

<b>Dissertation Code:</b>	PBL635S
<b>Title</b>	Trials and Tribunals: administrative justice after PAJA and <i>New Clicks</i> with particular reference to the financial services industry
<b>Word Count:</b>	24 716
<b>Due Date:</b>	15 February 2006
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### Declaration

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Law in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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## Abstract

In September 2005 the South African Constitutional Court handed down the seminal judgment of *Minister of Health v New Clicks*. The judgment is critical to our understanding of administrative justice in South Africa not only with regard to the applicability of administrative justice principles to the making of subordinate legislation, or administrative rule making, but also because of its wide ranging analysis of the state of administrative law in South Africa. Although the final Constitution of 1996 included a justiciable right to administrative justice, it was only with the passing of the Promotion of Administrative Justice Act [PAJA] in 2000 that this right was given effect to. The legislation was expected to both codify South Africa's common law and to introduce a system of administrative justice that was not wholly reliant on judicial review as a means of ensuring open, transparent and accountable government. The *New Clicks* judgment can be criticised for its lack of a truly majority judgment and the opaqueness of the justice achieved but it is to be welcomed for its certainty as regards the inter-relationship between the common law, the Constitution and PAJA. The judgment is concerned primarily with administrative rule-making but the case is analysed in this discussion with a view to extracting those principles that can be applied to administrative grievance tribunals. The practice of empowering expert tribunals to address grievances within the definition of administrative action and allowing administrators to review their own actions prior to a judicial review process is a favoured feature of administrative justice. The financial services industry is used as an example of the need for legislative consistency in the creation of such tribunals as well as a consistent standard of review of the resultant determinations, without which the advantages of tribunals as a means of achieving administrative justice are outweighed by competing jurisdictions, unnecessary costs and inefficiencies and, most significantly, the lack of justice for consumers.

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## 1. Introduction

Prior to the dramatic political changes which culminated in the 1994 Interim Constitution<sup>1</sup>, administrative law was one of the few tools available to individuals and groups attempting to enforce the rules of natural justice in their interactions with the state. The common law rules of natural justice, including the right to a hearing and the rule against bias, provided some small measure of procedural protection against capricious and arbitrary action by a state which founded its power in the doctrine of parliamentary sovereignty. Section 24 introduced, for the first time in South Africa, a justiciable right to administrative justice and, ever mindful of the need to balance this right with the need for an efficient and effective administration, the drafters created a hierarchy the section that distinguished between rights, entitlements and expectations. Section 24 also confirmed that South Africa's democracy was not going to be one based on a citizen's right to just administrative action only when deprived of a pre-existing right. The final Constitution<sup>2</sup>, however, did not adopt a similar administrative justice clause, electing instead a broad right against anyone, public or private, exercising public power, but subject to the ever present need for efficiency in government. The right was however subject to the promulgation of national legislation.

The Promotion of Administrative Justice Act<sup>3</sup>, it was hoped, would provide certainty as to the standard of review of administrative action as well as provide a framework of structures to augment judicial review as a means of managing the exercise of public power. It was also hoped that the legislation would normalise administrative law after the apartheid years when the judiciary alternatively submitted itself to the abuse of

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<sup>1</sup> Act 200 of 1993

<sup>2</sup> Act 108 of 1996

<sup>3</sup> Act 3 of 2000

powers by the executive branch or government or stretched the useful boundaries of administrative review for the purpose of achieving some small amount of justice. As will be seen from the discussion in chapter 2.1 below, PAJA is criticised for not having lived up to all expectations.

Two seminal cases have been heard before the Constitutional Court after the promulgation of PAJA; *Bato Star*<sup>4</sup> and *New Clicks*<sup>5</sup>. Both cases have contributed to our understanding of administrative justice particularly with regard to the applicability of a standard of review of administrative action. A reasonableness standard, confirmed by PAJA, *Bato Star* and *New Clicks*, is the standard to which administrators are held. The standard is noteworthy for its recognition that the contextual situation of both parties is critical in determining whether administrative fairness has been achieved. However, the very commitment to context creates variability that can be seen as a threat to certainty and consistency. Of greater concern is the potential for the boundary between review and appeal to be blurred even while the courts profess a commitment to honouring this boundary.

Under the common law, the practice of the classification of functions was a means for the judiciary to identify the nature of the administrative action under review and to then apply a pre-determined standard of review to that action. Assuming that the classification of functions remains discredited as a formalistic tool for judicial review, it continues to provide useful distinctions between types of administrative action. As Justice O'Regan has noted '... it is important to realize that there is a distinction that may, and should, be drawn between legislative and administrative functions, or between rule-

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<sup>4</sup> *Bato Star Fishing v Minister of Environment Affairs and Tourism et al* 2004 CCT 27/03 (CC)

<sup>5</sup> *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* CCT 59/04 (CC)

making and adjudication<sup>6</sup> O'Regan notes that typically the two distinctions drawn between rule-making and adjudication are that:

- rule-making is prospective while adjudication is retrospective
- rule-making has a general application while adjudication is specific and particular.

Drawing on a 1992 report by the Australian Administrative Review Council, she notes further that the distinctions should include that:

- rule-making determines the content of the law while adjudication seeks to apply that law and
- the results of rule-making are binding while the results from administrative action are generally not<sup>7</sup>

This dissertation aims to consider recent developments in administrative law in regard to administrative adjudication by administrative tribunals. This last is a vast subject and is consequently limited in scope to a consideration of industry specific adjudicative or grievance tribunals, in particular those functioning within the financial services industry.

Critics of judicial review as a means of achieving administrative justice point to the need for alternate methods that are cheaper, more efficient and more accessible and argue that the doctrine of separation of powers is partly dependent on administrators being acknowledged as the experts in the necessarily poly-centric decision making process. The argument, therefore, is that a system of tribunals and appeal tribunals would create the framework within which administrative agencies can regulate themselves subject to administrative justice principles with judicial review being the final recourse to abuses of public power. The arguments in favour of a system of tribunals

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<sup>6</sup> O'Regan, C 'Rules for Rule-making: Administrative Law and Subordinate Legislation' (1993) *Acta Juridica* 157 at 160

<sup>7</sup> *Ibid* at 161

with a general appeals tribunal at the apex are discussed in chapter 5 below with specific reference to specialist grievance tribunals functioning within the financial services industry. As will be seen from an analysis of tribunal determinations and high court reviews of such determinations, the current tribunal system suffers from a lack of jurisdictional certainty, cohesion and, most significantly, a common standard of review.

## **2. Doctrines of legality, rationality & reasonableness**

### ***2.1. Introduction***

The inclusion of a right to administrative justice in the Constitution<sup>8</sup> and the promulgation of national legislation<sup>9</sup> designed to give effect to the Constitutional right has codified South African administrative justice principles. One would be forgiven for thinking that this process of codification has created certainty in respect of the standard of review to be applied by the judiciary and clarity on the role of judiciary within government structures as well as a comprehensive system to facilitate and enable participative democracy. This hoped for certainty has not however materialised. As Hoexter laments, PAJA was an 'opportunity lost' as it provides no viable alternate to judicial review in the form of a system of independent and impartial appeal tribunals that would allow the administrator to review its own actions and decisions<sup>10</sup>.

If Hoexter's criticism of PAJA is accepted, aggrieved citizens are still reliant primarily on the judicial process when challenging an administrative decision or action and the judiciary remains responsible for setting a standard of review that is an adequate safeguard against intentional or accidental abuses of power while maintaining an

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<sup>8</sup> Section 33 of Act 108 of 1996

<sup>9</sup> Promotion of Administrative Justice Act 3 of 2000, hereinafter PAJA

<sup>10</sup> Hoexter, C 'Future of Judicial Review in South African Administrative Law' (2000) 117(3) *SALJ* 484 at 497

appropriate level of deference. This discussion is focussed primarily on the review of determinations made by grievance tribunals in the financial services industry and consequently, the level of scrutiny and standard of review that a court may apply to such determinations. The inquiry consequently starts with an analysis of the various standards of review present in South African administrative law and an attempt to appreciate the implications of applying the prevailing standard, being a review for reasonableness.

## ***2.2. Doctrine of Legality***

Section 33 of the final Constitution offers a wide ranging option to any person wishing to enforce their right to just administrative action:

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

It seeks to protect the citizen from abuses of power, it suggests an obligation to promote participatory and open, transparent decision making, justifiable against reasons and balances the need to promote efficiency in the administration. In applying administrative justice to 'everyone' regardless of whether a right or interest or legitimate expectation has been impacted, the section honours the philosophy that administrative

justice should be based on a determinative theory and not a deprivation one<sup>11</sup>, albeit not as explicitly as S24 of the Interim Constitution<sup>12</sup>.

The challenge to the courts in applying section 33 is perhaps in the far reaching nature of the section and the resultant need to limit or define administrative action. As Hoexter<sup>13</sup> notes, the Constitutional Court has largely excluded those administrative or executive decisions that would not have met the requirements of 'administrative action' under the common law. One of the defining aspects of 'administrative action' is that it is concerned with the implementation of legislative provisions and not the making of policy or legislation which would rest within the scope of the executive and the legislature respectively. Thus in the *SARFU*<sup>14</sup> case, the constitutional power of the State President to appoint a commission of enquiry was found to be an exercise of executive decision making discretion and not administrative action. In *Fedsure Life*<sup>15</sup>, the budgetary resolutions made by the local council were found to be legislative in nature and not reviewable under section 33. In *Pharmaceutical Manufacturers*<sup>16</sup>, the State President's decision to enact legislation while the backbone regulations were still pending was found not to be reviewable as administrative action as the action was clearly executive in nature as it required the exercise of political judgment, albeit as to the timing of implementing regulations. In so doing, the Court reinforced its commitment to maintaining a separation of powers but has not limited its own oversight function to

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<sup>11</sup> Mureinik, E 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* at page 38

<sup>12</sup> Act 200 of 1993

<sup>13</sup> Hoexter, C *op cit* at note 10

<sup>14</sup> *President of RSA and Others v SARFU and Others* 1999 (10) BCLR 1059 (CC)

<sup>15</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and others* 1998 CCT7/98

<sup>16</sup> *Pharmaceutical Manufacturers Association of South Africa & Another v In re ex parte President of RSA* 2000 (2) SA 674 (CC)

those actions that are concerned only with the implementation of legislation, regardless of the identity of the administrative actor. In all three cases mentioned above, the Court found that even though the action complained of was not administrative in nature, the functionary was still subject to judicial oversight but under the doctrine of legality. In the *Pharmaceuticals* case, the Court confirmed its oversight function and the standard of review under the doctrine of legality as being a rationality standard and stated that: 'Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement'<sup>17</sup>.

Consequently, the doctrine of legality requires that all public power must be exercised in terms of a constitutional principle of legality which sets a minimum threshold for the exercise of public power. This threshold is rationality and the requirement that actions taken remain within the powers conferred on the public body. As Hoexter notes, this may very well be applying administrative law principles by another name<sup>18</sup> and that merely because public power is not administrative in nature does not mean that there are no constraints upon it. Hoexter states that this pragmatic and variable approach to the cases suggests that the legality principle is an extensive and convenient way of subjecting all public power to a set of minimum standards without the formalism of thresholds that define what is and what is not administrative action. She suggests that the judgments reflect the real concern of the Court, being the rejection of irrational or unreasonable action and a rejection of formalistic judicial review.

This approach does not set the standard of review at proportionality, nor does it require administrators to give reasons, but it is an extensive general principle that requires that all public power conforms to minimum legality standards. Finally, it has the

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<sup>17</sup> *Ibid* at para 85

<sup>18</sup> Hoexter, C *op cit* at note 10 at page 506

advantage of developing a single system of public power justice and not two parallel systems of administrative law<sup>19</sup>.

### **2.3. A variable approach**

Pillay suggests that '[t]he inclusion of rationality as a requirement for the legality of non-administrative action, that is, action that does not involve the making of policy or legislation, implies that ordinary administrative action is susceptible to review on the higher standard<sup>20</sup> of reasonableness.

Henderson describes the legality approach as being one where the actions of the executive and administration are held to a Constitutional standard that permits a generalist test that is not bound to doctrine:

'a Court can impute to Parliament an intention of constitutionality ... on the premise that a prudent legislature would not intend the consequences of an authorising Act to run contrary to principles which, if applied to the Act, would invalidate an Act of Parliament'.<sup>21</sup>

This concept of variability in administrative justice, or the 'pragmatic and functional approach', is canvassed by Mullan in an analysis of the Canadian Supreme Court's approach to judicial review since the 1999 *Baker*<sup>22</sup> case in which the standard of unreasonableness was applied. The case marked a shift in the standard of review applied by the Court from a relatively less strict correctness standard. The application of a

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<sup>19</sup> Hoexter, C 'The Principle of Legality in South African Administrative Law' *Macquarie Law Journal* (2004) Vol 4 at page 184

<sup>20</sup> Pillay, A, 'Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction' (122) 2 (2005) *SALJ* 419 at 425

<sup>21</sup> Henderson, A 'The Curative Powers of the Constitution' (1998) 115 *SALJ* at page 354

<sup>22</sup> *Baker v Canada (Minister of Citizenship and Immigration)* (1999) 2 SCR – as reviewed in Mullan, D 'Deference from *Baker* to *Suresh* and Beyond – Interpreting the Conflicting Signals' in D Dyzenhaus *Public Law* (Hart Publishing, 2004) 21

reasonableness standard caused some concern and it has been suggested that the Court reduced the level of deference to be accorded to the administrative tribunal as a review for reasonableness necessarily implies a consideration of not only the factors taken into account by the administrative agency but also the weight accorded to those factors. Mullan suggests that despite the seeming retreat by the Court in subsequent cases, a review for reasonableness is consistent with democracy and the separation of powers as the approach places less attention on the character of the decision maker and more attention on the nature of the interests at stake<sup>23</sup>. He suggests that a review for reasonableness is the correct standard when fundamental constitutional rights are impacted, thereby suggesting that a variable approach by the courts requires greater scrutiny of administrative decisions where the impact or outcome is particularly threatening to a constitutional right<sup>24</sup>.

Section 6(2)(d) of PAJA provides that administrative action may be reviewed if: 'The action was materially influenced by an error of law'. It has been suggested that errors of law are therefore reviewable against a standard of correctness but, as De Ville illustrates, it is improbable that there is one correct interpretation of a statutory provision and there is 'little reason to believe that the courts' interpretation of a statutory provision will always be "better" than that of the administrative body, especially where such body has developed an expertise within a specific field'<sup>25</sup>. De Ville suggests that the standard of review could differ or vary from reasonableness, rationality or correctness according to the matter at hand, expertise of the administrator and the scope of the discretion

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<sup>23</sup> *Ibid* at page 53

<sup>24</sup> *Ibid* at page 57

<sup>25</sup> De Ville, J 'Judicial Review of Administrative Action in South Africa' 1<sup>st</sup> ed (LexisNexis, 2005) at page 153  
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exercised. The correctness standard would be reserved for errors of constitutional interpretation or questions of jurisdiction<sup>26</sup>.

The final drafting of PAJA perhaps provides less certainty and would seem to support the proposal that a range of standards can be applied to judicial review of administrative actions. A reading of section 6(2) illustrates that the legislature seems to have envisaged standards of review as including arbitrariness, rationality, proportionality and unreasonableness:

6(2)(e)(vi) the action was taken – ... arbitrarily or capriciously

6(2)(f)(ii) the action itself is not rationally connected to-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator

6(2)(h) the exercise of the power ... is so unreasonable that no reasonable person could have so exercised the power or performed the function

## **2.4. Unreasonableness**

The *Bato Star*<sup>27</sup> case was argued after the promulgation of PAJA but the judgment is silent on the range of possible standards of review present in section 6(2) of the Act. An analysis of the judgment would indicate that the Constitutional Court rejected the approach of considering the possible standards of review and selecting the most appropriate one according to the context and then applying that selected standard to the facts at hand. The Court's preferred approach has been a single and simple standard of reasonableness.

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<sup>26</sup> *Ibid* at page 154

<sup>27</sup> *Bato Star Fishing v Minister Environmental Affairs and Tourism et al* CC 2004 CCT 27/03

An unreasonableness standard is a significant shift from the common law position and is addressed by Justice O'Regan when considering the conjoined issues of review versus appeal and review for reasonableness. She noted that 'pre-constitutional jurisprudence failed to establish reasonableness or rationality as a free standing ground of review'<sup>28</sup> which required the presence of one of the common law grounds of review to be an indicator of unreasonableness. In respect of the PAJA definition of unreasonableness, O'Regan noted that the section must be read consistently with the constitution and, as section 33 does not prescribe the circuitous unreasonableness standard in PAJA, it should be read down to 'be understood to require a simple test, namely, that an administrative decision will be reviewable if ... it is one that a reasonable decision-maker could not reach'<sup>29</sup>.

