Contents

Preface ................................................................................................................................. v

Part 1  The founding principles of administrative law and just
administrative action

Chapter 1  The foundation of South African administrative law

1  What is administrative law? ......................................................................................... 3
   1.1  Administrative law under the previous constitutional dispensation ............... 3
   1.2  Administrative law under the new constitutional system ............................... 3
   1.3  General and specific administrative law ............................................................ 4
   1.4  The constitutional right to just administrative action
       (section 33 of the Constitution) ............................................................................ 5
       1.4.1  Just administrative action under the Promotion of
              Administrative Justice Act 3 of 2000 (PAJA) ........................................... 6

2  The public/state administration ..................................................................................... 10
   2.1  The state administration under the previous dispensation ............................. 10
   2.2  The state administration under the new constitutional dispensation ............ 10
       2.2.1  What is the public administration? ............................................................ 12

3  The relationship between constitutional law and administrative law .................... 14
   3.1  The sphere of constitutional law ....................................................................... 15
   3.2  The sphere of administrative law ..................................................................... 15

4  The distinction between public law and private law ................................................. 16
   4.1  The impact of the Constitution on the distinction between private law
       and public law ....................................................................................................... 18
       4.1.1  Section 8(1) of the Constitution ................................................................. 18
       4.1.2  Section 8(2) of the Constitution ................................................................. 18
       4.1.3  Sections 24 and 25 .................................................................................. 18
   4.2  The emergence of the welfare/benefactor state and privatisation/
       outsourcing ........................................................................................................... 19

5  The significance of the doctrine of the rule of law .................................................... 20

Chapter 2  The impact of the Constitution on administrative law

1  The supremacy of the Constitution – section 2 – a founding principle ................. 27

2  Constitutionalism ........................................................................................................ 28

