipality 1912 AD 659 at 670 et seq.
238. See Da Silva and Another v Coutinho 1971 (3) SA 123 (AD) at 140 F.

239. See Da Silva and Another v Coutinho (note 238) at 140 F referring to McKerron, Law of Delict (6 ed) at 257); see now the 7 ed at 276. See also, van der Walt, Delict, 8 LAWSA (1979) para 25 at p 37.
240. McKerron, Law of Delict (7 ed), 113.
241. See page 110 above.
245. 1931 AD 187 at 199, cited by Hoffmann and Zeffertt (3 ed) (note 188) at 411.
246. See page 110 above.
247. S. 29(1)(f) of Act No 32 of 1944.
248. See page 81 above.
249. S. 110 of Act No 32 of 1944.
250. Cf. the trial procedure of Roman Dutch Law at page 425 below and that at the Cape (after the British Occupation) at page 467 below.
251. Rule 23 (1) of the Uniform Rules of Court.
252. Ibid.
253. See 4.2.6 'An exception to a summons or plea.' at 316 et seq below.
254. See, for example, Johannesburg Municipality v African Realty Trust Ltd. (note 234).
255. Rule 23 (1) of the Uniform Rules of Court.
256. Algoa Milling Company v Arkell and Douglas 1918 AD 145 at 159; Myers v Shraga 1947 (2) SA 258 (T) at 261.

257. Lampert-Zakiewicz v Marine and Trade Insurance Company Limited 1975 (4) SA 597 (C) at 599 E et seq.
258. 1922 AD 457 at 459.
259. 1961 (2) SA 587 (AD); the case a quo was reported as Lockhat and Others v Minister of the Interior 1960 (3) SA 756 (N).
260. The decision a quo (note 259) at 757 A.
261. At 773C.
262. This is clear from the Appellate Division Judgment (note 259) at 602C.
263. At 602 E - G.
264. Amalgamated Footwear v Jordan & Co Ltd. 1948 (2) SA 891 (C); Geldenhuys v Maree 1962 (2) SA 511 (O).
265. See inter alia, Van der Merwe v Santam 1947 (2) SA 440 (C).
266. Warmbad Plase Raad v Bester 1954 (3) SA 71 (T); Dames v De Kock 1958 (1) SA 773 (W); Serobe v Koppies Bantu Community School Board 1958 (2) SA 265 (O) at 269.
267. Elvy's Estate v van Heyningen 1933 OPD 103.
268. Note 259 and the text relating thereto.
269. Rule 23(3) of the Uniform Rules of Court. The Court in both Cotas v Williams 1947 (2) SA 1154 (T) and Wicksteed v George 1961 (1) SA 651 (FSC) held that an excipient was limited to the grounds stated in his notice of exception; cf. Molteno Bros v S A Railways and Harbours 1936 AD 321 at 417.
270. Rule 23 (4).

271. The rules for the set down of an exception are governed by the special rules of each division e.g. Rule 34 (1) of the Rules of the Cape Provincial Division.
272. Haarhoff v Wakefield 1955 (2) SA 425 (E).
273. Cf. Buthelezi v Minister of Bantu Administration 1961 (3) SA 256 (N).
274. Pietermaritzburg City Council v Local Road Transportation Board 1960 (1) SA 254 (N) at 256; cf. Soma v Moruland 1975 (3) SA 53 (T).
- 274a. Van der Meulen v Van der Meulen 1913 EDL 218 at 224; Hudson v Hudson 1927 AD 259 at 269.
275. Santos and Others v Standard General Insurance and Another 1971 (3) SA 434 (O); Versluis v Greenblatt 1973 (2) SA 271 (NC) at 278; Du Raan v Maritz 1973 (4) SA 39 (SWA).
276. Cf. F J Hawkes & Co Ltd v Nagel 1957 (3) SA 126 (W); cf. also, International Tobacco Co v Wolheim and Others 1953 (2) SA 603 (AD) at 613.
277. Union Government v Heiberg 1919 AD 477 at 483.
278. Parsons v Executors Estate Parsons (1913) 34 NLR 515 at 518.
279. Colonial Industries Ltd. v Provincial Insurance Co Ltd 1920 CPD 627 at 632 - 633; see also, Lawford v Minister of Justice and Others (1914) 35 NLR 284.
280. Inter alia : Algo Mining Co Ltd. v Arkell and Douglas (note 256) 145; Cohen v Heywood 1948 (3) SA 365 (AD) at 374; cf van Plet-sen v Henning 1913 AD 82 at 96.