A review for reasonableness requires a consideration of the circumstances of each case and this, the Court found, would necessarily imply consideration of the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected<sup>30</sup>. This range of factors, which is not an exclusive list, to be considered in each case could be interpreted as a license for the courts to edge into a merits review. It certainly does permit a variable or, as Evans argues, a functional and pragmatic approach<sup>31</sup>. Taggart describes this approach, as constructed in the now famous *CUPE v New Brunswick Liquor Corporation*<sup>32</sup>, as one which was: 'first applied to determine

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<sup>28</sup> *Ibid* at para 43

<sup>29</sup> *Ibid* at para 44

<sup>30</sup> *Ibid* at para 45

<sup>31</sup> Evans, J 'Deference with a Difference: Of Rights, Regulation and the Judicial Role in the Administrative State' (2003) 120 *SALJ* 322

<sup>32</sup> (1997) 2 SCR 227

whether to defer to reasonable interpretations by expert decision-makers, but shortly thereafter was used also to influence the decision whether to characterize the error as jurisdictional in the first place<sup>33</sup>. The approach is one where the courts may intervene in the decision of an administrative functionary if they are convinced of the correctness of a particular reading of the legislation. If they are unable to reach such a 'correct' interpretation, they should refrain from any intervention and defer to the agency's preference as regards reasonableness<sup>34</sup>. Consequently, it is only where deference is not deserved that the Court will review the administrative action on a correctness standard.

In South Africa, the scope of the debate regarding the appropriate standard of review has been engaged with the standards of rationality, justifiability, legality or lawfulness or reasonableness. Preceding judgments by the Constitutional Court such as the *Bel Porto*<sup>35</sup> and *Carephone v Marcus*<sup>36</sup> cases, were decided on a standard of justifiability that was interpreted as including a requirement that the decision be rational<sup>37</sup>. While the *Bato Star* judgment may be criticised for being either overly or insufficiently deferential, for the *laissez faire* reading down of the definition of unreasonableness or for failing to address the uncertainty created by the legislature's inclusion of a range of standards of review in section 6(2) of PAJA but it is submitted that the judgment may be welcomed for the certainty provided by the finding that the correct standard of review of administrative action is one of reasonableness.

A reasonableness standard provides scope to the judiciary to enquire into the societal and factual context of the case, and to give effect to the broad governing principles in the Constitution. Writing in 1993 and at this time in South Africa's legal history clearly a

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<sup>33</sup> Taggart, M 'Outside Canadian Administrative Law' (1996) 46 *Toronto Law Journal* 649 at 651

<sup>34</sup> *Ibid*

<sup>35</sup> *School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC)

<sup>36</sup> 1998 (10) BCLR 1326 (LAC)

<sup>37</sup> See for example, Pillay, A, above at note 20 at 427

proponent of an increased activist role for the judiciary *vis-à-vis* the administration, Hlophe argues in favour of a reasonableness standard and states: ‘to put it bluntly, “unreasonableness” will provide our judiciary with the requisite muscle to challenge the abuse of discretionary powers by administrative bodies and officials’<sup>38</sup>. It is positions such as this, read in the current context where the state is entrusted with delivering massive socio-economic transformation, that feed the unease with a reasonableness standard as it creates a challenge for the judiciary to maintain the divide between judicial review and appeal and, consequently, the separation of powers so necessary to the modern democratic state.

### **3. Judicial review as a means of achieving administrative justice**

#### **3.1. Introduction**

In South Africa, judicial review has enjoyed primacy as a means of controlling the exercise of public power<sup>39</sup>. It is argued, however, that administrative law is broader and includes non-judicial safeguards that are more than a secondary review of the primary decision and should be aimed at generating good or better primary decisions<sup>40</sup>. The role and scope of administrative law has been described using the Harlow and Rawling’s

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<sup>38</sup> Hlophe, J ‘Judicial Control of Administrative Action in a Post-Apartheid South Africa – some Realities’ 1993 *Acta Juridica* 105 at page 112

<sup>39</sup> See, for example, Hoexter, C ‘Future of Judicial Review in South African Administrative Law’ (2000) 117(3) *SALJ* 484

<sup>40</sup> *Ibid* at page 487

traffic-light metaphor<sup>41</sup>, which highlights the tension between a red-light and green-light approach to judicial intervention. On the one side of the spectrum, the role of the judiciary is one of restraining or controlling the state from implementing large scale socio-economic projects and interfering with personal liberties and private property. On the other side of the spectrum is a green-light philosophy where the role of the judiciary is one of assisting the state to regulate in a way that socio-economic intervention and redistribution is possible. Necessarily, a green-light approach requires a hands-off role by the courts where they are deferential to the legislature's socio-economic and political imperatives and to the administrations interpretation and application of those intentions. As Taggart illustrates, however, if the green-light approach defines the judicial role as one which is custodial and supportive of socio-economic programmes, that role is less clear when governments move away from a social welfare state towards a cost-cutting, contracting and less interventionist political model, which he describes as a Thatcherist trend<sup>42</sup>.

'Having placed their [green-lighters or functionalist critics] faith in majoritarianism and the political process to deliver the right political results, they are dismayed that the swing of the political pendulum has delivered Right results. Trapped by their positivism and mistrust of the judiciary, they have been unable to build a theory to rival ... Dicey's'<sup>43</sup>

Regardless, it can be argued that the judicial arena is one which is not well suited to collective and policy laden decision making, as engaged as judicial review is with the

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<sup>41</sup> 'Law and Administration' 1984 (London: Weidenfeld & Nicholson). See for examples of discussions of this theory Hoexter, C 'Future of Judicial Review in South African Administrative Law' 2000 117 (3) *SALJ* at page 488; Taggart, M 'Outside Canadian Administrative Law' (1996) 46 *Toronto Law Journal* 649 at 655

<sup>42</sup> *Ibid* at page 656

<sup>43</sup> Dyzenhaus, D and Taggart, M 'Judicial Review, Jurisprudence and the Wizard of Oz' (1991) 1 *PLR* 21, 48 quoted in Taggart, M 'Outside Canadian Administrative Law' (1996) 46 *Toronto Law Journal* 649 at 657

immediacy and restricted nature of a specific case where the parties are in an adversarial relationship and not a consensus seeking one.

### ***3.2. Scope of judicial review***

Hoexter provides a thorough analysis of the limitations of judicial review<sup>44</sup>, including the following:

- There is no certainty that judicial review drives a significant change in the administrator's behaviour or decision making. Any change can be attributed to a defence against challenge.
- The outcome of judicial review does not necessarily provide justice for the participants as, more often than not, the decision is referred back to the original decision maker.
- An open, transparent and democratic political process should be better suited than the courts when called on to identify, isolate and eradicate maladministration and poor or erroneous decision making.
- Judicial review is necessarily backward looking and reactive. Certainly, industry specific tribunals, which are quasi-judicial in nature, are equally reactive, the main difference being that they are in a position within the political administration structure to influence or indeed drive regulatory changes or industry consultations.
- The inaccessibility of the judicial process, being 'slow, expensive and deeply mysterious to the layperson'<sup>45</sup>
- The biggest challenge to the judicial process is that it is deeply undemocratic and does little to enhance meaningful participation and threatens the separation of powers so necessary to the functioning of a democratic state and the appropriate

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<sup>44</sup> Hoexter, C *op cit* at note 10 at page 489

<sup>45</sup> *Ibid* at page 490

role of the courts. As Hoexter<sup>46</sup> argues, however, judicial review of the merits is only undemocratic in the absence of a representative political institutions and it is thus only unwarranted intervention by the judiciary that is undemocratic.

Arguments in favour of an integrated and systemic administrative law regime call for additional structures and mechanisms within the state infrastructure. Prior to the promulgation of PAJA, O'Regan argued in favour of legislative and executive overview in respect of subordinate legislation, consultation with affected and representative bodies as well as between government departments, public participation in rule-making within a formalised notice and comment procedure and access to information legislation<sup>47</sup>. She called for the development of rules for rule-making, including a central drafting office, periodical reviews of subordinate legislation, a register of subordinate legislation, consultation and interest group representation on rule-making bodies and notice and comment procedures<sup>48</sup>. PAJA, was meant to give effect to the constitutional right but, as Hoexter argues, it failed to add to the 'bag of tools'<sup>49</sup> available when engaged in the control of administrative power. She states that 'The final drafters seemed to take the view that the instruction in section 33(3) to "promote efficient administration" justified them in jettisoning most of the provisions relating to future reform of the administrative system'<sup>50</sup>.

This section began by questioning whether the codification of administrative principles has achieved the desired aim of certainty in administrative justice and whether a systemic alternate to judicial review has been created. While recognising the criticisms of the current legislative regime, it is equally important to recognise the vital role that

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<sup>46</sup> *Ibid* at page 492

<sup>47</sup> *Op cit* at note 6 at page 163

<sup>48</sup> *Ibid* at page 168

<sup>49</sup> Hoexter, C *op cit* at note 19 at page 177

<sup>50</sup> *Ibid*

administrative justice principles and judicial review plays in the modern state. In presenting a tragic litany of social assistance cases since 1996, Plasket<sup>51</sup> provides examples of the practical application of administrative justice. Applicants disadvantaged by the administration of social assistance grants have been able to rely on the right to lawful, reasonable and procedurally fair administrative action. It is difficult to argue against an entrenched and justiciable right to administrative justice when it is being used to benefit the truly marginalised and voiceless. Certainly, the cases do not seem to extend the common law overly much but, as Corder has pointed out, section 33 was not intended to completely redefine administrative justice<sup>52</sup>.

## **4. *New Clicks* and subordinate legislation**

### **4.1 *Introduction***

As discussed above at chapter 2, PAJA was drafted to give effect to the right 'lawful, fair and procedurally fair administrative action' in the Constitution<sup>53</sup>. The issue of the applicability of section 33 in the light of PAJA was decided in *Bato Star*<sup>54</sup>, where Justice O'Regan reaffirmed the court's findings in *Pharmaceutical Manufacturers*<sup>55</sup>, being that the control of public power is always a constitutional matter and that there is one system of administrative law that is grounded in the constitution, not in the doctrines of parliamentary sovereignty or *ultra vires*. The Court found that the '[c]ommon law informs

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<sup>51</sup> Plasket, C 'Administrative Justice and Social Assistance' (2003) 120 *SALJ* 494

<sup>52</sup> Corder, H 'A Cornerstone of South Africa's Democracy' (1998) 14 *SAJHR* at page 48

<sup>53</sup> Section 33(3) of Act 108 of 1996

<sup>54</sup> *Bato Star Fishing v Minister of Environment Affairs and Tourism et al* 2004 CCT 27/03 (CC)

<sup>55</sup> *Pharmaceutical Manufacturers Association of South Africa & Another v In re ex parte President of RSA* 2000 (2) SA 674 (CC)

PAJA and the Constitution and draws its force from the latter<sup>56</sup>. The decision was seminal for a number of reasons, one of which is that it was the first Constitutional Court case where PAJA was argued and applied by the court. Significantly, the parties to the matter did not dispute the applicability of PAJA.

In the *New Clicks*<sup>57</sup> matter, however, PAJA's applicability was contested specifically with reference to subordinate legislation. The case is enormously important to our understanding of administrative law and its evolution under South Africa's constitutional democracy. The difficulty of this task is made clear when one notes that the Court was hardly united in its interpretation of administrative principles nor in the application of those principles to the facts.

The *New Clicks* judgment relates to the making of subordinate legislation and the role that the courts play in holding the administrator to the constitutional principles of open, transparent and accountable government<sup>58</sup>. This discussion is concerned primarily with industry specific grievance tribunals as a means of achieving administrative justice. It is submitted that grievance tribunals are not however a complete alternative to judicial review. In fact, the quasi judicial nature of such tribunals, to use the classification of functions language, makes them more susceptible to judicial review. Effectively structured and utilised, however, tribunals can provide earlier, easier and more directed solutions for aggrieved citizens. Tribunal determinations should reflect an expert consideration that is alive to the multi-faceted policy considerations confronting administrators when implementing legislative enactments. They are tasked with enforcing and adjudicating legislation that is reflective of the will of the people as

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<sup>56</sup> *Supra* at para 22

<sup>57</sup> *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* CCT 59/04 (CC), decided 30 September 2005

<sup>58</sup> Sections 1, 57 and 95 respectively of the Constitution – see chapter 4.4.1. below

expressed by their elected representatives. Tribunals are not however immune to the same intentional or accidental abuses of power found in other administrative actions and decisions.

## **4.2 *The facts of New Clicks***

Very briefly, the facts of the case are that in 1997, the Medicines and Related Substances Control Act<sup>59</sup> [Medicines Control Act] was amended to introduce measures designed to make medicines more affordable, thereby giving effect to sections 27(1)(a) and 27(2) of the Constitution<sup>60</sup>.

'The newly introduced measures, ..., do not fit comfortably into an act designed to serve other purposes ... the grafted sections make provision for controls to be introduced in respect of production, importation, distribution and sales of medicines, the relaxation of certain patent restrictions, the promotion where possible of generic substitution of medicines, and the establishment of a Pricing Committee to make recommendations for the introduction of a pricing system for all medicines sold in the Republic.'<sup>61</sup>

As noted by the court, the measures 'provoked strong opposition from with the pharmaceutical industry, including litigation challenging the validity of certain provisions of the amending legislation'<sup>62</sup>. A majority of the High Court dismissed these challenges

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<sup>59</sup> Act 101 of 1965

<sup>60</sup> Section 27(1) '*Everyone has the right to have access to – (a) health care services, ...*'

Section 27(2) '*The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights*'

<sup>61</sup> *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* CCT 59/04 (CC), decided 30 September 2005 at para 2

<sup>62</sup> *Ibid* at para 3

but leave to appeal was granted. The Supreme Court of Appeal decided unanimously that the regulations were invalid.

### ***4.3 Administrative justice as an entrenched right and after codification***

The Court found unequivocally that PAJA was enacted to give effect to section 33 of the Constitution and that 'a litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law'<sup>63</sup>. Quoting Hoexter, with approval, Chaskalson CJ found that the common law can be used to inform the Constitution and PAJA but may not circumvent either and that the principle of legality<sup>64</sup> remains a fall-back position for those situations where PAJA does not apply<sup>65</sup>. Having acknowledged that South African administrative law owed its early development to English doctrines law<sup>66</sup>, he noted that certain provisions of PAJA had been transplanted from German and Australian provisions. This aspect of PAJA has been roundly criticised on the basis that they potentially introduce provisions that are at odds with South African administrative law<sup>67</sup>. Chaskalson CJ was not however prepared to borrow the interpretation of these provisions and stated that:

PAJA must, however, be interpreted by our courts in the context of our law, and not in the context of the legal systems from which provisions may have been borrowed.

In neither of the countries is there a defined constitutional right to just administrative action. Transplanting provisions from such countries into our legal and constitutional

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<sup>63</sup> *Ibid* at para 96

<sup>64</sup> As applied in the *Sarfu*, *Fedsure* and *Pharmaceutical Manufacturers*; notes 14; 15; and 16 above

<sup>65</sup> *Supra* at para 97

<sup>66</sup> *Supra* at para 102

<sup>67</sup> Hoexter, C 'The New Constitutional and Administrative Law' Vol 2 (Juta, 2002) at 107-110

framework may produce results different from those obtained in the countries from which they have been taken.<sup>68</sup>

In his consideration of the state of administrative law in South Africa, Sachs J concurred with Chaskalson CJ and found that an applicant cannot bypass PAJA. He differs in one significant respect, however, being whether PAJA is the starting point for any administrative law enquiry. He found that: 'The point of departure for the enquiry cannot be PAJA itself. The statute may refine constitutional provisions; it cannot define it'.<sup>69</sup>

In the context of determining that PAJA does not apply to subordinate legislation, which is discussed in more detail at 4.5 below, he found that neither PAJA nor section 33 of the Constitution apply at a macro level:

'I believe that section 33 and PAJA are together designed to control the exercise of public power in a special and focused manner, with the object of protecting individuals or small groups in their dealings with the public administration from unfair processes or unreasonable decisions... the principles of legality in a constitutional democracy, on the other hand, operate more at a macro level ... these principles, ..., should have a larger and more context-driven sweep'<sup>70</sup>

As intriguing as this suggestion may be, nothing seems to turn on it, as Sachs J himself acknowledges:

'Against this background whether judicial review of delegated legislation is conducted through the lens of legality, as I believe it should be, or through the prism of section 33 and PAJA, as the Chief Justice holds, the consequences should be roughly the

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<sup>68</sup> *Supra* at para 142

<sup>69</sup> *Supra* at para 586

<sup>70</sup> *Supra* at para 583

same. In both cases judicial review should be animated by the same constitutional philosophy.<sup>71</sup>

Moseneke J, with Justices Madala, Mokgoro and Skweyiya concurring, confirmed the Court's finding in *Bato Star* that:

'It is now well settled that in our constitutional democracy the exercise of all public power must occur lawfully and is susceptible to judicial scrutiny ... Clearly, section 22G does not immunize the regulation-making power of the Minister from judicial scrutiny. It is trite that a wielder of public power must exercise the power lawfully. This means the authority must be exercised within the bounds set by the empowering legislation, in a rational manner and within the constraints of the Constitution.' [footnotes omitted]<sup>72</sup>

It is clear from the above that the standard for judicial scrutiny of the exercise of all public power when reviewed against the Constitution is one of legality or rationality. PAJA, on the other hand, sets the standard of review of administrative action at reasonableness, which is potentially a much broader standard that may blur the boundary between review and appeal on the merits<sup>73</sup>. Further, it is clear that the litigation route to the entrenched section 33 right is via PAJA. A direct route is possible only in situations where PAJA cannot apply. Consequently, much turns on whether PAJA applies or not, not least the question of the role of the judiciary and the scope of its over-sight function.