3  The doctrine of the separation of powers ................................................................. 29
   3.1  The place of the administration in the traditional separation of powers .. 30
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.2</td>
<td>Judicial powers</td>
<td>30</td>
</tr>
<tr>
<td>3.2.1</td>
<td>Judicial deference</td>
<td>31</td>
</tr>
<tr>
<td>3.3</td>
<td>Legislative powers</td>
<td>38</td>
</tr>
<tr>
<td>3.3.1</td>
<td>Parliamentary powers</td>
<td>38</td>
</tr>
<tr>
<td>3.3.2</td>
<td>Provincial powers</td>
<td>38</td>
</tr>
<tr>
<td>3.3.3</td>
<td>Local government powers</td>
<td>40</td>
</tr>
<tr>
<td>3.4</td>
<td>Executive powers</td>
<td>41</td>
</tr>
<tr>
<td>4</td>
<td>Co-operative government</td>
<td>42</td>
</tr>
<tr>
<td>4.1</td>
<td>What do the principles of co-operative government and intergovernmental relations encompass?</td>
<td>43</td>
</tr>
<tr>
<td>4.2</td>
<td>The importance of co-operative governance</td>
<td>43</td>
</tr>
<tr>
<td>4.3</td>
<td>The field of application of the principles of co-operative government</td>
<td>45</td>
</tr>
<tr>
<td>4.4</td>
<td>What impact will co-operative governance have on administrative law?</td>
<td>48</td>
</tr>
<tr>
<td>5</td>
<td>Chapter 2 of the Constitution – the Bill of Rights</td>
<td>49</td>
</tr>
<tr>
<td>5.1</td>
<td>Section 33 – just administrative action</td>
<td>50</td>
</tr>
<tr>
<td>5.1.1</td>
<td>Lawfulness</td>
<td>50</td>
</tr>
<tr>
<td>5.1.2</td>
<td>Procedural fairness</td>
<td>51</td>
</tr>
<tr>
<td>5.1.3</td>
<td>Reasonableness (justifiability) and proportionality</td>
<td>52</td>
</tr>
<tr>
<td>5.2</td>
<td>Sections 32 and 34 (the right to information and the right of access to courts)</td>
<td>52</td>
</tr>
<tr>
<td>5.3</td>
<td>Section 38 – the enforcement of rights (locus standi) (legal standing)</td>
<td>53</td>
</tr>
<tr>
<td>5.4</td>
<td>Limitations to the rights listed in the Bill of Rights</td>
<td>54</td>
</tr>
<tr>
<td>5.4.1</td>
<td>The general limitation clause</td>
<td>54</td>
</tr>
<tr>
<td>5.4.2</td>
<td>Specific limitation clauses</td>
<td>58</td>
</tr>
<tr>
<td>5.4.3</td>
<td>The suspension of fundamental rights</td>
<td>58</td>
</tr>
<tr>
<td>5.5</td>
<td>Section 39 – the interpretation of the Bill of Rights</td>
<td>59</td>
</tr>
<tr>
<td>5.5.1</td>
<td>International law</td>
<td>59</td>
</tr>
<tr>
<td>5.5.2</td>
<td>Foreign law</td>
<td>59</td>
</tr>
<tr>
<td>5.5.3</td>
<td>Common law</td>
<td>59</td>
</tr>
<tr>
<td>6</td>
<td>Chapter 9 of the Constitution (state institutions which strengthen democracy and ensure accountability)</td>
<td>61</td>
</tr>
<tr>
<td>7</td>
<td>A rights-based philosophy of administrative law and a culture of justification</td>
<td>61</td>
</tr>
<tr>
<td>7.1</td>
<td>Introduction</td>
<td>61</td>
</tr>
<tr>
<td>7.2</td>
<td>Administrative law under the former constitutional system</td>
<td>62</td>
</tr>
<tr>
<td>7.3</td>
<td>Administrative law under the new constitutional system</td>
<td>63</td>
</tr>
<tr>
<td>7.3.1</td>
<td>The Constitution of the Republic of South Africa 200 of 1993 (the Interim Constitution)</td>
<td>63</td>
</tr>
<tr>
<td>7.3.2</td>
<td>The Constitution of the Republic of South Africa 1996</td>
<td>64</td>
</tr>
<tr>
<td>7.4</td>
<td>The shift to a culture of justification</td>
<td>64</td>
</tr>
<tr>
<td>7.4.1</td>
<td>The founding provisions of the Constitution</td>
<td>64</td>
</tr>
<tr>
<td>7.4.2</td>
<td>Section 7(2)</td>
<td>68</td>
</tr>
<tr>
<td>7.4.3</td>
<td>Section 8(1)</td>
<td>68</td>
</tr>
</tbody>
</table>
Chapter 3 The sources of administrative law

1 Introduction ........................................................................................................... 73

2 The distinction between the source of administrative power and the sources of administrative law ................................................................. 73

3 The role of statutory interpretation in determining the scope of administrative power .............................................................................. 74

4 Legislation ............................................................................................................. 75

4.1 Parliamentary legislation .................................................................................. 75

4.1.1 The Constitution ......................................................................................... 75

4.1.2 Empowering parliamentary statutes ......................................................... 75

4.1.3 Prescriptive parliamentary legislation ...................................................... 76

4.1.3.1 The Promotion of Access to Information Act 2 of 2000 (PAIA) .......... 77

4.1.4 Provincial legislation as empowering legislation ....................................... 83

4.1.5 Local government empowering legislation ............................................. 84

4.1.6 Subordinate (delegated) legislation as empowering legislation: Proclamations and regulations ......................................................... 85

4.1.7 “Impure” legislation .................................................................................. 86

4.1.8 Administrative “quasi”-legislation: Internal circulars, guides, directives ................................................................. 86

5 Judicial precedent ............................................................................................... 87

6 Common law ...................................................................................................... 89

7 International law and foreign law ..................................................................... 90

7.1 International law ............................................................................................ 90

7.2 Foreign law .................................................................................................... 90

8 Administrative practice ..................................................................................... 91

9 Estoppel ............................................................................................................. 91