281. Inter alia : R. v Williams 1914 CPD 277; R. v Manyisana 1929 CPD 399; The Queen v Heydenryck (1882) 2 EDC 248 at 249; see page 244 above.
282. See Caney, Statute Law and Subordinate Legislation (1957), at 41; see also page 244 above.
283. Inter alia : R. v Ndaba 1956 (2) SA 673 (T); Springs Town Council v Macdonald 1968 (2) SA 114 (T); cf. R. v Nbode 1930 AD 484; see page 245 above.
284. R. v Jopp 1949 (4) SA 11 (N); S. v Fusaro 1972 (3) SA 218 (RAD); S. v Bechoo 1979 (3) SA 946 (AD); cf. R. v Pretoria Timber Co (Pty.) Ltd. and Another 1950 (3) SA 163 (AD); see also, Taitz, 'Vagueness and Uncertainty in Subordinate Legislation as a Ground of Invalidity', 42 THRHR (1979) 412.
285. See page 246 above.
286. 1898 2 QB 91 at 100; see, inter alia : Minister of Posts and Telegraphs v Rasool 1934 AD 167 at 173 and 180; Sinovich v Hercules Municipal Council 1946 AD 783 at 789, 799, 801; see also, page 246 above.
287. Inter alia : R. v Abdurahman 1950 (3) SA 136 (AD) at 145; R. v Lusu 1953 (2) SA 484 (AD) at 488 et seq; see cases referred to in note 408 (Chapter 3).
288. See the cases referred to in note 409 at page 282 above.
289. See the cases referred to in note 410 at page 283.
290. See the cases referred to in note 411 at page 283.
291. See the cases referred to in note 412 at page 283.
292. Note 287.

293. At 147 H.
294. At 146 G, see also 150 E.
295. S. 85 (1)(c) of the Criminal Procedure Act 1977.
296. R. v Standard Tea and Coffee Co (Pty.) Ltd. 1951 (4) SA 412 (AD) at 417B; R. v Ismail and Another 1958 (1) SA 206 (AD) at 209 B.
297. S. 85 (1) of the Criminal Procedure Act 1977.
298. See note 296.
299. See the text relating to notes 292 - 294.
300. S. 244 of the Criminal Procedure Act 1977.
301. In terms of S. 85 of the Criminal Procedure Act 1977.
302. Note 300.
303. Note 301.
304. Ibid.
305. See inter alia : S. v Manelis 1965 (1) SA 748 (AD); R. v Naran Samy 1945 AD 618 at 622; Byers v Chinn and Another 1928 AD 322 at 332; R. v Malaka 1966 (1) SA 117 (T) at 120 C et seq; R. v Mathlala 1951 (1) SA 49 (T); R. v Podbrey 1948 (2) SA 189 (C); cf. Kellerman v Minister of the Interior 1945 TPD 179 and R. v Jogi 1948 (1) SA 1162 (T).
306. R. v Vayi 1946 NPD 791 at 792; R. v Pretoria Timber Co (Pty.) Ltd. and Another (note 284) at 170; cf. Arnold v Race Classification Appeal Board 1967 (2) SA 267 (C) at 272; cf. S. v O'Malley 1976 (1) SA 469 (N) at 473.

307. R. v Correia 1958 (1) SA 533 (AD) at 542E; see also, Ex parte Minister of Justice: In re: R. v Jacobson and Levy 1931 AD 466 at 477 Steyn, Die Uitleg van Wette (5 ed) at 123 and Taitz, 'Vagueness and Uncertainty in Subordinate Legislation' (note 284), at 412.
308. 1939 TPD 369 at 372.
309. 1928 AD 220 which case was fully considered at page 240 above.
310. 1972 (3) SA 726 (AD) at 735 H.
311. See page 110 below and the cases therein cited.
312. Taitz, "Prisoners' rights and Administrative law: Symptomatic Unreasonableness and the Notion of True Justice", 3 SACC (1979) 63 at 65; see also, cf. Kellerman v Minister of the Interior 1945 TPD 179 at 191 - 193 regarding the application of the omnia praesumuntur rule is apposite.
313. Rule 53 of the Uniform rules of Court, see page 86 above.
314. S. 110 of the Magistrates Court Act 1944.
315. Ibid.
316. S. 85 (2) of the Criminal Procedure Act 1977.
317. S. 85 (2) (a) read with s 86; cf. R. v Herschel 1920 AD 575; see further, R. v Limbaba and Another 1958 (2) SA 481 (AD) at 484 E - 485 A.
318. R. v Limbaba and Another (note 317) at 484.
319. Ibid. See also, R. v Maasdorp and Another 1947 (4) SA 858 (N).
320. S. 88 of the Criminal Procedure Act.
321. S. v Sarjoo 1978 (4) SA 520 (N) at 522; cf. S. v Mtetwa 1979 (3) SA 1250 (T).