#### ***4.4 Judicial deference***

In *New Clicks*, Sachs J, found that neither section 33 nor PAJA were applicable to subordinate legislation<sup>74</sup>, but did console with the view that these remedies 'do not stand alone as bulwarks against arbitrary and inappropriate use of public power' and that

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<sup>71</sup> *Supra* at para 585

<sup>72</sup> *Supra* at para 716

<sup>73</sup> Acknowledged by Chaskalson *Supra* at para 108

<sup>74</sup> *Supra* at para 583

'judicial review of subordinate legislation can be more effectively and robustly done if not forced to tip-toe in the narrow pedestal appropriate for reviewing administrative acts' [footnotes omitted]<sup>75</sup>. This position seems to suggest that by not subjecting subordinate legislation to the administrative justice principles codified in PAJA, the Court could exercise less deference than one would expect. It begs the question as to whether this approach is supportive of the doctrine of separation of powers and whether it would not lead the Court into political and value laden territory. The issue of deference and the judicial role within a democratic state deserves a brief mention here as Justice Sachs' position is noteworthy given the Court's commitment, in *Bato Star*, to deference, the separation of powers and remaining within the limits of judicial review and not judicial appeal in matters which are polycentric and politically value laden.

In *Bato Star*, the Court tackled the issue of an unelected and unaccountable, albeit independent, judiciary reviewing the actions and decisions of the administration. The judicial structure is conceived within the separation of powers doctrine as being responsible for implementing state policy and is itself immune from judicial interference. The Court analysed its own role in the democratic process as being one of deference to the function of the administration but reconfirmed the importance of maintaining an over-sight role. The Court noted that the partial solution to this dichotomous position is the concept of deference as respect and not submission<sup>76</sup>, as proposed by Dyzenhaus<sup>77</sup>, who argues that democracy requires a balance to be maintained between judges legitimately resisting an encroachment on fundamental individual rights and liberties and recognising that politicians determine the values that form part of the law. He suggests, therefore, that deference should be read as being respectful of the reasons supporting

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<sup>75</sup> *Supra* at para 609

<sup>76</sup> *Supra* at para 46

<sup>77</sup> Dyzenhaus, D 'The Politics of Deference' Judicial Review and Democracy' in M Taggart *The Province of Administrative Law* (1997) 279

the decision regardless of whether the decision is based in statute, common law or from another Court<sup>78</sup>. Dyzenhaus recognises the difficulty that the courts have in setting a standard that will respect the bright line between review on substantive grounds, maintaining respect for the decision maker, and a “hands off” approach. He notes, however, that deference as respect is wholly democratic as all public power must be justified against the reasons given for the exercise of that public power<sup>79</sup>.

Consequently, it is argued, the notion of deference may rescue judicial review from being an undemocratic interference with the administrative arm of government. This position has been taken by Hoexter who argues that the desired level of judicial deference is one of according the administration due respect and being sensitive to the legitimately pursued interest. This position, she argues, ‘is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration’<sup>80</sup>. This theory of deference finds support in the “pragmatic and functional” approach of the Canadian judiciary<sup>81</sup>.

The difficulty with this position, as argued by De Ville<sup>82</sup>, is that in determining whether a power lies within the sphere of another branch of government, the Court is actually determining or making law and, consequently, not demonstrating deference. De Ville notes that the position that a doctrine of deference can rescue judicial review from being anti-democratic is reliant on a belief that politics and law can be separated, which boundary, he argues, is notoriously difficult to determine and easy to manipulate<sup>83</sup>. De

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<sup>78</sup> *Ibid* at page 286

<sup>79</sup> *Ibid* at page 305

<sup>80</sup> Hoexter, C *op cit* at note 10 at page 501

<sup>81</sup> See, for example, Evans, J ‘Deference with a Difference: Of Rights, Regulation and the Judicial Role in the Administrative State’ (2003) 120 *SALJ* 322; Mullan, D ‘Deference from *Baker* to *Suresh* and Beyond – Interpreting the Conflicting Signals’ in D Dyzenhaus *Public Law* (Hart Publishing, 2004) 21

<sup>82</sup> De Ville, J ‘Deference as Respect and Deference as Sacrifice’ (2004) 20 *SAJHR* 577 at page 589

<sup>83</sup> *Ibid* at page 591

Ville goes further to argue that the Court in *Bato Star* left the method of implementing transformation to the discretion of the decision maker stating that the method of implementation was a policy decision. On the face of it, the Court's statement seems uncontentious however De Ville's argument is that this is in fact a determination on the breadth and depth of the scope of that discretion<sup>84</sup>. He notes that the Court followed a legal process involving 'institutional competence, reasoned elaboration and majoritarianism' and, in so doing, acknowledged that reaching agreement on the means of achieving a result is possible while agreement on the outcome is less so. He suggests that the *Bato Star* Court adopted the approach of determining the best sphere of government to make the decision and deferred to it<sup>85</sup>. In acknowledging the use of a broadly contextual approach, the Court recognises that the context is without boundaries and De Ville argues that the very act of fixing the context is in itself a decision of a political nature<sup>86</sup>.

In a similar vein, Allan takes the view that judicial review is principle and rule bound and that 'Legal principles limit executive freedom but do not substitute judicial discretion for ministerial discretion'<sup>87</sup>. He argues that judicial deference is merely 'a function of the generality of legal standards that equality entails'<sup>88</sup>. His concluding position is that deference should reflect the balance of reason in a particular case and that deference should not be an automatic judicial restraint, even in matters of national security, as automatic deference can lead to a serious undermining of constitutional rights<sup>89</sup>. In fact,

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<sup>84</sup> *Ibid*

<sup>85</sup> *Ibid* at page 594

<sup>86</sup> *Ibid* at page 596

<sup>87</sup> Allan, TRS 'Common Law Reasons and the Limits of Judicial Deference' in D Dyzenhaus *The Unity of Public Law* (Hart Publishing, 2004) 289

<sup>88</sup> *Ibid* at page 291

<sup>89</sup> *Ibid* 305

he suggests that respect for the expertise and policy-making function of the executive is inherent in the judicial review process and there is therefore no reason for a free-standing doctrine of deference as deference rests on crude distinctions between spheres of courts and agencies and is insufficiently attuned to the circumstances of each case. All administrative action, should therefore be reviewable against the ideal of equality which forces the executive to justify any disparate or exceptional treatment of individuals<sup>90</sup>.

In summary therefore, deference to the administrative decision maker, as fraught as it is with contradictions and challenges, is based on the doctrine of the separation of powers and the recognition that the administrative role is one of implementing the will of the people. Further, the practice of deference is also on the assumption that the administrator possesses the necessary expertise and understanding of symbiotic policy decisions. Both these justifications for deference are relevant to the decisions of grievance or adjudicative tribunals. It can be argued that the quasi-judicial nature of grievance tribunals calls for less judicial deference as the courts must be seen as experts on adjudicative processes and the judicial process is no stranger to the requirement of subject-matter expertise. It remains, however, that the budgetary, socio-economic, political and policy implications of tribunal determinations make deference by the judiciary a necessity even if the level of such deference is open to debate.

## ***4.5 Applicability of PAJA to subordinate Legislation***

### **4.5.1 General**

As mentioned at 4.1. above, the issue of whether PAJA is applicable to the making of subordinate legislation was critical to the Court's finding in *New Clicks*. If PAJA cannot be said to apply, the generalist doctrine of legality would be applicable as opposed to the

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<sup>90</sup> *Ibid* 306

principles of administrative justice and, consequently, the standard of review would be the relatively lower one of legality or rationality and not the PAJA unreasonableness standard.

Chaskalson CJ noted that the Interim Constitution<sup>91</sup> specifically permitted judicial review of subordinate legislation and that the final Constitution contained no provision that may suggest a legislative intention to exclude the review of subordinate legislation. He found, rather, that the legislative drafting points in the opposite direction, citing the values of accountability, responsiveness and openness as well as a participatory, accountable and transparent democracy provided for in sections 1, 57 and 95 respectively of the Constitution<sup>92</sup>. He argued that

'The making of delegated legislation by members of the executive is an essential part of public administration. It gives effect to the policies set by the legislature and provides the detailed infrastructure according to which this is done ... To hold that the making of delegated legislation is not part of the right to just administrative action would be contrary to the Constitution's commitment to open and transparent government.'<sup>93</sup>

The Chief Justice acknowledged that subjecting delegated legislation to the administrative justice standard of being 'reasonable and procedurally fair' is a higher standard than demanded in a pre-Constitutional era<sup>94</sup> but found that to apply the lower standard would create two systems of review - one under the common law for delegated legislation and one under the Constitution for administrative action. This, he found could not be consistent with section 33 which provides for a coherent and overarching system for review of all administrative action and would not be consistent with the values of the

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<sup>91</sup> Act 200 of 1993

<sup>92</sup> *Supra* at para's 110 - 112

<sup>93</sup> *Supra* at para 113

<sup>94</sup> *Supra* at para 115

constitution<sup>95</sup>. Consequently, PAJA would apply to delegated or subordinate legislation when such legislation is made by an organ of state exercising a public power, as both the Minister of Health and the Pricing Committee were<sup>96</sup>.

Chaskalson CJ's judgment may be welcomed for its certainty and its commitment to a consistent, single standard of review for both administrative action and subordinate legislation. The resultant simplicity is attractive. His fellow justices, however, did not fully concur and his finding on this issue and he must remain in the minority.

Ngcobo J, with Justices Langa, O'Regan and Van Der Westhuizen concurring, decided the matter on a narrower basis, being that PAJA may not necessarily apply to the making of all subordinate legislation but, on the facts of this case, it did apply to the regulations made under section 22G of the Medicines Control Act<sup>97</sup>. The reasoning was based in the "uniqueness" of section 22G which required that neither the Minister nor the Pricing Committee could act independently and, therefore, the process followed by the pricing committee and the making of regulations were interlinked<sup>98</sup>.

It is not my intention to attempt a contradictory argument but it is submitted that the honourable justice's use of the term "unique" when describing the process of the making of regulations under the Medicines Control Act is unfortunate. The term may be read as meaning that no other regulatory making process can require two functionaries with different but interdependent functions and therefore closing the door in future matters where subordinate legislation is challenged on grounds contained in PAJA. This may indeed have been the intention but it is submitted that the issue is far from resolved. As O'Regan notes,

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<sup>95</sup> *Supra* at para 118

<sup>96</sup> *Supra* at para 121

<sup>97</sup> *Supra* at para 422

<sup>98</sup> *Supra* at para 441

'... although Ngcobo J decides the question of the applicability of the Promotion of Administrative Justice Act, 3 of 2000, on a narrower basis than Chaskalson CJ, much of the reasoning he employs in doing so seems equally applicable to me to the wider question ...'<sup>99</sup>.

The position that the regulations under section 22G, in terms of a statutory and symbiotic relationship between the Minister of Health and the Pricing Committee, are in fact "unique" is unconvincing. This paper is focussed on the financial services industry and the industry specific adjudicative or grievance tribunals created in statute. As Ngcobo J notes, section 22G(2) of the Medicines Act provides that 'the Minister may, on the recommendation of the pricing committee, make regulations ...' as far as these regulations relate to a transparent pricing systems and a single dispensing fee<sup>100</sup>. Section 5 of the Financial Advisory and Intermediary Services Act<sup>101</sup> creates an Advisory Committee made up of representatives from industry, the regulator and government and section 15(1) provides that the Registrar must consult this committee on the drafting of subordinate legislation. The Advisory Committee is even to be consulted on the appointment of the industry ombud and deputy ombud<sup>102</sup> and on the drafting and implementation of the rules in respect of the complaints and investigations that the ombud may undertake<sup>103</sup>. It is submitted that it is not "unique" for the administrative decision maker to be constrained in their discretion either to consider the recommendation of a secondary or advisory body, to consult with that body or to implement its recommendations.

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<sup>99</sup> *Supra* at para 849

<sup>100</sup> *Supra* at para 439

<sup>101</sup> Act 57 of 2002, hereinafter 'FAIS'

<sup>102</sup> Section 21(1)(a) and (b)

<sup>103</sup> Section 26(1)

Moseneke J<sup>104</sup> made the compelling point that the Supreme Court of Appeal had not fully considered the issue as PAJA's applicability was not one of the issues that aggrieved the Minister and he therefore did not consider himself to have had 'the benefit of full argument on a matter of much, much importance for the proper development of our administrative law'<sup>105</sup>.

Moseneke J, with Justices Madala, Mokgoro, Skweyiya and Yacoob concurring<sup>106</sup>, found that he considers 'it neither prudent nor necessary to decide, in this case, the complex and contested issue of the proper standard of review of ministerial law-making ... review under PAJA is not one of the grounds on which the Minister felt aggrieved and approached this Court'<sup>107</sup> and assumed without deciding that the grounds of review in PAJA did apply to the recommendation of the Pricing committee and the subordinate legislation<sup>108</sup>.

Section 4 of PAJA provides for the procedure to be followed by administrators when making subordinate legislation. Once the action is found to be 'administrative' within the section 1 definition, section 4 applies as to procedure, the final choice of which rests with the administrator. As noted by Chaskalson CJ, section 4 would seem to indicate that the legislature had the making of subordinate legislation in mind when drafting PAJA. It would therefore be surprising if provision was made for the procedure to be followed, which would then be reviewable, but the reasonableness and lawfulness of such subordinate legislation would not be<sup>109</sup>.

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<sup>104</sup> With Madala, Mokgoro and Skweyiya JJ concurring

<sup>105</sup> *Supra* at para 723

<sup>106</sup> Making Moseneke's finding on this issue the majority decision of the Court

<sup>107</sup> *Supra* at para 722

<sup>108</sup> *Supra* at para 724

<sup>109</sup> *Supra* at para 133

#### **4.5.2 Exclusions from the definition of 'administrative action'**

Chaskalson CJ's judgment rests partly on an analysis of the exclusions from the definition of 'administrative action' found in section 1(i) of PAJA and notes that, in respect of the first exclusion, which relates to the President's powers, all of section 85 of the Constitution is included in the PAJA exception but for the implementation of national legislation. The definition thus includes policy setting; co-ordination of state departments; preparing and initiating legislation. Again, when cross checking the section 125<sup>110</sup> exclusion contained in the PAJA definition, he noted that the implementation of legislation is again excluded<sup>111</sup>. He consequently found that the implementation of national legislation by the President and Cabinet members is administrative in nature and therefore justiciable under section 33. In support of this finding, he noted that it would have been a simple thing for the legislature to have incorporated the full provisions of sections 85 and 125 thus clearly communicating the legislative intention to exclude all executive powers, including the making of subordinate legislation, from the definition of administrative action. The failure by the legislature to do so must be seen as deliberate. Finally, Chaskalson CJ found that the implementation of legislation includes the making of regulations in terms of the empowering provision and is therefore not excluded from the definition of 'administrative action'<sup>112</sup>.

Turning to the earlier judgment, the High Court excluded the review of subordinate legislation from the scope of PAJA on the basis that the definition of 'administrative action' expressly excludes any action taken in terms of section 4(1), which deals, *inter alia*, with the procedure to be followed by the administrator in the creation and

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<sup>110</sup> Section 125 of the Constitution dealing with the powers of the provincial executive

<sup>111</sup> *Supra* at para's 124 and 125

<sup>112</sup> *Supra* at para 126

publication of subordinate legislation. Chaskalson CJ, however, determined that section 4(1) relates to the procedure selected by the administrator, which would not be reviewable under PAJA, but not the regulations themselves, which would be so reviewable<sup>113</sup>.

On the same issue, Ngcobo J stated that the power conferred on the Minister and the Pricing Committee in terms of section 22G involved the implementation of a transparent pricing system; fixing of an appropriate dispensing fee and fixing of an appropriate fee for wholesalers and distributors and found that the nature and subject matter of these functions is concerned with the implementation of legislation<sup>114</sup>. The Court's commitment to a variable approach to administrative justice as opposed to a formalistic or procedural one is reflected in Ngcobo J's judgment:

'To suggest that the performance of these functions does not amount to implementation of legislation and therefore administrative action, because the Minister performs these functions through regulations [and not primary legislation], seems to me, to put form above substance'<sup>115</sup>.

Ngcobo J concurred with Chaskalson CJ's finding regarding the omission of subordinate legislation from the exclusions from 'administrative action' listed in section 1. He noted, however, that the legislative text used the term 'including' before listing, *inter alia*, the sections 85 and 125 functions of Executive<sup>116</sup> which would not typically indicate

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<sup>113</sup> *Supra* at para 133

<sup>114</sup> *Supra* at para 450

<sup>115</sup> *Ibid*

<sup>116</sup> Section 1(i) Any decision or failure to take a decision ... which adversely affects the rights of any person, ... but does not include –

(aa) the executive powers or functions of the National Executive, **including** the powers or functions referred to in sections ... 85(2)(b), (c), (d) and (e) ...

an exhaustive list<sup>117</sup>. Looking at the word 'including' in context however, Ngcobo J found that the power to implement legislation was conspicuous by its omission. Critically, the executive functions listed did not go beyond the generally understood functions and powers of the executive and therefore the list did not extend or amplify the meaning. Consequently, the legislature must have intended, by using the word 'including', to narrow the definition<sup>118</sup>. Finally, he concurred with Chaskalson CJ on the issue that, had the legislature indeed expressly excluded the implementation of legislation from the scope of PAJA, it would have excluded 'the very core of administrative action'<sup>119</sup> and that PAJA would therefore not give effect to the Constitutional right to administrative justice.

Ngcobo J reviewed the definition of 'administrative action' in PAJA and notes that it 'is in line with the decision of this Court in *Fedsure and Sarfu 3*'<sup>120</sup>. This makes for an interesting and circuitous method for the Court to establish legislative intent based on the legislature incorporating the Court's own definitions. It is a useful illustration of the fiction involved in a court determining legislative intent while attempting to maintain strict separation of powers.