Chapter 4 The legal subjects in administrative law and the administrative-law relationship

1 Introduction ....................................................................................................... 93

2 The legal subjects in administrative law .......................................................... 93

2.1 The organ of state ......................................................................................... 93

2.2 Functionaries and institutions ....................................................................... 94

2.3 Natural and juristic persons ......................................................................... 96

2.4 The identification of organs of state ............................................................ 97

2.4.1 The control test – the narrow test ........................................................... 97
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.4.2 The public power test – a wider test</td>
<td>99</td>
</tr>
<tr>
<td>2.4.3 The broad test</td>
<td>99</td>
</tr>
<tr>
<td>3 Private persons as legal subjects</td>
<td>99</td>
</tr>
<tr>
<td>4 The administrative-law relationship</td>
<td>100</td>
</tr>
<tr>
<td>4.1 The relationship of inequality</td>
<td>100</td>
</tr>
<tr>
<td>4.2 The administrative-law relationship of inequality in contradistinction to the right to equality entrenched in the Bill of Rights</td>
<td>101</td>
</tr>
<tr>
<td>4.3 The general (objective) administrative-law relationship and the individual (subjective) relationship</td>
<td>102</td>
</tr>
<tr>
<td>4.3.1 The general relationship</td>
<td>102</td>
</tr>
<tr>
<td>4.3.2 The individual relationship</td>
<td>103</td>
</tr>
<tr>
<td>4.4 The two types of individual administrative-law relationships</td>
<td>103</td>
</tr>
<tr>
<td>4.4.1 The administrative-law relationship within the same authoritative hierarchy</td>
<td>103</td>
</tr>
<tr>
<td>4.4.2 The independent relationship</td>
<td>103</td>
</tr>
<tr>
<td>4.5 The object of the administrative-law relationship</td>
<td>104</td>
</tr>
</tbody>
</table>

Chapter 5 The concept of administrative action

1 The scope, content and application of administrative action ............ 107
   1.1 Introduction .................................................................................. 107
   1.2 The constitutional position .......................................................... 108
   1.2.1 What does not constitute administrative action? ....................... 109
   1.2.2 What constitutes “administrative action”? ................................... 110
   1.3 The Promotion of Administrative Justice Act (PAJA) ....................... 111

2 The statutory powers and functions excluded by PAJA .......................... 113
   2.1 Executive powers and functions of the President and the national executive .......................................................... 113
   2.2 Executive powers and functions of the provincial executive ............ 115
   2.3 Executive powers or functions of a municipal council ..................... 117
   2.4 Legislative function of Parliament, a provincial legislature or a municipal council ................................................. 119
   2.5 Judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996 and the judicial functions of a traditional leader under customary law or any other law ......................... 120
   2.5.1 The exclusion of judicial functions ............................................. 120
   2.6 Decisions relating to any aspect regarding the appointment of a judicial officer by the Judicial Service Commission .................. 126
   2.7 Any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act 2 of 2000 .......................................................... 127
   2.8 Any decision taken or failure to take a decision in terms of section 4(1) of the Promotion of Administrative Justice Act 3 of 2000 .......................................................... 127
3 Definitions impacting on the concept “administrative action” ................................................. 128
  3.1 Introduction .......................................................................................................................... 128
  3.2 Decision ............................................................................................................................ 128
    3.2.1 Does the exercise of discretionary powers constitute a decision?............................. 130
    3.2.2 Does delegated (subordinate) legislation constitute a decision?......................... 131
    3.2.3 Does a decision refer to final matters only? .............................................................. 132
  3.3 The refusal to take a decision ........................................................................................... 133
  3.4 Decision “of an administrative nature” .......................................................................... 133
4 . . . Made . . . under an “empowering provision” ................................................................. 134
5 . . . By an organ of state or by a natural or juristic person exercising public power or performing a public function ................................................................. 136
  5.1 Organ of state ..................................................................................................................... 136
    5.1.1 Institutions or functionaries ....................................................................................... 136
    5.1.2 A natural or juristic person exercising a public power or performing a public function ................................................................. 136
    5.1.3 The interpretation of “public”, “public power” and “public function” ................... 137
    5.1.4 Are private bodies which exercise public functions such as the regulation of professional sport organs of state? ................................................................. 140
6 . . . Actions expressly excluded by the Act ........................................................................... 144
7 . . . Which adversely affects the rights of any person ........................................................... 144
  7.1 The meaning of “rights” .................................................................................................... 145
8 “. . . that has a direct external legal effect” ........................................................................ 147
  8.1 Direct effect ....................................................................................................................... 148
  8.2 Legal effect ....................................................................................................................... 148
  8.3 External effect .................................................................................................................... 149