322. See Hiemstra, Suid-Afrikaanse Strafproses (2 ed), 170 - 180; Lansdown and Campbell, South African Criminal Law and Procedure Vol-V, (1982) 221 - 226 .
323. See page 394 above.
324. Taitz, 'When is an Appeal not an Appeal? - a Legal Conundrum', 42 THRHR (1979) 70 at 71.
325. See page 79 above; and see Changuion and Another v Secretary for the Interior 1971 (1) SA 1 (AD) at 5A, more particularly the statement by Potgieter JA "... the application to the Court a quo was not an appeal from the Secretary's decision but a review of his decision, the Court a quo was not, and this Court is not called upon to adjudicate on the correctness of the classification but merely on the validity thereof." (my italics).
- 325a. The Queen v Heydenryck (1882) 2 EDC (Buch) 218; see page 545 below.
326. 1952 (2) SA 149 (N).
327. At 153 A.
328. At 152 G - H.
329. S. 110 of the Magistrates Court Act 1944, see the text relating to note 314 above.
330. Note 326.
331. 1954 (3) SA 833 (AD).
332. At 835 E - H.
333. At 837 A.
334. 1953 (4) SA 384 (AD).
335. At 838 A - H.

336. 1976 (3) SA 352 AD at 369 H et seq.

337. At 368 G; see Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (AD) at 600 E et seq.; see also page 24 below.

338. Cooper's case (note 336) at 368 H.

339. 1976 (4) SA 777 (N).

340. At 781 A - D.

341. Save for the invoking of the Court's inherent review jurisdiction in criminal cases (see page 319 above), each remedy by which the inherent jurisdiction may be invoked was previously considered under certain specific headings more particularly:

- a) the essential requirements for the grant of the remedy;
- b) the review process; and
- c) procedure.

This format was not appropriate when considering criminal cases. It is also not appropriate in regard to situations where it becomes necessary for the Court to resort to its inherent review powers despite other relief being sought initially. For example the initial requirements for a successful appeal, (apart from the necessary procedure) are not relevant. Accordingly the text will be confined largely to the review process.

342. Note 331.

343. At 836A and 839A.

344. At 839 A - B.

345. At 835 G.

346. At 840 A - C.

347. At 839 D - E.
348. In respect of criminal appeals, Rule 67 (1) of the Rules to the Magistrates Court Act 1944. In respect of civil appeals, Rule 51 (3) of the Rules to the Magistrates Court Act read with Rule 7 (3)(a) and (b) of the Uniform Rules of Court.
349. Rule 51 (7) of the Rules to Magistrates Court Act.
350. Rule 53 (7).
351. Rule 67 (1).
352. Rule 51 (8) (a) and (b); cf Rule 67 (3)(b) (i) - (iii).
353. Rule 67 (13) and Rule 51 (10) in respect of criminal and civil cases respectively.
354. Rule 50 (7) (a) - (d) of the Uniform Rules of Court.
355. Rule 67 (13) of the Rules to Magistrates Court Act read with Rule 51 (3) of the Uniform Rules of Court.
356. Rule 50 (1) - (4) of the Uniform Rules of Court.
357. Rule 51 (2) of the Uniform Rules of Court.
358. Rule 51 (2) of the Uniform Rules of Court.
359. S. 87 of the Magistrates Court Act 1944.
360. S. 309 read with s. 304 of the Criminal Procedure Act No 51 of 1977.
361. Taitz, 'When is an Appeal not an Appeal? - a Legal Conundrum' (note 324), at 72.
362. The latter type of review will be considered under a separate heading at page 337 above.

363. 1903 TS 111 at 116.

364. 1969 (2) SA 91 (T) at 96 H.

365. S. 29 of the Liquor Act 1928 (now s. 20 of the Liquor Act 1977).

366. 1942 AD 275 at 310.

367. 1982 (1) SA 754 (W).