Sachs J retained the view that the definition of 'administrative action' was concerned exclusively with the adjudicative process between individuals<sup>121</sup> but also cited Hoexter's criticism of the Act which is that the section 8 remedies in PAJA are silent on the power to declare subordinate legislation, which is a major part of our judicial review history, and therefore focuses on decisions, rights, actions which provides no clarity on the applicability of PAJA to subordinate legislation<sup>122</sup>.

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<sup>117</sup> *Supra* at para 455

<sup>118</sup> *Supra* at para 459

<sup>119</sup> *Supra* at para 461

<sup>120</sup> *Supra* at para 464

<sup>121</sup> *Supra* at para 596

<sup>122</sup> *Supra* at para 604

### **4.5.3 The meaning of 'direct external effect'**

The Court was united generally on one issue, being that the making of regulations in terms of section 22G was a two stage but inter-related process where a recommendation was made by the Pricing Committee while the decision to implement was within the Minister's discretion. The applicant relied on the definition of 'administrative action' in section 1 of PAJA to argue that the recommendation of the Pricing Committee did not have a direct, external legal effect<sup>123</sup>. Per Chaskalson CJ, 'In the circumstances of the present case, to view the two stages of the process as unrelated, separate and independent decisions, each on its own having to be subject to PAJA<sup>124</sup>, would be to put form over substance'. Sachs J however was persuaded by the German and Australian interpretation, which is that 'a direct, external legal effect' means, *inter alia*, that the making of subordinate legislation is excluded from the definition of administrative action<sup>125</sup>. As discussed above at chapter 4.3<sup>126</sup>, Chaskalson CJ was not persuaded by this argument.

## **4.6 Review for reasonableness**

Despite having found that either PAJA does apply to all subordinate legislation, or that it applies in the specific circumstances of the *New Clicks* case, the Court, as will be seen from the discussion that follows, seems to have tested the subordinate legislation against the general grounds of lawful, reasonable and procedurally fair grounds listed in section 33 of the Constitution and not against the specific grounds listed in section 6(2) of PAJA.

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<sup>123</sup> Section 1(i) Any decision or failure to take a decision ... which adversely affects the rights of any person and has a direct, external legal effect but does not include – ...

<sup>124</sup> Presumably specifically the reference to 'direct, external legal effect' in PAJA

<sup>125</sup> *Supra* at para 599

<sup>126</sup> *Supra* at para 142 see note 68

Chaskalson CJ is succinct in his analysis of the standards of lawfulness and reasonableness:

'PAJA addresses the four requirements of the Constitution relating to just administrative action: lawfulness, reasonableness, procedural fairness and the provision of reasons ... Lawfulness is relevant to the exercise of all public power, whether or not the exercise of the power constitutes administrative action. Where the making of regulations is challenged on this ground, lawfulness depends on the terms of the empowering statute. If the regulations are not sanctioned by the empowering statute they will be unlawful and invalid. ... Reasonableness and procedural fairness are context specific.' [footnotes omitted] <sup>127</sup>

The judgments of Chaskalson CJ and Moseneke J reaffirmed the findings of the Court in *Bato Star*<sup>128</sup> which are discussed above at chapter 2.4. In this case, the issue turned on whether the regulations made in terms of section 22G of the Medicines Control Act were 'appropriate' in the context and therefore whether they were reasonable<sup>129</sup>. One of the challenges to a reasonableness standard is that its context driven and variable nature, makes it possible for an overzealous court to subject the administrative decision maker to a merits review<sup>130</sup>. In determining whether the regulations were 'appropriate', Moseneke J evaluated the evidence led by both parties seemingly with an eye to determining whether the data used by the Pricing Committee in their recommendation supported the dispensing fee set<sup>131</sup> and therefore whether the Pricing Committee had been correct in its analysis of the data. This illustrates the difficulty that a reasonableness standard may present as regards judicial deference and the distinction between appeal

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<sup>127</sup> *Supra* at para's 143 - 145

<sup>128</sup> *Supra* at para's 187 and 725

<sup>129</sup> *Supra* at para's 188 and 713

<sup>130</sup> See discussion at chapter 2.4 above

<sup>131</sup> *Supra* at para's 726 - 782

and review. Moseneke J states that the term 'appropriate' is not in itself immutable but subject to a range of reasonableness where the fee may be considered 'proper, well-suited and fair'<sup>132</sup>. He does not restrict his review to a consideration of the nature of the decision; the identity and expertise of the decision maker; the range of factors relevant to the decision; the reasons given for the decision; the nature of the competing interests and the impact of the decision on the lives of those affected<sup>133</sup> but considered the levels of returns needed for a pharmacy to remain viable, market forces, profitability and business models, polycentric issues that are surely best suited to the expert administrative decision maker. In his conclusion, he stated:

'It is not surprising that the expert evidence falls short of resolving several intractable issues associated with the assessment of the viability of a business. It is trite that an enterprise must realise an adequate return on capital. The challenge is fixing an appropriate level of return. The evidence does not venture to fix one. The evidence rightly notes that an adequate return is always relative to the market structure and its inherent risks. The Pharmacies submitted to the Pricing Committee and in evidence that a 26% gross profit margin on sales will lead to an adequate return on capital. But the evidence does not show that there is a fixed equation between financial viability and gross profit. ... The extravagant conclusion that the regulated dispensing fee will force pharmacies to go to the wall is in my view premature and is not adequately predicted by the evidence.'<sup>134</sup>

It is submitted that Moseneke's judgment, with respect, is at best a merits review and potentially an appeal in the wide sense. One would have expected the honourable justice to limit the reasonableness review to questions such as the staffing and expertise

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<sup>132</sup> *Supra* at para 713

<sup>133</sup> *Bato Star supra* at note 4 at para 45

<sup>134</sup> *Supra* at para's 784 - 785

of the Pricing Committee<sup>135</sup>, whether it had adequately considered the macro and micro economic impact of their recommendation, whether relevant factors were considered and irrelevant factors excluded, the rationality of the reasons given by the Committee and whether the Committee could demonstrate that it had considered and weighed the interests of the pharmacies against the political imperative to establish affordable and accessible medicines.

## **4.7 Review for lawfulness<sup>136</sup>**

### **4.7.1 Vagueness**

The single exit price set in terms of Regulation 22G was challenged on the grounds of vagueness. Hoexter<sup>137</sup> has noted that the section 6(2) grounds of review under PAJA do not include the common law grounds of vagueness, disproportionality and rigidity.

Chaskalson CJ, however, notes that:

'It seems to have been assumed by the parties, and in my view correctly so, that vagueness is a ground for review under PAJA. Although vagueness is not specifically mentioned in PAJA as a ground for review, it is within the purview of section 6(2)(i) which includes as a ground for review, administrative action that is otherwise 'unconstitutional or unlawful'. This Court has held that the doctrine of vagueness is based on the rule of law which is a foundational value of our Constitution' [citing *inter*

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<sup>135</sup> Ngcobo J does find on this issue at paragraph 522 but within the context of a review for lawfulness which is discussed in detail chapter IV section 5(ii) below

<sup>136</sup> Although there is a lack of consistency between each judgment as regards the elements of 'Lawfulness' considered by each justice, an analysis of the full judgment shows that the Court reviewed the regulations for lawfulness on the grounds of vagueness, relevance and *ultra vires*. The discussion that follows is therefore structured on this basis.

<sup>137</sup> Hoexter, *C op cit* at note 10 at page 497

*alia Affordable Medicines Trust and Others v Minister of Health pf RSA and Another*  
2005(6) BCLR 529 (CC) at para 108]<sup>138</sup>.

The doctrine of vagueness thus means that laws must be written in a clear and accessible manner with reasonable certainty. Perfect lucidity is not required and the doctrine should not be used to hamper the legitimate government socio-economic objective<sup>139</sup>.

As Sachs J found that the Regulations, as they relate to a single exit price, were unlawful albeit on a general application of the doctrine of legality, and not on the grounds of vagueness, the Court had sufficient majority to find that the single exit price was unlawful. However, five members of the Court<sup>140</sup> found that they were not vague, while accepting the Chief Justice's analysis of the law. Yacoob J's analysis is useful to consider as it adds to our understanding of 'vagueness'. He stated that, certainly, the drafter's duty is to set out regulations that are not difficult to interpret and are clear however some difficulty or lack of clarity does not excuse the court from the obligation to try and understand them<sup>141</sup>. Having analysed regulation 7 and 8, the Honourable Justice provided alternate wording for the regulations which would give better effect to his interpretation of the legislature's intention.

#### **4.7.2 Relevance**

The dispensing fee made in terms of section 22G was challenged on the grounds of relevance. The issue therefore was whether the administrator took into account all relevant factors and excluded any irrelevant factors when making the decision in question. Chaskalson CJ, reconfirmed that while the judiciary is obliged to defer to the

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<sup>138</sup> *Supra* at para 246

<sup>139</sup> *Ibid*

<sup>140</sup> Yacoob, Moseneke, Madala, Mokgoro and Skweyiya JJ

<sup>141</sup> *Supra* at para 822

expertise of the administrator in regard to the range of factors to be considered, the Court should not merely 'rubber-stamp' the decision on the basis of the identity of the decision maker<sup>142</sup>. On an analysis of the evidence, the Chief Justice found that the Pricing Committee, having invited oral representations from the affected parties, was obliged to consider such representation. On the evidence, the Pricing Committee had relied only on the written submissions and, consequently, failed to take into account relevant factors. From paragraph 311 to 388, Chaskalson CJ considered the evidence as regards viability of the pharmacies in the face of the prescribed dispensing fee. He does not however opine on the accuracy or completeness of this evidence but finds that:

'The Pricing Committee has provided no models or other evidence to demonstrate how the dispensing fee was calculated or how the members of the Pricing Committee satisfied themselves that it was appropriate. It has not told us what assumptions it made about the probable [single exit price] in calculating the dispensing fee, or how it assessed the dispensing fee when it seems to have had no data dealing with dispensary revenue and expenses which it considered to be essential for that purpose ... the failure to make provision for compounding in the dispensing fee is a material misdirection' [emphasis added] <sup>143</sup>

While the Court generally concurred with the Chief Justice's interpretation and application of the grounds of taking into account relevant factors, his finding as regards his analysis of the evidence<sup>144</sup> is not a decisive one. The majority of the Court<sup>145</sup> did not concur that the Pricing Committee had failed to take account of relevant factors by failing to consider the oral submissions made by the Pharmacies. The Chief Justice seemed to have held the administrative decision maker to a higher standard by finding

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<sup>142</sup> *Supra* at para 390

<sup>143</sup> *Supra* at para 403

<sup>144</sup> Ngcobo, O'Regan and Van der Westhuizen concurring

<sup>145</sup> Yacoob J with Moseneke, Madala, Mokgoro, Skweyiya, and Langa JJ concurring

that the Constitutional values of 'accountability, responsiveness and openness' required the administrator to demonstrate that it had considered the allegations made by the Pharmacies in respect of the dispensing fee being set at a level that would challenge their viability, and having failed to demonstrate this, it cannot be said that the Pricing Committee and the Minister had taken into account all relevant factors. Significantly, the Chief Justice did not attempt to analyse the evidence to determine whether the dispensing fee would, in fact, challenge viability. His finding was based on the administrator's inability to demonstrate that this had been properly considered. It is submitted that, regardless of the outcome or evidence, this is the correct theoretical approach to a review of administrative action as it steers clear of an appeal on the merits, a merits review or a consideration of the substance while still holding the administrator accountable for decisions made and actions taken.

Ngcobo J concurred with the Chief Justice on the issue of relevance but, writing his own judgment, emphasised the importance of the judiciary remaining respectful of the boundary between appeal and review and of retaining deference towards the administrator's expertise and position. This position is well summarised in the following extract:

'The determination of an appropriate dispensing fee is informed by both economic and other policy considerations. And as the Chief Justice observes, the task of the Pricing Committee calls for expertise and understanding of a complex market in which medicines are traded. The Pricing Committee possesses such expertise and it consists of individuals with diverse backgrounds and experience in these matters. Courts have no expertise in these matters. As a general matter, they should only interfere with a fee fixed by the Pricing Committee if the fee is one that is beyond the range of what is appropriate.'<sup>146</sup>

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<sup>146</sup> *Supra* at para 522

On the facts, the failure of the Pricing Committee and the Minister to properly take into account the viability of community pharmacies, albeit being 'alive'<sup>147</sup> to the issue, and to have failed completely to take account of rural<sup>148</sup> and courier pharmacies<sup>149</sup> as well as the costs of compounding medicines<sup>150</sup> in setting the dispensing fee. On the evidence, Ngcobo J found that 'on the applicant's own version, it is therefore clear that without an increase in such volume [of medicine dispensed], the dispensing fees adopted are not appropriate'<sup>151</sup>. Finally, Ngcobo J concurred with Chaskalson CJ on the issue of whether, having invited oral representation, the Pricing Committee was bound to consider it and found that:

'In ignoring the oral representations, the Pricing Committee ignored relevant matters which it was bound to take into account. The duty of the Pricing Committee was to apply its mind properly to all materials before it including matters at the oral hearings. It failed to do so when it ignored oral representations. In doing so it erred.'<sup>152</sup>

### **4.7.3 *Ultra Vires***

The doctrine of *ultra vires* can be seen, historically, as the bedrock of administrative law. The rule of law, as first described and promoted by AR Dicey, was premised on the requirement that each sphere of government functions, within defined and distinct realms, defer to each other within those areas of expertise, with the legislature being sovereign. It required that administrative action must be exercised within the scope of its

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<sup>147</sup> *Supra* at para 534

<sup>148</sup> *Supra* at para 549

<sup>149</sup> *Supra* at para 563

<sup>150</sup> *Supra* at para 566

<sup>151</sup> *Supra* at para 548

<sup>152</sup> *Supra* at para 574

empowering legislation and was challengeable only on limited *ultra vires* grounds which included absurdness, vagueness or ambiguity, failure to comply with the formalities of the empowering legislation or being inconsistently applied<sup>153</sup>. The doctrine was premised on the legislature controlling the executive and being bound to express the will of the people. Administrative agencies gave effect to state policy by implementing legislative enactments and remaining within the boundaries of that empowering legislation. Under the common law, the review of administrative action was limited to grounds falling within the *ultra vires* doctrine, which included a jurisdictional error of law, ulterior motive, *mala fides*, vagueness, failure to apply the mind, consideration of irrelevant factors or a disregarding of relevant factors and gross unreasonableness. The section 6 grounds of review in PAJA incorporate the doctrine of *ultra vires*, albeit not expressly, and the administrator is enjoined, in a number of subsections, to act only within the provisions of the empowering provisions<sup>154</sup>. The obligation to act only within the boundaries of the empowering legislation is consequently a statutory obligation which supplants the common law doctrine of *ultra vires*. It has been argued that the doctrine exists in South African law only as a means of applying Constitutional principles and provisions<sup>155</sup>, which are, in turn, given effect by PAJA. Regardless of the status of the *ultra vires* doctrine, the courts continue to use the term.

On the evidence, Chaskalson CJ<sup>156</sup> found that only Regulations 22 and 23 were not permitted by the empowering legislation and were therefore invalid<sup>157</sup>. The Regulations allowed the Director-General to publish his opinion on whether the single exit price was unreasonable or not, notwithstanding that the single exit price would have been set in

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<sup>153</sup> See for a general discussion, Henderson, A *op cit* at note 21

<sup>154</sup> Sections 6(2)(a)(i) and (ii); 6(2)(b); 6(2)(e)(i); 6(2)(f)(i)

<sup>155</sup> Henderson, A *Op cit* at note 21

<sup>156</sup> Ngcobo, O'Regan and Van der Westhuizen JJ concurring

<sup>157</sup> *Supra* at para 419

terms of the regulations and would therefore be correct or *intra vires*. The majority of the Court<sup>158</sup> did not find the single exit price to have been inappropriate as it fell within a range of reasonableness<sup>159</sup>, and was objective and sanctioned by the Act<sup>160</sup> and was therefore *intra vires*.

As can be seen from the above, a review for reasonableness and a review for lawfulness on the grounds of *ultra vires* are interwoven in the judgment and unfortunately, little is added to clarify the standard of review of administrative action.

#### **4.8 Procedural Fairness**

Having considered the reasonability and lawfulness of the recommendation of the Pricing Committee and the decision of the Minister, the final ground on which the Court reviewed the administrative action was procedural fairness.

'What section 3 of PAJA requires is that administrative action must be procedurally fair. It refers specifically to the giving of adequate notice and providing a reasonable opportunity to make representations, and it makes it clear that what is necessary for this purpose will depend on the circumstances of each case.'<sup>161</sup>

The Court found that as section 22G of the Medicines Control Act had not provided a procedure to be followed in setting the regulations, the minimum standards prescribed by section 4(1) of PAJA would apply<sup>162</sup>. The Court also confirmed that the standards of fairness would differ according to the context and according to the type of administrative action taken. An example is that adjudicative administrative action, where individuals are

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<sup>158</sup> Yacoob J with Moseneke, Madala, Mokgoro, Skweyiya, and Langa JJ concurring

<sup>159</sup> *Supra* at para 840

<sup>160</sup> *Supra* at para 841

<sup>161</sup> *Supra* at para 151

<sup>162</sup> *Supra* at para 150

affected directly by the outcome, will require a higher standard of procedural fairness<sup>163</sup>.