Chapter 6 The classification and legal force of administrative action

The classification of administrative action ............................................................................... 151
  1 Introduction ......................................................................................................................... 151
  2 The various categories of administrative action ................................................................. 152
    2.1 Legislative administrative action (subordinate or delegated legislation).................... 153
      2.1.1 The characteristics of legislative administrative actions ......................................... 154
    2.2 Actions by tribunals – judicial administrative action .................................................... 156
      2.2.1 Material tests ............................................................................................................ 156
      2.2.2 Formal tests ............................................................................................................. 157
      2.2.3 Examples of tribunals (judicial administrative bodies) ........................................... 157
    2.3 Purely administrative action .......................................................................................... 159
      2.3.1 Unilateral administrative action ............................................................................. 160
      2.3.2 Multilateral action ................................................................................................. 167
  3 The position of private bodies or voluntary associations .................................................... 178
The legal force of administrative action ........................................................................... 178
1 Material legal force ........................................................................................................... 178
2 Formal legal force .............................................................................................................. 178
3 The commencement of the legal force of administrative action ................................ 179
4 Enforcement of administrative action or ensuring the legal force of administrative action .......................................................... 180
5 The termination of the legal force of administrative action ........................................ 180
  5.1 Legislative administrative actions ................................................................................. 180
  5.2 Judicial administrative actions ...................................................................................... 180
  5.3 Purely administrative actions ....................................................................................... 181
     5.3.1 Invalid dispositions .............................................................................................. 182
     5.3.2 Valid administrative actions or dispositions ......................................................... 182
  5.4 The distinction between void and voidable action ...................................................... 183

Part 2 The general powers, duties and functions of the administrator

Chapter 7 The requirements for the proper exercise of the general powers and functions by administrators

1 Introduction to the general powers, duties and functions of administrators ... 187
2 General administrative powers, duties and functions .................................................. 188
   2.1 Administrative powers .............................................................................................. 188
      2.1.1 The power must be exercised by the competent authority ................................ 189
   2.2 Administrative duties ............................................................................................... 189
   2.3 Administrative functions ......................................................................................... 190
   2.4 Public powers and public functions ........................................................................ 191
3 The scope of administrative power ................................................................................ 191
   3.1 Express and tacit administrative powers .................................................................. 191
   3.2 Discretionary powers ............................................................................................... 192
   3.3 Peremptory and directory powers ............................................................................ 193
   3.4 Original and delegated powers ................................................................................ 194
      3.4.1 Original powers ................................................................................................ 194
      3.4.2 Delegated powers ............................................................................................. 194
   3.5 Executive/prerogative and administrative powers .................................................... 195

Chapter 8 The requirements for the achievement and upholding of the right to just administrative action

1 Introduction ..................................................................................................................... 197
2 The constitutional right to just administrative action .................................................... 197
   2.1 The common-law precursor to just administrative action ....................................... 197
   2.2 A comparative discussion of just administrative action ........................................... 198
      2.2.1 Canada ............................................................................................................. 198
      2.2.2 United Kingdom .............................................................................................. 199
      2.2.3 United States of America .................................................................................. 200
      2.2.4 Namibia .......................................................................................................... 201
### 2.3 Just administrative action in South Africa