368. S. 124 (2) (a) of the Insolvency Act 1936.

369. Kruger's case (note 367) 761 B.

370. At 761B.

371. S. 151 of the Insolvency Act 1936.

372. Kruger's case (note 367) op cit 761 C - D.

373. At 756 A - B.

374. At 759A.

375. At 759 D - F.

375a. For a criticism of this judgment see Taitz, 'Judicial Review of the Master's Refusal to recommend an Application for Rehabilitation - an Unfortunate Decision', 100 SALJ (1983) 32.

376. As with the previous heading, viz. an appeal, (see page 328 above) it is not appropriate to follow the format used earlier in this Chapter (see note 341.)

377. See page 329 above.

378. Note 367.

379. At 759 F.
380. See page 325 above.
381. See page 586 below.
382. 1903 TS 111 at 115.
383. R. v Zackey 1945 AD 505 at 509; Salisbury Municipality v Psillos NO. 1953 (3) SA 101 (SR); Venter v Cassimjee 1956 (2) SA 242 (N); Vawda v Rasool 1957 (1) SA 724 (N).
384. See Chapter 3 'The Grounds of Review' at page 183 et seq above.
385. 1 Menz 533.
386. See page 341 above.
387. Berg v Regional Magistrate 1956 (2) SA 676 (T).
388. See page 105 et seq above.
389. Rule 53 of the Uniform Rules of Court.
390. See page 86 above.
391. See page 113 et seq above which is concerned with the orders which the Court may make when considering an application for (common law) review.
392. For details of 'inferior courts' see page 31 above.
393. Ss. 96 - 100 of Act No 32 of 1944.
394. S. 96. This section has been re-enacted in ss. 302 - 304 of the Criminal Procedure Act 1977, with certain modifications.
395. S. 98 (2).

- 396. S. 98 (1).
- 397. S. 302 of the Criminal Procedure Act No 51 of 1977.
- 398. S. 304 (2).
- 398a. See page 113 above.
- 399. S. 304 (1) (2) and (3).
- 400. S. 303.
- 401. 1976 (4) SA 185 (T).
- 402. 1980 (1) SA 187 (T).
- 403. See annexures 4 and 5 annexed to the end of this Chapter being at pages 343(i) and 343(xii) respectively, above.
- 404. See pages 343(xvii) of Annexure 5 which is a copy of such request; the informal nature thereof is evident.
- 405. In S. v Taylor (note 401) the matter was heard by two judges in chambers. It appears that the court was influenced by the comments made by the Attorney-General - see page 343(iv) of Annexure 4 - which may be compared with the judgment.
- 406. See inter alia : S. v Masemula 1959 (4) SA 285 (T); S. v Johannes Mashai an unreported judgment of the Transvaal Provincial Division dated 14 September 1973, see page 343(v) thereof; cf. S. v Besser 1968 (1) SA 377 (SWA).
- 407. Note 401; see page 105 et seq above.
- 408. 1979 (1) SA 767 (T).
- 409. See page 105 et seq above.

410. 1980 (1) SA 187 (T).
411. At 188 A - D.
412. At 188 D - F.
413. At 188 F - G.
414. See Annexures 6 at page 343(xii) to 343 (xvii). The Annexure constitutes copies of the documents filed with record in the Transvaal Provincial Division.
415. See the letter dated 29 August 1979 being the initial comments of the Attorney-General (at page 343(xiii) above).
416. See the manuscript of the reviewing judge, Le Roux J, in a memorandum to the Attorney-General (at page 343(xvii) above). The Attorney-General's reply undated is to be seen from page 343(xiv) 343(xvi) above.
417. See the manuscript memorandum by the reviewing judge, Le Roux J to the Attorney-General (at page 343(xvii) above).
418. Lubisi's case 188H.
419. Rule 53 of the Uniform Rules of Court.
420. See S. v Taylor (note 401) at 188 et seq; S. v Mametja (note 408) at 768 B - C.
421. Cf. the right of appeal in regard to a question of law in favour of an accused by the prosecution in terms of s 310 of the Criminal Procedure Act 1977. See the reference to S. v Johannes Masekoameng (an unreported Transvaal Review judgment) set out on the Attorney-General's reply to the queries by Le Roux J, at page 343(xiv) above.
422. The setting aside of an acquittal granted by a lower court has been considered in a number of earlier cases inter alia Grahamstown Town Council v Brown and Wood (1882) 2 EDC 338; In re Scholtz (1884) 3 ED C 169; cf Distin v Williamson (1880) 1 EDC 20. See also Price Albert Board of Management v Jooste and Others (1885-1886) 4 SC 400 at 403 et seq and R. v Radu 1923 EDL 214.