In respect of legislative administrative action, the requirements of fairness would ordinarily be met by a notice and comment procedure<sup>164</sup> and the process of analysing and considering submissions may certainly be delegated<sup>165</sup>.

The main procedural challenge was that the oral hearings were improperly constituted as not all members of the Pricing committee were present at all times. The Court found that this standard would properly apply only to adjudicative hearings and that, within the boundaries of the empowering provisions, the functionary is able to prescribe its own procedure<sup>166</sup>. The Court found the procedure to have been fair on the basis that the regulations to the Act did not prescribe a quorum; the nature of the Pricing Committee was long term and therefore it was unlikely that all the members could be present at all times<sup>167</sup>; the oral submissions had resulted in changes to the regulations<sup>168</sup>; the oral representations, which were electronically recorded and could be referred to at a later date, were not prescribed for the making of delegated legislation as a notice and comment procedure would suffice<sup>169</sup>.

The judgment of Sachs J is useful in that, having found that PAJA does not apply to the making of delegated legislation, he provided an analysis of what procedural fairness would require in that context and against general Constitutional grounds. He noted that, historically, SA administrative law was influenced by English not American law and as such, as long as the regulation makers complied with whatever procedure was set in the

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<sup>163</sup> *Supra* at para 153

<sup>164</sup> *Supra* at para 157

<sup>165</sup> *Supra* at para 158

<sup>166</sup> *Supra* at para 171

<sup>167</sup> *Supra* at para 172

<sup>168</sup> *Supra* at para 180

<sup>169</sup> *Supra* at para 180 and 181

legislation, there was no obligation to provide for public participation<sup>170</sup>. In the current constitutional era, government and organs of state are accountable for their conduct and any secret law-making at a legislative or regulatory level is an anathema. Certainly, the degree of public participation may vary from a requirement that deliberative bodies deliberate in public while non-deliberative bodies may find alternate methods of public involvement<sup>171</sup>. A fair procedure is an imperative for administrative justice, particularly with regard to South Africa's Constitutional framework where public participation in government ensures not only a fair procedure but, as significantly, ensures accountability, transparency and openness<sup>172</sup>. Sachs J is persuasive in his argument that:

‘It would be strange indeed if the principles of participatory democracy and consultation when the chain of public power began with the enactment of the original legislation, then vanished at the crucial stage when the general principles of the original statute were being converted into operational standards and procedures, only to re-surface at the stage of the implementation of provisions impacting on specific individuals ... The right to speak and be listened to is part of the right to be a citizen in the fullest sense of the word. In a constitutional democracy dialogue and the right to have a voice on public affairs is constitutive of dignity,<sup>173</sup>

The issue therefore is not whether the regulatory body should allow public participation but how it should be provided for. Absent legislative guidance on this, when administrative procedures are challenged, it is left to the courts to ensure that proper procedure was followed in the making of subordinate legislation<sup>174</sup>. The judgment did not attempt to prescribe these procedures but provided insight into the factors to be

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<sup>170</sup> *Supra* at para 620

<sup>171</sup> *Supra* at para 621

<sup>172</sup> *Supra* at para 625

<sup>173</sup> *Supra* at para 626 and 627

<sup>174</sup> *Supra* at para 625

considered. Critically, the challenge to a participative process must be balanced with the need for efficiency and effectiveness:

'..., much will depend on the setting in which the subordinate legislation is being adopted, the nature of the power being exercised, the purpose of the rules being made, the people who stand most directly to be affected and the social and economic context in which the measure will function. An appropriate balance will need to be struck between facilitating meaningful public access to the process and achieving economic use of time and resources. Indeed, it should be borne in mind that endless consultation can be as paralysing to democratic decision-making as insufficient consultation' [footnotes omitted]<sup>175</sup>

Achieving the necessary balance between participation and efficiency is a familiar feature of all administrative actions and decisions, so much so that it is constitutionally recognised<sup>176</sup>.

In the context of grievance tribunals, the direct impact for the aggrieved party may lead the tribunal to adopting a quasi-judicial and consequently formalistic procedure. If, as discussed in chapter 5.3. below, the advantages of tribunals over a judicial process are the relative cost effectiveness and speed and efficiency, a procedure that mimics the judicial process may not necessarily meet those objectives. It may be tempting for tribunals to adopt a quasi-judicial procedure in an attempt to avoid challenges on the basis of procedural fairness, but even though such a procedure may be sufficiently tried and tested, it is not necessarily the only method of assuring procedural fairness nor is it necessarily the most effective. In the context of the financial services industry, the grievance resolution procedure is defined in the FAIS Act and provides for methods of dispute resolution that do not rely solely on an adversarial model. Section 27(4)

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<sup>175</sup> *Supra* at para 629

<sup>176</sup> Section 33(3)(c)

empowers the ombud for Financial Service Providers [FSP's] with investigative powers and section 27(5) defines the procedural options available to the ombud. In fact, the ombud is directed to attempt a conciliated settlement prior to commencing a more formal procedure<sup>177</sup> and is not obliged to permit legal representation as any hearing<sup>178</sup>.

The issue of limiting legal representation at grievance tribunals is in keeping with the section 3(3) provisions of PAJA which provides that the administrative decision maker retains the discretion to permit legal representatives in 'serious or complex cases' if such representation is necessary to 'give effect to the right to procedurally fair administrative action'. Conversely, section 3(2)(b) provides that an aggrieved party has the right to make reasonable representations but this does not include a right to legal representation, a decision that remains within the administrator's discretion. Even though the legislative intention is clear and is suggestive of a policy decision that legal representation can lead to an overly formalistic, adversarial, expensive and time-consuming procedure, the courts have been reluctant to permit any rule or guideline that is a blanket exclusion of legal representation and permits no discretion by the presiding decision maker. The position was well stated by the SCA in the *Hamata*<sup>179</sup> judgment:

'There may be administrative organs of such a nature that the issues which come before them are always so mundane and the consequences of their decisions for particular individuals always so insignificant that a domestic rule prohibiting legal representation would be neither unconstitutional nor be required to be "read down" (if its language so permits) to allow for the exercising of a discretion in that regard.

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<sup>177</sup> Section 27(5)(b)

<sup>178</sup> Section 27(5)(a)

<sup>179</sup> *Hamata & another v Chairperson, Peninsula Technikon Disciplinary Committee & others* (2002) 23 ILJ 1531 (SCA). The case involved the outcome of a disciplinary hearing for a journalism student at Pen. Tech. who was expelled from the institution after publishing a less than flattering article about the learning institution. The SCA heard the appeal from the Cape High Court.

On the other hand, there may be administrative organs which are faced with issues, and whose decisions may entail consequences, which range from the relative trivial to the most grave. Any rule purporting to compel such an organ to refuse legal representation no matter what the circumstances might be, and even if they are such that a refusal might very well impair the fairness of the administrative proceeding, cannot pass muster in law<sup>180</sup>

It is thus left to the decision maker to determine the correct procedure to be followed and whether the context of the case requires the presence of legal representation and, in doing so, to consider issues such as the degree of factual and legal complexity, the seriousness of the consequences or prejudice and the relative abilities of the parties.

The above discussion is restricted to one small aspect of procedural fairness, being legal representation, and demonstrates the difficulty of establishing rules or guidelines that permit sufficient flexibility to allow a quicker, cheaper and more efficient grievance tribunal while still retaining the necessary fairness to achieve administrative justice. What is clear however is that the procedure is dependant on the context of each case and that the presiding administrative decision maker must remain alive to the exercising his/her discretion where it is provided for to ensure fairness and not a formalistic adherence to procedure.

#### ***4.9 Classification of Functions***

In this discussion, grievance tribunals have been described as quasi-judicial in nature and form. The term suggests an adherence to a formalistic classification of functions. However, as can be seen from the following discussion, the term may still have applicability even while the practice of classifying administrative functions in order to

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<sup>180</sup> *Ibid* at para 12

determine the extent of the rights of the parties as well as the scope of judicial review has been discredited in South African jurisprudence.

Historically, South African administrative law categorised the functions of administrators so as best to identify the standard of review applicable to each function. The purpose was partly to enable the judiciary to honour the doctrine of the separation of powers and therefore, depending on the nature of the function or functionary, to review the actions and decisions against either a limited or expansive standard of review. Consequently, in areas where the courts would not ordinarily consider themselves expert, they could defer almost entirely to the discretion of the functionary while in areas where the courts could apply their unique expertise, for example in adjudicative matters, they could apply a higher standard. Simply put, the functions recognised by the courts were<sup>181</sup>:

- Legislative administrative acts where the administrator had broad discretion. This category referred to the making of delegated or subordinate legislation and not primary legislation, being the domain of an elected legislature responsible for implementing executive policy. This category is characterised in part by a high level of discretion being afforded the administrative functionary.
- Adjudicative administrative acts, sometimes referred to as quasi-judicial and related to specialised tribunals with power sourced from statute or some other empowering provision such as contract or a voluntary association. The nature of adjudicative bodies is similar to that of the judicial function and the courts have tended to review more strictly the decisions taken by the administrator
- Administrative or purely administrative acts, where the administrative functionary is afforded limited discretion in the implementation of legislation.

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<sup>181</sup> See for example Hoexter, *C op cit* at note 67 at page 28

This method of organising the exercise of public power can be criticised as being formalistic in nature as the courts were occupied with the process of categorising the type of power exercised and not with the substance of the matter at hand<sup>182</sup>. As Hoexter notes<sup>183</sup>, South African jurisprudence eventually followed its English counterpart in rejecting the classification of functions in favour of a general duty to act fairly regardless of the nature of the administrative enquiry or the identity of the administrative functionary<sup>184</sup>.

As the classification of functions had been safely relegated to the annals of jurisprudential history, it was with some alarm that Hoexter<sup>185</sup> considered the definition of 'decision'<sup>186</sup> in PAJA. She suggested that as the definition excluded acts of an executive, legislative and judicial nature, by including the phrase 'of an administrative nature' in the definition, the drafters may have been attempting to emphasise that executive, legislative and judicial decisions were not within the scope of the legislation. Alternatively, the legislature was attempting to re-introduce the classification of functions by limiting the scope of the Act to administrative or purely administrative acts and decisions and signalled a resurgence of the classification of functions. Hoexter's objection to the aspect of South Africa's common law is such that she hypothesises that reading it into PAJA definition would exclude legislative and judicial administrative acts and would therefore make the definition unconstitutional as it fails to give effect to section 33 of the Constitution.

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<sup>182</sup> *Ibid* at page 69

<sup>183</sup> *Ibid* at page 208

<sup>184</sup> *Administrator, Transvaal v Traub* 1989 (4) SA 731 (AD) and *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A)

<sup>185</sup> *Op cit* at note 67 at page 101 and 102

<sup>186</sup> Section 1(v) of Act 3 of 2000 ' "Decision" means any decision of an administrative nature made ... under an empowering provision ...'

Hoexter's warning seems to have been well founded. Sachs J's judgment in *New Clicks* noted that the classification of functions had been rejected in favour of a distinction between administrative acts that would impact all members of the community and those that impact individuals but goes further to suggest that the changed nature of South Africa's political landscape makes even this distinction irrelevant. He suggested that the requirement of consultation and notice and comment procedures in respect of the creation and application of subordinate legislation arises from the Constitutional principle of legality and not from the general duty to act fairly<sup>187</sup>. Sachs J attempted to incorporate some structure into an otherwise formless principle of legality by suggesting that:

'One may thus envisage a continuum ranging from pure law-making acts at one end, to pure administrative (adjudicative) acts at the other. All will be subject to constitutional control that is of both a procedural and a substantive kind. There will be a difference of emphasis rather than of kind, to take account of the different constitutional and public law values implicated at each end of the spectrum. Hybrid regulatory systems involving both generality (regulatory schemes) and specificity (adjudicative acts) could then be comfortably accommodated at appropriate places along the spectrum. The precise form of the hearing required in each case and the manner in which the substantive reasonableness will be determined, will accordingly depend more on the nature of the interests at stake in each particular instance than on the label or labels attached. In this way administrative law emerges from the constitutional chrysalis as an integrated body of law.'<sup>188</sup> [emphasis added]

His hypothesis is interesting in that it suggests a means of limiting or organising the scope of review available to the judiciary when reviewing administrative acts and decisions and may add much to the debate on the level of deference owed by the

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<sup>187</sup> *Supra* at para 638 and 639

<sup>188</sup> *Supra* at para 640

judiciary, albeit in a formalistic manner. However, Sachs J's suggestion remains a minority view and one that did not receive the support of the *New Clicks* bench:

'Nor am I persuaded that categorisation of the exercise of public power as adjudicative or legislative provides the criterion as to whether the exercise of the power in question amounts to administrative action. The trend in modern administrative law has been to move away from formal classification as a criterion. It is clear from the decisions of this Court in *Fedsure* and *Sarfu 3* that the use of labels in order to determine whether the action in question is administrative or legislative is not helpful. Thus in *Fedsure* this Court held that the process may in form be legislative but yet administrative in substance. ... It seems to me that the fruitful enquiry is to look at the nature and effect of the power that is being exercised.'

[footnotes omitted]<sup>189</sup>

## 5 Adjudicative or Grievance Tribunals

### 5.1 Introduction

Writing in 1993, Govender<sup>190</sup> noted the apparent need for consideration and potentially rationalisation of administrative tribunals in South Africa. This proposal, based primarily on the Australian example and the work of the South African Law Commission<sup>191</sup> which ultimately influenced the drafting of the first Administrative Justice Bill, included the need for a single and common or general appellate body to hear appeals from the findings of any administrative tribunal. The aim of such a tribunal would not only be a means of ensuring openness, fairness and impartiality<sup>192</sup>, but would provide a consistent

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<sup>189</sup> Ngcobo J, *Supra* at para 476

<sup>190</sup> Govender, K 'Administrative Appeals Tribunals' (1993) *Acta Juridica* 76

<sup>191</sup> South African Law Commission, Working Paper 34, Project 24 55 (1991) and Project 115 (August 1999)

<sup>192</sup> Govender, K *Op cit* at 87

development of administrative jurisprudence which, in turn, would facilitate accessibility to the administrative framework as well as the predictability of administrative principles.

Practically, an administrative tribunal structure should support one of the basic tenants of the doctrine of separation of powers, being to defer to the expertise and experience of the administrative decision maker, particularly in polycentric or complex matters with far reaching consequences. The concept, therefore, calls for specialisation within a common and consistent structure. Within the financial services industry alone, there are currently five different quasi-judicial statutory and voluntary adjudicative tribunals:

- The ombud for banking services, a voluntary scheme
- The short term insurance ombud, a voluntary scheme
- The long term insurance ombud, a voluntary scheme
- The pension funds adjudicator [PF adjudicator], empowered by Chapter VA of the Pension Funds Act 24 of 1956
- The ombud for FSP's, empowered by Chapter VI, part I of the Financial Advisory and Intermediary Services Act 37 of 2002
- The directorate for market abuse, empowered by section 83 of the Security Services Act 36 of 2004

The voluntary schemes mentioned above are subject to and empowered by the Financial Services Ombud Schemes Act, 37 of 2004. In addition to these bodies, the following regulatory and self-regulatory administrative tribunals have administrative powers to sanction, caution, suspend or remove any licenses to operate:

- the Financial Services Board appeals tribunal, empowered by section 26 of the Financial Services Board Act 97 of 1990
- the board of the Securities regulation panel for take-overs and mergers, empowered by chapter XVA of the Companies Act 61 of 1973
- the Johannesburg Securities Exchange, empowered by Chapter III of the Security Services Act 36 of 2004<sup>193</sup>

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<sup>193</sup> Until the promulgation of the Security Services Act, 36 of 2004, the Johannesburg Securities Exchange was regulated in terms of the Stock exchange Control Act 1 of 1985

## ***5.2 Jurisdiction***

Having noted the plethora of administrative tribunals and the demands of modern industrialised state, Govender<sup>194</sup> notes that the granting of administrative discretion is inevitable. Aronson, *et al* summarise some of the issues surrounding discretion and the inter play with the doctrine of separation of powers in the following way:

‘Public statutory power is best seen as a series of delegations: To the executive is delegated the tasks of policy development within the framework of the Act, the making of regulations and the application and enforcement of the administrative scheme initiated by the Act ... Most traditional administrative law theorists see discretion as *the* problem of administrative law. They do not, of course, imagine that it can be eliminated. They recognise its inevitability in an administrative state, and see judicial review as part of the checks and balances needed to legitimate it. Others, however, see discretion as simply part of the system of delegation, being intrinsically neither good nor bad.’ [emphasis in original]<sup>195</sup>

The proliferation of adjudicative tribunals, within one industry, necessarily requires a cautious approach to jurisdiction and responsibilities, a requirement that would seem to be familiar in comparative jurisdictions. As Mullan states, within the context of Canadian administrative law:

‘At present, uncertainty and confusion pervade much of the law governing the allocation of adjudicative responsibilities under many specialized justice regimes. This is not only the case in allocating responsibility between the regular courts and the administrative justice system, but also among the various components of the administrative justice regime.’<sup>196</sup>

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<sup>194</sup> *Op cit* at note 190 at page 76

<sup>195</sup> Aronson, M *et al* ‘Judicial Review of Administrative Action’ 3<sup>rd</sup> ed (2004) Lawbook Co, Sydney at 101

<sup>196</sup> Mullan, D ‘Tribunals and Courts – The Contemporary Terrain: Lessons from Human Rights Regimes’ (1998 – 1999) 24 *Queens Law Journal* 643 at 644

The conflict of jurisdictions and statutory provisions is well illustrated in one of the first determinations of the ombud for FSP's<sup>197</sup>; *Dennis v Nedbank Limited*<sup>198</sup>. The complainant received a loan from Nedbank Limited on the security of a mortgage bond over her immovable property. Despite the fact that the complainant was in receipt of homeowners insurance, Nedbank declined to take cession of this policy and, at the complainant's cost, effected additional homeowners insurance as security against its loan. In the first instance, the ombud for Banking Services heard and dismissed the complaint. On advising the ombud for Banking Services that she was dissatisfied with the finding and would refer the matter to the ombud for FSP's, the complainant was advised that the ombud for Short Term Insurance would be the correct tribunal. The ombuds for banking services and short term insurance are voluntary schemes while the ombud for FSP's is a statutory scheme. The issue of competing jurisdictions is not provided for in statute and therefore, as the complaint related to the provision of a financial services product as defined in section 1 of FAIS the ombud for FSP's was able to find jurisdiction in the matter and rehear the complaint<sup>199</sup>. The case is a good illustration of the uncertainty, inconsistency and inefficiency that can result from competing but not exclusive jurisdictions between grievance tribunals. The issue of competing jurisdictions was not the result of an unfortunate oversight by the legislature. The issue was known to the regulator prior to the promulgation of the FAIS legislation and as early as 1993:

'One cause for concern remains the repositioning of the office vis-à-vis the Financial Services Board (FSB) and the newly created Financial Advisory and Intermediary Services (FAIS) ombud. It is no trade secret that there was a stand-off during Judge

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<sup>197</sup> The Financial Advisory and Intermediary Services Act took effect from 30 October 2004 and the office of the ombud for FSP's has been in operation since 2005

<sup>198</sup> *H A Dennis v Nedbank Group Insurance Brokers and Nedbank Limited* Case Number FOC 979/05 decided 21 July 2005 (office of the ombud for FSP's)

<sup>199</sup> *Ibid* at para 20

Steyn's regime [ombud for Long Term Insurance] between the office and the FSB over the jurisdictional divide between it and the FAIS ombud.<sup>200</sup>

The report describes a series of workshops between industry and the regulator designed to resolve the jurisdictional divide. It is unclear why the resultant proposals did not receive consideration by the legislature.