#### 2.3.1 Section 24 of the Interim Constitution

#### 2.3.2 Section 33 of the 1996 Constitution

### 3 The content of section 33 (just administrative action)

#### 3.1 Lawfulness

1. Lawfulness in contradistinction to *ultra vires*
2. Lawfulness and ouster clauses
3. Lawfulness and discretionary powers
4. Lawfulness and acts of state

### 4 Reasonableness/justifiability/proportionality

#### 4.1 Common law

#### 4.2 The Interim Constitution – the requirement of justifiability

#### 4.3 Reasonableness under the 1996 Constitution

### 5 Procedural fairness

---

**Chapter 9 The administrator's duty to act fairly – section 3 of PAJA**

#### 1 Introduction

#### 2 Procedurally fair administrative action affecting any person: Section 3(1)

1. The content of section 3(1)
   - Administrative action which materially and adversely affects rights
   - Administrative action which materially and adversely affects legitimate expectations
   - The doctrine of legitimate expectation

#### 3 Fair administrative procedure depends on the circumstances of each case: Section 3(2)(a)

#### 4 Basic requirements of fairness: Mandatory procedures of fairness in terms of section 3(2)(b) of PAJA

1. Adequate notice in terms of subparagraph (i)
2. A reasonable opportunity to make representations in terms of subparagraph (ii)
3. A clear statement of the administrative action as required by subparagraph (iii)
4. Adequate notice of any right of review or internal appeal as required by subparagraph (iv)
5. Adequate notice of the right to request reasons in terms of section 5 in terms of subparagraph (v)

#### 5 Discretionary powers relating to procedural fairness: Section 3(3)

1. Discretionary power to allow a person to obtain assistance, and in serious cases, legal assistance in terms of subparagraph (a)
2. Assistance
3. Legal representation
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.2 Discretionary power to allow a person to present and dispute information and arguments in terms of subparagraph (b)</td>
</tr>
<tr>
<td>5.2.1 The extent of the right to present and dispute information and arguments</td>
</tr>
<tr>
<td>5.3 Discretionary power to allow a person to appear in person in terms of subparagraph (c)</td>
</tr>
<tr>
<td>6 Departures from the requirements of fair procedure in terms of section 3(4) of PAJA</td>
</tr>
<tr>
<td>6.1 Departure from the requirements of section 3(2) if it is reasonable and justifiable in the circumstances: Section 3(4)(a)</td>
</tr>
<tr>
<td>6.2 Ways of determining whether any departure from the requirements of section 3(2) is indeed “reasonable and justifiable in the circumstances”: Section 3(4)(b)</td>
</tr>
<tr>
<td>6.3 Factors to be taken into account when considering the reasonableness and justifiability of the departure (limitation)</td>
</tr>
<tr>
<td>7 Fair but different procedure allowed in terms of section 3(5)</td>
</tr>
</tbody>
</table>

**Chapter 10 Procedural fairness which affects the public – section 4**

1 Introduction | 239
2 The exclusion of a decision in terms of section 4(1) from the definition of “administrative action” | 240
3 The content of section 4 | 241
3.1 The public | 241
3.2 Rights of the public | 242
3.3 Rights of the public must be materially and adversely affected | 242
4 Does administrative action affecting the public include rule-making | 242
5 Decision-making in terms of section 4(1) and the procedures to be followed | 244
5.1 The procedures set out for the chosen options | 245
5.1.1 A public enquiry in terms of section 4(2) | 245
5.1.2 A notice and comment procedure in terms of section 4(3) | 247
6 Departures from the prescripts of section 4(1), (2) and (3) | 249