Having founded his jurisdiction, the ombud for FSP's considered section 43(1) of the Short Term Insurance Act which provides consumers with free choice in regard to selecting their short-term underwriter<sup>201</sup>. This section is, however, subject to section 43(5)(a) which reads in its entirety:

'Subsection (1) shall not apply in the case of a short-term policy which is required to be made available in relation to a contract in terms of which money is loaned upon the security of the mortgage of immovable property.'

Despite the apparent clarity of the section, the ombud found that:

'In my view, the legislature could never have intended such a consequence. What was intended, in my view, is that the creditor and the debtor ... would have to ensure that the security that is provided in terms of the policy or policy benefits is appropriate to protect the interests of the creditor... My view is supported by the various respects in which the conduct of the 1<sup>st</sup> Respondent in placing, as it does, reliance on Section 43(5)(a) of the STO Act would be both inconsistent and irreconcilable with the provisions of the FAIS Act<sup>202</sup>

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<sup>200</sup> 2003 *Annual Report* ombudsman, at page 3 [www.ombud.co.za](http://www.ombud.co.za) accessed 3 January 2006

<sup>201</sup> 'Free choice in certain circumstances.—(1) Subject to subsection (5), if a party to a contract in terms of which money is loaned, goods are leased or credit is granted, requires, ... shall be entitled, and shall be given prior written notification of that entitlement, to a free choice—

(a) as to whether he or she wishes to enter into a new policy and make it available for that purpose, or wishes to make available an existing policy of the appropriate value for that purpose, or wishes to utilise a combination of those options;'

<sup>202</sup> *Supra* at para 23

The ombud found that as the FAIS Act entitled consumers to make informed decisions, they are also entitled to free choice<sup>203</sup> and relies on section 16(1) of the FAIS Act to make this finding. Section 16(1) is concerned with the manner and form of the Codes of Conduct to be drafted and published by the Regulator:

'A code of conduct must be drafted in such a manner as to ensure that clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately ...'.

The ombud therefore relies on the General Code of Conduct<sup>204</sup> or administrative rules, and not a statutory provision to overturn the legislative provisions of the Short Term Insurance Act, an Act not within his jurisdiction.

Leaving aside for the moment the question of whether or not the ombud for FSP's was sufficiently empowered, as an adjudicative tribunal tasked with the enforcement of the FAIS Act only, to dismiss the provisions of the Short Term Insurance Act on the basis that the provisions pre-dated those of FAIS and where inconsistent with it<sup>205</sup>, and consequently whether the ombud was acting *ultra vires*, the conflict between jurisdictions is clear. It is submitted that the number of adjudicative decision making bodies with jurisdictional conflicts as well as the absence of an over-arching, single appellate tribunal has the potential for contradictory and inconsistent administrative decision making. Moreover, time and cost efficiency is necessarily compromised and certainty for the parties cannot easily be provided in a structure that allows and, it would seem from the *Dennis v Nedbank* judgment, encourages "forum shopping" by complainants.

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<sup>203</sup> *Supra* at para 33

<sup>204</sup> Published by the Financial Services Board, in terms of Board Notice 80 of 2003 (effective 30 October 2004)

<sup>205</sup> *Supra* at para 40

In respect of the tribunals under review in this paper, the empowering legislation has not attempted to oust the jurisdiction of the High Court, even though precedence does exist in the labour law context<sup>206</sup>. Certainty and speedy finality has been sacrificed in favour of an inherent High Court jurisdiction. In the Canadian human rights context, Mullan notes that even when the legislature has attempted to create exclusive jurisdiction for grievance tribunals, the courts have been loathe to defer to it<sup>207</sup>, a phenomenon shared in the South African experience.<sup>208</sup>

### ***5.3 The case for an administrative appeals tribunal***

Even though the concept of a general administrative appeals tribunal has not been implemented in the South African administrative law framework, it remains useful to consider the Australian experience. The Australian Administrative Appeals Tribunal [AAT] has been in operation since 1976<sup>209</sup>. In considering the different options of a generalist tribunal as opposed to a series of specialist tribunals, Creyke notes that:

'The biggest criticism of tribunal systems composed solely of specialist tribunals is that their tribunals have been developed in a haphazard fashion. The result is that there is no consistent pattern of decisions which are reviewable, and no common procedures, making it difficult for citizens bringing claims and those who appear before the. Other criticisms are that they duplicate resources, premises and

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<sup>206</sup> Section 157 of the Labour Relations Act, 66 of 1995

<sup>207</sup> Mullan, D 'Tribunals and Courts – The Contemporary Terrain: Lessons from Human Rights Regimes' (1998 – 1999) 24 *Queens Law Journal* 643 at 653

<sup>208</sup> See *Fedlife Assurance Limited v Wolfaardt* (2001) 12 *BLLR* 1301 (SCA) where the Supreme Court of Appeal rejected the exclusive jurisdiction of the Labour Appeal Court in matters relating to the employment contract, finding that fixed term contracts could be governed not by labour legislation but by the common law of contract. The effect of the judgment is two fold: (1) to subordinate the Labour Appeal Court to the Supreme Court of Appeal and (2) to create, albeit in limited circumstances, dual jurisdictions

<sup>209</sup> Creyke, R 'Tribunals and Access to Justice' (2002) 2 *Queensland University T.L. & J Journal* 65

infrastructure, and are generally an inefficient way to administer administrative justice'<sup>210</sup>.

Creyke notes that the arguments in favour of a single, general tribunal system were restated in the UK's 2001 Leggatt report<sup>211</sup>:

- 'The important place which tribunals now play in the modern system of administrative law would best be recognised by forming them into a coherent system to sit alongside the ordinary courts
- The overriding aim should be to present citizens with a single, overarching structure. It would be accessible to all tribunals. Any citizen who wished to appeal a tribunal would only have to submit the appeal, confident in the knowledge that one system handling all such disputes, and could be relied upon to allocate it to the right tribunal. This would be a considerable advance in clarity and simplicity for users and their advisers. The single system would enable a coherent, user-focused approach to the provision of information which would enable tribunals to meet the claim that they operate in ways which would enable citizens to participate directly in preparing and presenting their own cases.
- Tribunals should do all they can to render themselves understandable, unthreatening, and useful to users, who should be able to obtain all the information they need about venues, timetables, and sources of professional advice' from a single source.
- The procedural reform of formal dispute resolution processes, in courts and tribunals, involves a distinctive and common set of issues ... [L]eaving procedural reform of tribunals scattered across a series of departments is impeding modernisation.'

It is not my aim to add to the many and far superior calls for a single administrative appeals tribunal in South Africa, but rather to submit that, if the financial services

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<sup>210</sup> *Ibid* at 69

<sup>211</sup> Leggatt, A *Tribunals for Users One System, One Service: Report of the Review of Tribunals* (2001) as quoted in Creyke *Ibid* at 69

industry is used as an example of how industry specific adjudicative tribunals have developed in South Africa, any proposals for change should include a rationalisation and consolidation of these industry bodies.

The Australian AAT is an overarching structure that has a wide ranging jurisdiction and a resolution based approach to dispute settlement that includes mediation and conciliation as well as adversarial hearings<sup>212</sup>. Like the South African Constitution<sup>213</sup>, the Australian Commonwealth Constitution provides the courts with an inherent jurisdiction, which cannot be ousted, over all legal disputes including the findings of adjudicative tribunals<sup>214</sup>. This over-sight or supervisory role of the judiciary has required not only the establishment of an appropriate standard of review but also one which is capable of handling the alternate dispute resolution procedures that may be employed by adjudicative tribunals. One of the criticisms laid at the door of judicial review of adjudicative decisions is that the right to access the common law courts with their adversarial nature can influence tribunals to a more formalistic, legalistic or procedural process that ignores the inherent cost and efficiency advantages of less formal procedures such as mediation, arbitration or conciliation. As one of the primary arguments in favour of tribunals concerned with the implementation of government policy and the application of legislative rules, is that being functionaries within the government infrastructure, they are able to apply government policy. This begs the question however of how slavishly such tribunals should apply government policy.

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<sup>212</sup> At 1993, a jurisdiction of approximately 200 statutory instruments ranging from taxation, veteran affairs, social welfare, refugee status, student affairs and wildlife protection. See Saunders, C 'Appeal or Review: The Experience of Administrative Appeals in Australia' (1993) *Acta Juridica* 88 at 89

<sup>213</sup> Section 34 of Act 108 of 1996

<sup>214</sup> Saunders, C 'Appeal or Review: The Experience of Administrative Appeals in Australia' (1993) *Acta Juridica* 88 at 91

Saunders<sup>215</sup> notes that this debate required an internal solution within the AAT itself such that the tribunal honoured the Federal Court injunction to apply independent judgment over government policy<sup>216</sup> while recognising the importance of consistent decision making. The solution is that policies that have been subject to parliamentary evaluation are not generally departed from. Saunders notes that this has led to an increase in those administrative policies that receive parliamentary scrutiny, a practice, it is submitted, that would be welcome in the South African context.

## **6 Financial services tribunals as 'organs of state'**

### ***6.1. Introduction***

An analysis of the statutes that empower grievance tribunals in the financial services industry highlights the need for legislative consistency in respect of whether a dissatisfied participant may appeal a tribunal determination, in the widest sense, or whether the remedy should be restricted to a review process.

The three tribunals that will be reviewed in this section are the ombud for Financial Services Providers<sup>217</sup>, the Pension Funds Adjudicator<sup>218</sup> and the Directorate for Market Abuses<sup>219</sup>. The ombud for FSP's and the PF adjudicator are adjudicative bodies that are empowered to hear and determine on complaints received in respect of pension fund

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<sup>215</sup> *Ibid* at 96

<sup>216</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 quoted by Saunders, *Ibid* at 95

<sup>217</sup> Chapter VI, part I of the Financial Advisory and Intermediary Services Act 37 of 2002

<sup>218</sup> Chapter VA of the Pension Funds Act 24 of 1956 Hereinafter, the PF adjudicator

<sup>219</sup> Section 83 of the Security Services Act 36 of 2004. Prior to 2004, the Directorate for Insider Trading empowered by the Insider Trading Act 135 of 1998

organisations and financial services providers<sup>220</sup>. Both statutes provide for an alternate dispute resolution procedure and for the creation and function of the tribunals. The Directorate for Market Abuses, conversely, is empowered by statute to investigate suspected market abuse events and to sue in civil law on behalf of any prejudiced parties. The question posed in this section is whether these tribunals are subject to administrative justice principles, with specific reference to judicial review.

## ***6.2. Administrative Action in PAJA and the Constitutional Court***

Administrative action is defined in PAJA<sup>221</sup> as meaning

‘any decision taken, or failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power of performing a public function in terms of an empowering provision’

In terms of subsection (a)(ii) of the definition, as Plasket points out, the terms ‘public power’ and ‘public function’ are linked to ‘legislation’ and, consequently, it is only a creature of statute that can be considered an organ of state. A voluntary body would therefore not be considered an organ of state and any administrative law challenge to

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<sup>220</sup> Financial services are defined in FAIS as including any body that administers, provides or manages, *inter alia*, insurance and investment products and therefore includes insurers, investment managers, collective investment scheme managers (unit trust companies), banks, stock brokers, insurance agents or brokers

<sup>221</sup> Section 1

such a body would need to be in terms of subsection (b) of the definition of 'administrative action'<sup>222</sup>.

In the *Sarfu*<sup>223</sup> case, the Constitutional Court recognised that determining whether action is administrative in nature or not rests not on who is exercising the public power but on the nature of the power exercised. The Court distinguished between the implementation of legislation, which would ordinarily be administrative action, and setting policy that would not be administrative action and used the following factors as a determinate:

- the nature of the power being exercised. Implementation of legislation is definitely administrative in nature which is justiciable while setting policy is executive in nature and is not justiciable
- the source of the power
- the subject matter of the power

### ***6.3 Exercising Public Power***

The test to determine whether a statutory body is indeed an organ of state has not been finally settled by the courts. Plasket<sup>224</sup> analyses the various standards applied and notes three trends:

- The broad reasoning applied in *Baloro v University of Bophutatswana*<sup>225</sup> which recognised the need to apply administrative justice principles to the exercise of purely private power

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<sup>222</sup> Plasket, C 'The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa' (2002) Doctoral Thesis, University of Rhodes

<sup>223</sup> *President of RSA and Others v SARFU and Others* 1999 (10) BCLR 1059 (CC) at para 141

<sup>224</sup> Plasket, C *op cit* at note 222 at page 115

<sup>225</sup> 1995 (8) BCLR 1018 (B)

- A narrower interpretation as applied in *Directory Advertising Cost Cutters*<sup>226</sup> and *Mistry v Interim National Medical and Dental Council of South Africa*<sup>227</sup> where the courts applied a strict control test, finding that organs of state are limited to those institutions within the government infrastructure or where the institutions are controlled by the state. In *Mistry* the Court found that although the respondent was created by statute and held search and investigative powers, arguably 'public powers', the fact that the Minister did not appoint all the councillors, it was financed by fees charged to the profession and that it employed staff who were not state employees meant that it was not an organ of state
- A benevolent control test<sup>228</sup> as applied in *Esack v Commission on Gender Equality*<sup>229</sup> where the control test was acknowledged but the Court applied flexibly such that a body could be subject to the control of the state without being within the state infrastructure. Further, the statutory independence of the body did not detract from the state's ability to direct the function of that body. Significantly, the Court found that the gender equality commission performed a function that was in the public interest and in terms of state imperatives.

The English courts, applied the "public function" test in the *Datafin* case<sup>230</sup> in which it was found that the Panel had exercised a public power even though it was not a government agency nor was it created by statute. The court found that had the Panel

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<sup>226</sup> *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T)

<sup>227</sup> *Mistry v Interim National Medical and Dental Council of South Africa* 1997 (7) BCLR 933 (D)

<sup>228</sup> Plasket, C *op cit* at note 222 at page 119

<sup>229</sup> (2000) 21 ILJ 467 (W)

<sup>230</sup> *R v Panel on Take-overs and mergers; Ex parte Datafin plc* (1987) 1 QB 815 in Aronson, M *et al* 'Judicial Review of Administrative Action' 3<sup>rd</sup> ed (2004) at page 118

not existed, the function would have needed to be performed by government and, further, that even though the power exercised was economic in nature and not legal, that 'power behind the scenes is power nonetheless'<sup>231</sup>.

The South African courts were equally prepared to review the decisions of a non-government body exercising public power in the *Dawnlaan Beleggings* case<sup>232</sup> where the Court found that the securities exchange had a duty to act in the public interest.

The approach taken in both cases has been criticised. Aronson, *et al* submits:

'... that it is untenable to test a function's amenability to judicial review by speculation (or even hard evidence) as to what government would have done if the non-governmental body had not performed the function. Government intentions are hard to ascertain, rarely fixed, and not always directly or immediately translated into legislation.'<sup>233</sup>

Regardless of the criticisms, the principle enunciated in these cases is reflected in subsection (b) of the definition of 'administrative action' in PAJA. As will be seen from the discussion in chapter 8 below, the potential for judicial review of private industry specific adjudicatory tribunals has not been directly addressed by the courts since the promulgation of PAJA, but it is clear that the definition of 'administrative action' has opened the door to such review.

In the event that subsection (b) is read down by the courts and the nature of the power exercised would not be considered sufficiently public so as to warrant administrative review, it is submitted that both the PF adjudicator and the ombud for FSP's nevertheless fall within the definition of 'organs of state' for the reasons set out below.

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<sup>231</sup> *Ibid*

<sup>232</sup> *Dawnlaans Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W) discussed in Hoexter, C 'The New Constitutional and Administrative Law' Vol 2 (Juta, 2002) at page 99

<sup>233</sup> Aronson, M *et al* 'Judicial Review of Administrative Action' 3<sup>rd</sup> ed (2004) at page 119

Section 21 of FAIS<sup>234</sup> provides that the board (Financial Services Board<sup>235</sup>) is responsible for the appointment of the ombud and deputy ombud and is empowered to dismiss both incumbents, on good cause. The FSB is the primary regulator for all financial services providers and is accountable to the Minister of Finance and financed by levies from the industry<sup>236</sup>.

Section 22 provides that funding for the office of the ombud is provided by the FSB and section 23(3) provides that the records and financial statement must be audited by the Auditor-General.

Finally, section 26(1) empowers the FSB to make and publish the rules regulating the procedure, jurisdiction, scope of the ombud and 'liaison between the ombud and the registrar, and administrative duties of these functionaries regarding mutual administrative support, exchange of information and reports, .. and avoidance of overlapping of their respective functions'<sup>237</sup>. Section 26(2)(a) provides that the Board must 'ensure that no rule made under subsection (1) detracts or affects the independence of the ombud in any material way'. This last is critical to the integrity and independence of the ombud but should not be read to mean that the ombud is not an organ of state, exercising a public power. This position is supported by *Esack v Commission on Gender Equality*<sup>238</sup>.

Similarly, section 30C of the Pension Funds Act<sup>239</sup> provides for the appointment and removal of the PF adjudicator by the Minister of Finance. Section 30R provides that

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<sup>234</sup> Act 37 of 2002

<sup>235</sup> Hereinafter FSB

<sup>236</sup> Section 15A of the Financial Services Board Act 97 of 1990

<sup>237</sup> *Supra* section 26(1)(c)

<sup>238</sup> *Supra* at note 229

<sup>239</sup> Act 24 of 1956

funding for the office of the ombud is provided by the FSB and section 30T provides that the records and financial statement must be audited by the Auditor-General.

The assertion that administrative justice principles should be applied to the functioning and determinations of both the ombud for FSP's and the PF adjudicator can be challenged on the basis that although both functionaries are statutory bodies, they are not necessarily organs of state as they do not function within the traditional government infrastructure. In fact, both statutes provide that the tribunals enjoy a level of independence from the department and Minister of Finance. It is submitted however that both tribunals function as regulatory bodies, are ultimately responsible to the state and are exercising power that is public in nature. Both are directed to fulfil the policy imperative of emphasising the protection of the public rather than the promotion of self or sectoral self interests<sup>240</sup>. In the alternate, the principles of administrative justice can be said to apply by virtue of subsection (b) of the PAJA definition of 'administrative action' that specifically provides for private bodies exercising public power.

## **7 Appeal or Review within financial services adjudicatory tribunals**

### ***7.1 The Pension Funds Adjudicator***

Section 30P of the Pension Fund Act 24 of 1956 states:

- 1) 'Any party who feels aggrieved by a determination of the adjudicator may, within six weeks after the date of the determination, apply to the division of the Supreme Court which has jurisdiction, for relief ...

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<sup>240</sup> Section 30D of the Pension Funds Act 24 of 1956 and section 20(3) of the Financial Advisors and Intermediary Services Act 37 of 2002

- 2) The division of the Supreme Court contemplated in subsection (1) shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit'

In the *De Beer*<sup>241</sup> case, an appeal from the determination of the PF adjudicator, Davis J refers to the Supreme Court of Appeal decision of *Meyer v Iscor Pension Fund* 'From the wording of s30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the Pension Fund Adjudicator's determination is right or wrong. Neither is it confined to the evidence of the grounds upon which the Pension Fund Adjudicator's decision was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by s30P(2) to a consideration of "merits of the complaint in question". The dispute submitted to the High Court for adjudication must therefore still be a "complaint" as defined.'<sup>242</sup>

It is submitted that although the legislation clearly intended that an aggrieved party can appeal the decision of the PF adjudicator, it also constrained the nature of the appeal. The resultant hybrid does nothing to advance the effective use and application of industry specific tribunals. The High Court is still called upon to find on the determination made at the tribunal but is not constrained by a call to deference:

'To confirm first respondent's determination, it is necessary to find, on the evidence, that there was no reasonable basis for the reduced benefits received by second respondent...however ...I do not consider that the available evidence justifies the conclusion reached by first respondent.'<sup>243</sup>

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<sup>241</sup> *Central Retirement Annuity Fund v PF Adjudicator of Pension Fund, F E de Beer and Others* Case Number 3404/05 decided 20 October 2005 (C) at page 11

<sup>242</sup> (2001) SCA case number: 391/2001 (judgment delivered 20/11/2002) at page 8

<sup>243</sup> *Supra* at note 241 at page 20

## **7.2 Ombud for FSP's**

The remedy differs in respect of disputes before the ombud, created by s20 of the FAIS Act<sup>244</sup>. Determinations by the ombud may be appealed internally to the Financial Services Board of Appeal<sup>245</sup> and only with the leave of the ombud or permission from that Board of Appeal<sup>246</sup>. Determinations from both the ombud and the Board of Appeal have the same force and effect as a judgment from the common law courts and awards<sup>247</sup>. The statutory provision excludes a direct appeal or review to the common law courts and this section would seem to provide for the internal remedy envisaged by section 7(1) of PAJA. Although not explicit in the legislation, it is submitted that the decisions of the FSB Appeal Board would be capable of being taken on review, in terms of PAJA, and not appealed to the common law courts.

## **7.3 Directorate for Market Abuses**

Although the Directorate functions within the financial services arena, it does differ markedly from its fellow adjudicative tribunals in that the empowering statute is clear that it does not fulfil an administrative function. Section 83(1)(c) states that the Directorate is empowered to investigate any suspected offences and to institute civil proceedings against people or bodies contravening the Act. Section 83(1)(d) states that 'The directorate is not intended to act as an administrative body when exercising its powers referred to in paragraph (c)'. The Directorate is responsible for the investigation and prevention of abuses such as insider trading, market manipulation, front running,

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<sup>244</sup> Act 37 of 2002

<sup>245</sup> The function and procedure of this body is provided for in section 26 of the Financial Services Board Act 97 of 1990

<sup>246</sup> Act 37 of 2002 S28(5)

<sup>247</sup> *Ibid* s28(4)

and price setting<sup>248</sup>. The offences in the legislation range from criminal, where the Directorate hands over its investigative findings to the prosecuting authorities for prosecution in the High Court<sup>249</sup>, and civil sanctions in the form of fines against the offending party.

The Directorate has very wide ranging investigative powers including search and seizure powers<sup>250</sup>, it is appointed by and accountable to the Minister of Finance<sup>251</sup> and is financed by the Financial Services Board<sup>252</sup>. The directorate is critical to South Africa's economic well being as it is charged with maintaining an efficient and fair trading market, a function that is clearly public in nature and, absent the Directorate, would surely fall to the state. The impact of investigations and fines imposed by the Directorate on individuals and institutions is significant. The legislative intent however is clear in that administrative review is excluded however section 83(1)(d) has not been tested in the courts since the promulgation of PAJA.

Like the PF adjudicator and the ombud for FSP's, the Directorate for market abuses is used as an example of the inconsistency of legislative treatment of adjudicatory tribunals functioning within the financial services industry.

#### ***7.4 Seeking consistency***

None of the three adjudicative tribunals are defined as organs of state by the empowering legislation and it is consequently an issue for interpretation. Using the test applied in *Mistry*<sup>253</sup>, in all three instances, the bodies are created in statute, are

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<sup>248</sup> Section 75 of the Security Services Act, 36 of 2004

<sup>249</sup> *Ibid* section 79

<sup>250</sup> *Ibid* section 82(1)

<sup>251</sup> *Ibid* section 83(1)

<sup>252</sup> *Ibid* section 84

<sup>253</sup> *Supra* at note 227

accountable to the Minister of Finance, are staffed in part by government appointees and the internal rules are subject to consultation or approval by the Minister. On the other hand, they are financed by levies charged to the industry and do not receive a budgetary allocation from Department of Treasury and they employ staff not appointed by the state. It is submitted, however, that the Court in *Mistry* focussed not on the nature of the power exercised, being disciplinary and regulatory powers as well as serving the public interest, but rather on the nature of the functionary and whether it could be contained within the state infrastructure. In my view, a broader interpretation is preferred where a consideration of the nature of the power is favoured over a consideration of where the adjudicative body fits into the state infrastructure.

It is submitted that the judicial review provided for in section 28 of FAIS should be preferred to the appeal provisions in the Pension Funds Act. As Mullan notes:

'Allowing the tribunal first crack at the determination of issues ... has a number of positive virtues. The courts' judicial review or appellate role may be better informed by an appreciation of the view of the tribunal operating daily in the relevant field. On matters where the standard is patent unreasonableness or even reasonableness, this is a logical imperative. However, it may apply to cases where the issue is one on which the standard of review is correctness. Just because the tribunal is required to be correct does not mean that it cannot assist in the court's understanding of the issue<sup>254</sup>. Also, putting together the relevant factual record may be done more cheaply and efficiently by the tribunal.'<sup>255</sup>

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<sup>254</sup> The Canadian practice of retaining two standards of review dependant on the nature of the administrative decision is not directly relevant to this paper. It is the advantages to both the judicial and the administrative regime of excluding the common law court jurisdiction as a primary recourse that are of interest.

<sup>255</sup> Mullan, D 'Tribunals and Courts – The Contemporary Terrain: Lessons from Human Rights Regimes' (1998 – 1999) 24 *Queens Law Journal* 643 at 660

The growth of industry specific adjudicative tribunals is partly attributable to the inherent difficulties with the adversarial judicial process and the integrity and effectiveness of industry specific tribunals remains dependent on:

1. the courts recognising and respecting the expertise and experience of that decision maker and thus restricting their enquiry to a review for lawfulness and reasonableness
2. the cost and accessibility advantages of a tribunal structure being retained in the internal remedy process
3. a review process that will encourage or, indeed, force the adjudicatory bodies to better decision making in that the review is of the decision maker's application of administrative justice principles. In an appeal process, where additional facts and evidence can be introduced, while the finding of the courts may differ from that of the adjudicatory decision maker, that finding can be defended as being on the basis of additional facts
4. the participants retaining their confidence in a tribunal process
5. a tribunal structure that encourages or demands an internal appeals process prior to seeking recourse in the common law courts does not fully respond to the challenges inherent to judicial review, discussed at chapter 3, above, but does provide a partial alternate.

Following Hoexter's<sup>256</sup> call for the minimisation of judicial review (however unlikely that may be) in favour of seeking integration and an appropriate role for judicial review, it is submitted that judicial review as the final remedy is preferable to judicial appeal at an earlier stage. It provides the balance needed to allow an effective and efficient adjudicative process and a limitation of the recourse available to the judicial process

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<sup>256</sup> *Op cit* note13 at page 493

while retaining the fail-safe protection against decisions that are inconsistent with the principles of administrative justice.

## 8 The *De Beer* case<sup>257</sup>

It is argued above that consistency of treatment is required in the application of administrative justice principles to adjudicative tribunals in the financial services industry. Further, it is argued that the integrity of these tribunals would be better provided for if the legislature provided for judicial review and not judicial appeal. The statutory framework regulating the financial services industry was dramatically overhauled in 2003 and 2004<sup>258</sup>. It is with regret that the legislature did not take the opportunity to provide an overarching adjudicative regime that supports administrative justice principles. This argument is not based solely on the practical need for consistency of treatment within one industry but also on the theoretical advantages of maintaining a separation of powers between the state and the judiciary, the requirements of deference to the industry experts and, importantly, the need for better administrative decisions. At the time of writing, since the promulgation of PAJA and since the legislative changes mentioned above, only one adjudicative decision has been decided by the High Court, being the *De Beer* case. The case is intriguing for a number of reasons:

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<sup>257</sup> *F E De Beer v Central Retirement Annuity Fund and Sanlam Life Insurance Limited* Case Number PFA/KZN/1357/2002/KM decided 15 March 2005 (Office of the PF adjudicator) and *Central Retirement Annuity Fund v PF Adjudicator of Pension Fund, F E de Beer and Others* Case Number 3404/05 decided 20 October 2005 (C)

<sup>258</sup> *Inter alia*, the Financial Advisory and Intermediary Services Act, 37 of 2000 was promulgated in October 2004; the Financial Services Ombud Schemes Act 37 of 2004; the Security Services Act 36 of 2004 replaced the Insider Trading Act 135 of 1998, the Stock Exchange Control Act 1 of 1985 and the Financial Markets Control Act, 55 of 1989

1. The High Court was clear that, due to the statutory provisions of the Pension Fund Act required the matter to be taken on appeal and not review. However, the High Court judgment is concerned exclusively with a review of the PF adjudicator's determination. In the conclusion the Court states: 'I do not consider the available evidence justifies the conclusion reached by first respondent [PF adjudicator]',<sup>259</sup>.
2. The finding over-turns the PF adjudicator's decision but is based on the factual and legal aspects of his determination and therefore does not provide direction for better decision making in the future.
3. The High Court confirms that the management committees of pension funds are subject to the 'abstract values such as values of good faith, reasonableness and fairness',<sup>260</sup> [emphasis added] and that:  
  
'Applying this approach to the present dispute, the provisions of the Act read together with the Rules of applicant, should be construed to promote principles of transparency, accountability and fairness to be implemented by the management committee of applicant in a manner which seeks to promote the objects of the fund as defined.'<sup>261</sup>

The PF adjudicator is therefore enjoined to hold parties to a dispute to reasonableness standard. The management committee of the pension fund is itself subject to administrative principles and yet the PF adjudicator's determination is not reviewable on administrative principles.

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<sup>259</sup> *Ibid* at page 20

<sup>260</sup> *Ibid* at page 15

<sup>261</sup> *Ibid*

What follows is an analysis of the PF adjudicator's determination and the High Court decision with a view to demonstrating that the current legislative regime fails in not providing space and opportunity for the courts to guide better decision making or retain a deferential position towards industry specific tribunals.

### ***8.1 Lawfulness: Reasonable Apprehension of Bias***

The common law rule against bias is based on the principle that justice must not only be done but be seen to be done<sup>262</sup> as well as the need for the parties subject to an administrative decision to receive a fair hearing and therefore for a better decision to be made. The rule against bias has been codified and can be found in section 6(2)(a)(iii) of PAJA which states that a decision may be subject to judicial review is the administrator '... was biased or reasonably suspected of bias'.

The rule against bias should not be mistaken for the rule against ulterior purpose or motive, although there is much common ground between the two, which provides that administrative functionaries are bound to act in terms of the purposes in terms of which the power was granted. Purpose and motive can be distinguished by noting that 'purpose' relates to the stated aim of the administrator and 'motive' relates to the actual but hidden aim<sup>263</sup>. As Hoexter illustrates, the South African courts have been loathe to overturn the decisions of an administrator where an ulterior motive is evidenced on the basis that as long as the administrator is so empowered and the power was used for the purpose it was intended, the motive is irrelevant<sup>264</sup>. Regardless, PAJA has included ulterior purpose or motive as a ground of review<sup>265</sup>.

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<sup>262</sup> Hoexter, C 'Administrative Justice and Dishonesty' (1994) 111 *SALJ* 700 at page 711

<sup>263</sup> *Ibid* at page 703

<sup>264</sup> *Op cit* at note 262 at page 705

<sup>265</sup> Section 6(1)(2)(e)(ii)

The test for bias is that a 'reasonable suspicion' of bias, objectively determined, exists, which was decided in the *BTR Industries*<sup>266</sup> case where protracted labour negotiations led to a conciliation agreement by the Industrial Court<sup>267</sup>. The presiding official was charged by the Union (MAWU) with bias as a result of him delivering a talk at an unrelated conference organised and for the benefit of BTR's legal advisors. The Appellate Division confirmed that the Union was not obliged to show that actual bias existed nor that there was a real likelihood of bias but rather that '... reasonably to create an impression of a leaning or inclination on his [the presiding officer's] part towards one side in the dispute'<sup>268</sup> and, in so finding, confirmed that a reasonable suspicion of bias was sufficient for the finding to be reviewed and overturned.