**Chapter 11 Written reasons for administrative action – section 5**

1 Introduction | 251
2 The right to reasons under the new constitutional dispensation | 252
2.1 The right to reasons under the Interim Constitution | 252
2.2 The right to reasons under the 1996 Constitution | 253
3 The right to reasons under PAJA | 253
4 The importance and function(s) of reasons | 253
4.1 The importance of reasons for administrative action in terms of section 5 of PAJA | 254
5 The content of section 5 | 255
5.1 The request for reasons in terms of section 5(1) | 256
5.2 Adequate reasons as a standard | 257
5.3 Failure to provide adequate reasons in writing leads to an "adverse inference" ................................................................. 259
5.4 Departures from the requirement to furnish written reasons in terms of section 5(4) – reasonable and justifiable refusal to furnish reasons.... 259
5.4.1 Refusal to furnish reasons must be reasonable and justifiable in the circumstances .................................................................... 259
5.4.2 Factors to determine whether the refusal to furnish reason was reasonable and justifiable .................................................. 260
5.5 A "fair but different" procedure in terms of section 5(5) .................. 260
5.6 Providing reasons without the need for request in terms of section 5(6) 260

Part 3 The control of administrative action

Chapter 12 The control of administrative action under a system of constitutional supremacy

1 Introduction .................................................................................................................................................................................. 263
2 Extra-judicial control .................................................................................................................................................................... 263
  2.1 Parliamentary control ............................................................................................................................................................. 263
  2.2 Control by state institutions supporting democracy ............................................................................................................... 265
    2.2.1 The Public Protector ......................................................................................................................................................... 266
    2.2.2 The Human Rights Commission ....................................................................................................................................... 267
    2.2.3 The Commission for the promotion and protection of the rights of cultural, religious and linguistic communities ..... 267
    2.2.4 The Commission for Gender Equality ............................................................................................................................. 268
    2.2.5 The Auditor-General .......................................................................................................................................................... 268
    2.2.6 The Electoral Commission .................................................................................................................................................. 268
    2.2.7 The independent authority to regulate broadcasting ..................................................................................................... 268
    2.2.8 The Truth and Reconciliation Commission ...................................................................................................................... 268
  2.3 Internal administrative control..................................................................................................................................................... 269
    2.3.1 Introduction ........................................................................................................................................................................ 269
    2.3.2 Internal control of the various forms of administrative actions .......................................................... 269
3 Judicial control ............................................................................................................................................................................ 272
  3.1 Introduction ............................................................................................................................................................................... 272
  3.2 Judicial control under the previous dispensation ................................................................................................................... 273
  3.3 Judicial control under the new constitutional dispensation .................................................................................................. 274
    3.3.1 Which court has jurisdiction? ............................................................................................................................................. 276
    3.3.2 Should specialised administrative courts be established? ................................................................................................. 278
  3.4 The distinction between judicial appeal and review ............................................................................................................. 278
  3.5 Common-law review ............................................................................................................................................................... 280
  3.6 Constitutional review ............................................................................................................................................................. 280

Chapter 13 Statutory grounds of judicial review of administrative action – section 6(2)

1 General introduction to the judicial review of administrative action ........................................................................................... 283
  1.1 The position of common law ................................................................. 285
# Administrative Law under the 1996 Constitution

1.2 The status of customary law ................................................................. 286
1.3 Who is the administrator? ................................................................. 286
1.4 The role of the courts ........................................................................... 287
1.5 The purpose of section 6 of PAJA ......................................................... 288

2 Section 6(1) - the general provision ....................................................... 288

3 The grounds of review in section 6(2) ..................................................... 288

3.1 Section 6(2)(a) ................................................................................. 289

3.1.1 Section 6(2)(a)(i) - unauthorised action ........................................... 289

3.1.2 Unauthorised delegation - section 6(2)(a)(ii) .................................... 296

3.1.3 Bias or a reasonable suspicion of bias - section 6(2)(a)(iii) ............... 302

## Chapter 14 Non-compliance with formal requirements relating to administrative action – section 6(2)(b)

1 Introduction ............................................................................................ 309

2 The effect of the distinction between mandatory and directory provisions .... 311

2.1 Circumstances in which the courts have not recognised the power of dispensation ............................................................................ 312