In the *De Beer* case, the issue of costs charged by the Applicant was critical to both the PF adjudicator's determination and the High Court's overturning of that determination. The High Court found that

'First respondent placed considerable emphasis on an increase in costs and, in particular, that between 1 November 1987 and 1 November 2002 the portion of the second respondent's total contribution to the fund was R50,368 whereas the total amount of costs amounted to R11,782. What appears to have been omitted from consideration is the analysis that, of the amount of R11,782 R8,523 constitutes a risk premium from rider benefits and life and disability cover; that is the cost of additional cover for risks provided by Sanlam Life for the benefit of second respondent. The riders formed part of the initial contract and this of the agreement entered into

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<sup>266</sup> *BTR Industries South Africa (Pty) Ltd and others v Metal and Allied Worker's Union and another* 1992(3)

SA 482 A

<sup>267</sup> Now, Labour Court

<sup>268</sup> *Supra* at note 266 at page 689 G

between second respondent and applicant. Only R3,259 of the R11,782 constituted policy fees and administration costs; ... which constitutes 4% of the maturity value<sup>269</sup>

It is harmful to the integrity of an industry specific tribunal when an error occurs in respect of the factual merits of the case. The motivation for tribunals of this nature is in part the expertise of the decision maker in regard to the industry over which it has jurisdiction and is critical to the ongoing success of such adjudicative tribunals. One explanation for the PF adjudicator's incomplete analysis of the contractual arrangement between the parties could be explained by a consideration of the PF adjudicator's opening remarks:

'The facts of the case demonstrate a truly disturbing practice in the South African retirement industry, especially if regard is had to a widely held view that less than 10% of South Africans of vocational age have wholly adequate retirement provision. It would seem that those who try to make adequate provision for their retirement through retirement annuity funds are mulcted in costs that erode the very nest egg such funds are supposed to preserve and grow for their members. What is of even greater concern is that these costs are generally not disclosed to members at the time of signing up, nor are they disclosed with some degree of precision in the schedule or terms and conditions document that usually follows a member's signing up<sup>270</sup>

It is submitted that the PF adjudicator approached the case with a previously held and negative general view of the retirement industry as regard costs, going so far as to call for regulation on the matter<sup>271</sup>, which jaundiced his analysis of the specific facts. In so doing he failed to take account of the fact that the second respondent had not

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<sup>269</sup> *Supra* at page 19

<sup>270</sup> *Supra* at para 1

<sup>271</sup> *Supra* at para 2

contracted with the applicant in respect of an investment only but had received death benefits and disability (“rider”) benefits for which premiums had been charged.

## ***8.2 Lawfulness: Irrelevant considerations taken into account***

Section 6(2)(e)(iii) of PAJA states that an administrative decision may be subject to judicial review if ‘... the action was taken- ... because irrelevant considerations were taken into account or relevant considerations were not considered’<sup>272</sup>.

In considering the role of the management board of the applicant (“the trustees” or “management committee”), the PF adjudicator found that the board had been derelict in its fiduciary duties when it failed to challenge the assumptions made by Sanlam Life Assurance Limited when it calculated the projected or illustrative retirement values when issuing the policy contract. At paragraph 18 and in support of this contention,

‘Perhaps the lack of vigilance on the part of the management board or Sanlam should come as no surprise since the Sanlam document<sup>273</sup> still (more than 10 years since the birth of our constitutional democracy that outlaws retribution by death) contains a clause that excludes liability for payment of a death benefit where the death happens “as a result of the execution of the death sentence on account of an offence ...”. The death sentence has not been a part of our existence in South Africa since the Interim Constitution enshrined the right to life in 1993 and the Constitutional Court upheld that right in strong and decisive terms in *S v Makwenya* 1995(3) SA 391 (CC). That

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<sup>272</sup> Incidentally, it is submitted that the sentence structure of this section does not add to its clarity. Nothing particular turns on it but the section would be better suited by the word ‘because’ being replaced by ‘and’. De Ville *op cit* at note 25 at page 181 suggests that the term ‘because’ implies that the relevant or irrelevant factors are sufficiently material to have caused a defect in the outcome or decision

<sup>273</sup> (the policy of insurance entered into between the applicant and Sanlam Life Assurance Limited in respect of the second respondent at his entrance into the fund 1 November 1987)

the terms and conditions of a pension fund organization should still contain such clauses (while a crass demonstration of the trustees' dereliction of their fiduciary duties) is also cause for serious concern'

The High Court failed to address this issue in its judgment which is perhaps no surprise considering its magnificent irrelevance to the facts at hand to say nothing of the fact that the policy document had been issued in 1987. The PF adjudicator's suggestion therefore seems to be that the management board should have seen to it that the underwriter of member benefits amended the policy contracts with all members. Aside from the irrelevance of the issue, a policy contract is, in exchange for premiums, a promise to pay an amount at a future determinable date on the happening of an uncertain event. The object of such contracts is to provide for a myriad of future events, including those that may not exist at the time of contracting. There is theoretically no guarantee that the position of capital punishment as reflected in *S v Makwenya* may not change in years to come.

### ***8.3 Lawfulness: Failure to take into account relevant considerations***

As discussed at chapter 8.2. above, section 6(2)(e)(iii) provides for review of the administrator has failed to take account of relevant considerations. Certainly, the courts remain loathe to interfere with the administrator's discretion to determine relevance but will do so when such factors are prescribed by statute or where the administrator has patently ignored relevant factors. The issue seems to have been resolved by the *New Clicks* judgment, discussed in chapter 4 above, albeit in the context of an administrator making subordinate legislation and not in an adjudicative or grievance tribunal.

Chaskalson CJ confirmed that relevance goes to the lawfulness of the decision taken and that although the administrator is best positioned to consider relevance, the courts will

not 'rubber stamp' that decision<sup>274</sup>. Chaskalson CJ seems to be suggesting that the role of the courts is to consider the weight applied to the factors under consideration and the appropriateness or reasonableness of that weight, a position made the now famous Canadian *Baker*<sup>275</sup> case.

The PF adjudicator's determination in the *De Beer* matter is an illustration of how this ground of review on the basis of relevance may be applied. The High Court found that the member's own contribution rates contributed to the lower than expected retirement benefit and that this had not been taken into account by the PF adjudicator in his determination:

'The quantum of contributions is clearly a reason for a discrepancy between the final payout and the initial illustrative value. This point did not appear to have been adequately considered by first respondent as can be gleaned from the conclusion in his determination which follows upon an examination of the performance of the fund ...Unfortunately, no mention is made in the determination, of the extent of the increases in contributions paid by second respondent or the further information regarding decreasing benefits provided by Sanlam Life to second respondent'<sup>276</sup>

#### ***8.4 Error of Law or Fact***

As Hoexter notes:

'Any legal system that tries to uphold a distinction between appeal and review is bound to experience some controversy regarding review for an error of law (or, indeed, one of fact). The rationale for the distinction is that it is not the court's

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<sup>274</sup> *Supra* at note142

<sup>275</sup> *Supra* at note22 and discussed by De Ville *op cit* at note25 footnote 715 at page 183

<sup>276</sup> *Supra* at page 18

function to say whether an administrator's decision is right or wrong, but merely whether it was arrived at in an acceptable manner.' [footnotes omitted]<sup>277</sup>

The traditional South African approach was to distinguish between jurisdictional and non-jurisdictional errors with non-jurisdictional errors not being reviewable as the administrator had acted within the empowering provisions. De Ville summarises the position as being that a review of administrative action was restricted to the legality of that action and, consequently, an error of fact or law could only be reviewed if the administrator had exceeded his/her powers or jurisdiction<sup>278</sup>. In 1992, the distinction fell into disuse when the Appellate Division<sup>279</sup> found that 'the reviewability of an error of law depends on whether the legislature intended the tribunal to have exclusive authority to decide the question of law concerned.'<sup>280</sup> The Court found that in adjudicative or grievance tribunals, it would be unlikely that the administrator held the sole authority to interpret the empowering statute and that the error must be of a material nature.

The *Hira* requirement of materiality has been codified in PAJA<sup>281</sup>. As De Ville argues, it would be unfortunate if this provision of PAJA was interpreted to mean that all material errors of law were to be held to a correctness standard. He favours a contextual approach where the courts recognise that more than one 'correct' interpretation of a legislative provision is possible. He argues further that the courts should not be positioned as the final arbiters on statutory interpretation<sup>282</sup>.

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<sup>277</sup> Hoexter, C *op cit* at note 67 at page 155

<sup>278</sup> De Ville, J *op cit* at note 25 at page 149

<sup>279</sup> *Hira and Another v Booyens and Another* (1992) (4) SA 69 A

<sup>280</sup> *Op cit* at note 25 at page 155

<sup>281</sup> Section 6(2)(d) - the actions of an administrator may be reviewed if 'the action was materially influenced by an error of law'

<sup>282</sup> *Op cit* at note 25 at pages 154 - 156

As to errors of fact, the test seems to be a rationality one where the decision may be set aside on the basis that there is a rational connection between the outcome of the decision, the facts on which the decision was based and the reasoning given for the decision<sup>283</sup>.

The section 6 grounds of review provided for in PAJA do not explicitly specify that an administrator's decision may be reviewable on the grounds of an error of fact. They do, however, provide for review in the case of non-compliance with a prescribed mandatory procedure or condition<sup>284</sup>. The section seems to provide for review if the administrator has erred on the facts but only is so far as they are required to be considered by the empowering statute. Certainly the administrator's decision is reviewable if that decision or action is not rationally connected to 'the information before the administrator'<sup>285</sup> which seems to be a codification of the pre-PAJA common law position.

In situations where the administrator is not enjoined by the empowering statute to consider certain factual evidence, the courts require the administrator to properly consider material evidence and to be able to justify the decision taken by reference to supporting evidence.

With respect to the drafters of PAJA, it is unfortunate that the standard of review in respect of errors of law or fact is not clearly and explicitly stated. The use of a rationality standard in respect of the facts and the decision, a justifiability standard in respect of the reasons given as well as the suggestion of a correctness standard in respect of statutory interpretation does not make for certainty. De Ville has illuminated the matter by offering the following recommendation:

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<sup>283</sup> *Derby-Leweis and Another v Chairman of the Committee on Amnesty of the TRC and Others* 2001 (3) SA 1033 (C) As discussed by De Ville *Op cit* at note25 at page 161

<sup>284</sup> Section 6(2)(b)

<sup>285</sup> Section 6(2)(f)(ii)(cc)

- a correctness standard should be applied by the courts to determine whether the facts were correctly found
- a reasonableness standard should be applied to determine whether the decision is rationally connected to the outcome
- a rationality standard should be applied, when the administrator is acting under wide discretionary powers, to determine whether there is a rational basis for the decision with reference to the information before the administrator<sup>286</sup>.

With respect to the illustrative case under discussion in this chapter, it is submitted that the PF adjudicator erred on the facts before him in respect of the legal relationship between the parties. The PF adjudicator addressed the nature of the contractual and legal relationships between the insurer (Sanlam Life Assurance Limited), the applicant (Central Retirement Annuity Fund) and the second respondent (De Beer). The rules of the CRA Fund provided for the payment of benefits to members at retirement, death, disability, etc. The rules also limited the fund's liability to the values of the policies and investments held on behalf of a specific member<sup>287</sup>. The fund therefore underwrote its liabilities by means of insurance policies entered into between the Fund and Sanlam Life for the benefit of the member.

The issue is relevant in respect of jurisdiction. If the PF adjudicator was unable to find liability on behalf of the Fund, and could do so only in respect of the underwriter, he would not have had jurisdiction to hear the dispute. The matter of competing and overlapping tribunals in the financial services industry is evidenced in the judgment of the High Court which found that the management board of the fund does hold duties as

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<sup>286</sup> *Op cit* at note25 at page 170

<sup>287</sup> *Supra* at para 6 - 7

regards the policies effected on behalf of the members and therefore, the PF adjudicator's jurisdiction was confirmed:

'In any event, applicant is a pension fund organization and has separate legal personality in terms of s51(a) of the Act. It cannot simply be treated as an illusionary "go between" [between] the members such as second respondent and Sanlam Life. It should be accountable to its members and hence subject to the discipline of the Act's complaints mechanism'<sup>288</sup>

and

'It follows that the reasonableness of the total charges levied by the insurers from time to time in respect of the administration of the fund and the apportionment thereof among beneficiaries are considerations, of which account must be taken by applicant's management committee. Similarly, the reasonableness of investments effected and maintained by the insurer for the fund from time to time should be examined by the management committee, if the latter is to fulfil its fiduciary'<sup>289</sup> responsibilities to member.'<sup>290</sup>

Although finding that the management committee had not been derelict in this regard, the High Court confirmed that the management committee could not hand all liability to the insurer thereby excluding the jurisdiction of the PF adjudicator.

The PF adjudicator's path to the same end is found at paragraph 6 of the determination:

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<sup>288</sup> Central Retirement Annuity Fund and PF Adjudicator of Pension Fund and Others Case Number 3404/05 decided 20 October 2005 (C) at page 9

<sup>289</sup> On the point of "fiduciary duties" a reading of S7C and S7D of the Pension Fund Act 24 of 1956 will show that these are in fact statutory duties. The common law as regards fiduciaries may inform the interpretation of the statutory duties but it is submitted that the continued reference to fiduciary duties is misleading and inappropriate

<sup>290</sup> *Supra* at page 16

'The language used in this document<sup>291</sup> makes it clear that the parties thereto consider it to be an insurance policy "proposed" by the fund for the benefit of the complainant. I have already indicated that a retirement annuity fund (including the one here in issue) is not an insurance policy by a pension fund organisation. I thus consider that I can safely ignore the misleading form of this document (to the extent that it purports to be an insurance policy) and focus rather on its substance ...'  
[emphasis in original].

The position taken by the PF adjudicator is, with respect, astounding in its far reaching implications and its disregard of the regulatory regime within which retirement annuities function. As an example, in redefining the contractual relationship, the PF adjudicator is able to state that the benefits are payable by the fund per its own rules. The effect is that the Fund's status as an audit exempt fund<sup>292</sup> is amended. At page 4, the High Court also notes that the policy is effected in terms of section 34 of the Insurance Act of 1943<sup>293</sup> which regulates, *inter alia*, the method of calculating contributions and benefits and for the supervisory role to be played by the Registrar for Long Term Insurance.

It is submitted that the High Court's approach is correct. To found liability for the management committee, the PF adjudicator disregarded or re-interpreted a policy contract. Conversely, the High Court recognised the separate legal personalities, the

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<sup>291</sup> The policy contract between the Fund and the Insurer for the benefit of the member

<sup>292</sup> audit exempt fund as defined by Regulation 1 of Regulations issued under Government Notice Regulations 98 of January 1962 and promulgated in terms of the Act. The effect of this Regulation is that, in order to be exempted by the Registrar of Pension Funds from the provisions of section 9 and 15(1) (2) of the Act, the fund must comply with the following:

- (i). The assets must consist **only** of claims against one or more insurers;
- (ii) Every benefit in terms of the fund's Rules must be paid solely by one or more insurers;
- (iii) Contributions to the fund must not be paid into a bank account of the fund but directly into one or more insurers.
- (iv) One insurer must accept responsibility to act as administering insurer.

<sup>293</sup> Now the Long Term Insurance Act 52 of 1998

contractual relationship between the parties and distinguished the various statutory duties, referred to as “fiduciary duties” in the judgment, of the parties.

## 9 The Path to better Decision-making

Sections 7(1) and 7(2) of PAJA require that aggrieved parties exhaust any internal remedies prior to seeking redress via judicial review. The legislative framework within which administrative tribunals can function is to be welcomed. It has been argued in the preceding chapters however that the ‘haphazard fashion’<sup>294</sup> in which specialist tribunals in the financial services industry have developed in South Africa has meant that the opportunity presented by PAJA in respect of alternative paths to administrative justice cannot be fully explored.

The *De Beer* case is illustrative of the need for a consistent standard of review across tribunals operating within the same industry. In legislating in favour of an appeal process and not a review, either on the basis of reasonability or rationality, the legislature has failed to recognise the expertise of industry specific tribunals and, therefore, the need for deference by the judiciary. If the Canadian approach<sup>295</sup> is to be followed, a reasonableness standard would best be reserved for reviews involving fundamental rights and it may therefore be more appropriate for a rationality standard to be applied to grievance procedures where financial interests and not fundamental rights are impacted. One of the challenges to modern participative democracy is the path to managing or controlling the use of public power while retaining the separation of powers between branches of government. An analysis of the PF adjudicator’s determination and the High Court judgment in the *De Beer* case would indicate that this path has not yet been found.

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<sup>294</sup> Creyke, R *op cit* note 209

<sup>295</sup> As discussed by Mullan *op cit* note 23

The appeal process provides no incentive towards better decision making by the administrative decision maker, it demonstrates no deference to the expertise of that decision maker nor does it assure future participants in a grievance procedure of the integrity or finality of the process. Certainly, the PF adjudicator's determination can be roundly criticised but it is submitted that a review on the basis of lawful, reasonable and procedurally fair administrative justice as determined by the Constitution Court in the *New Clicks* judgment would have achieved the same ends and would have cemented deference to the specialist grievance tribunal.

Deference is required not because the common law courts are unable or ill-suited to hear appeals from grievance tribunals but because courts should recognise the role that administrative agencies and tribunals play within government and within the regulatory structure. This deference to the experience and the expertise of administrative decision makers is not however without limits however. As found by the Court in *Bato Star*:

[t]his does not mean ... that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision.<sup>296</sup>

Open, accountable and transparent government rests partly on an efficient and trusted administration and this must be seen to include grievance tribunals established with the purpose of providing more immediate, cost efficient and expert solutions that are alive to the policy considerations of government. In respect of the financial services industry, government policy is to encourage personal wealth protection within a macro-economic model that is not able to provide adequate social assistance and this requires a well regulated, efficient industry that is committed to consumer protection, education and empowerment. It is argued that this laudable aim is not easily achievable without a

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<sup>296</sup> *Supra* at note 4 at para 48

coherent and symbiotic tribunal structure, with distinct jurisdictions, an internal appeal opportunity and ultimately judicial review on the basis of reasonableness. Finally, as the Constitutional Court said in *New Clicks*: 'The important of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated.'<sup>297</sup>

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<sup>297</sup> *Supra* at note 5 at para 588

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