2.2 Circumstances in which the courts have recognised the power to grant dispensation ........................................................................... 313

2.3 Judicial decisions relating to the distinction between mandatory and directory provisions ................................................................. 313

2.3.1 Pre-1994 judicial decisions ............................................................... 313

2.3.2 Post-1994 judicial decisions ............................................................... 314

## Chapter 15 Judicial review of procedural unfairness – section 6(2)(c)

1 Introduction ............................................................................................ 317

2 The common-law antecedents of procedural fairness ............................... 318

3 The application of the common-law rules or principles of natural justice in the new constitutional dispensation ........................................... 320

4 The content of the principles of natural justice – the audi alteram partem rule (the duty to act fairly) ................................................................. 320

4.1 The flexibility of the principles or rules of natural justice ....................... 320

4.2 The audi alteram partem rule and administrative hearings ...................... 321

4.2.1 The individual must be given an opportunity to be heard on the matter at a hearing ................................................................. 321

4.2.2 The party must be properly informed of considerations which count against him/her ................................................................. 326

4.2.3 Reasons must be given by the administrator for any decisions taken ......................................................................................... 328

5 The right to procedural fairness: Its scope and content ............................ 331

5.1 Striking a balance between the state’s duty to give effect to procedural fairness and the promotion of an efficient administration ............... 332

5.2 Flexibility in fair procedure ................................................................... 333

5.3 The content of the constitutional right to procedural fairness ............... 333

5.3.1 The provisions of PAJA .................................................................... 333
| 5.3.2 | The provisions of the common law | 334 |
| 5.3.3 | The interpretation provided by judicial decisions (under both the Interim and 1996 Constitution) | 334 |
| 5.4 | The courts’ approach to adherence to procedural fairness in various decisions | 336 |
| 5.4.1 | Preliminary investigations | 336 |
| 5.4.2 | Subordinate legislation | 339 |
| 5.4.3 | Tribunals | 339 |
| 5.4.4 | Mechanical administrative action | 340 |
| 5.4.5 | Decisions by tribunals of voluntary associations (“domestic tribunals”) | 340 |
| 5.4.6 | Where the relationship is of a contractual nature | 341 |
| 5.5 | Substantive or procedural fairness? | 343 |
| 5.6 | Procedural fairness – before or after a decision is taken? | 344 |
| 5.7 | May procedural unfairness be cured on appeal? | 345 |

Chapter 16 The action was materially influenced by an error of law – section 6(2)(d)

1 | Introduction | 347 |
2 | The traditional approach to error of law | 348 |
2.1 | Pre-1994 judicial decisions on jurisdictional and non-jurisdictional errors of law | 349 |
2.2 | The judicial approach laid down in *Hira v Booysen* | 349 |
3 | Error of law under PAJA | 351 |

Chapter 17 The review of discretionary power – section 6(2)(e)

1 | Introduction | 355 |
2 | The scope of administrative discretionary power | 356 |
2.1 | The judicial interpretation of the scope of discretionary power | 356 |
3 | The review of jurisdictional facts | 357 |
3.1 | Substantive jurisdictional facts | 357 |
3.1.1 | Subjectively worded jurisdictional facts | 357 |
3.1.2 | Objectively worded jurisdictional facts | 358 |
3.2 | Procedural jurisdictional facts | 358 |
4 | Control of discretionary power by the various branches of government | 358 |
4.1 | Control by the legislature | 359 |
4.2 | Control by the executive (administration) | 359 |
4.3 | Control by the judiciary | 359 |
5 | The control of discretionary power in terms of PAJA | 362 |
5.1 | Action taken for a reason not authorised by the empowering provision – section 6(2)(e)(i) | 363 |
5.2 | The action was taken for an ulterior purpose or motive – section 6(2)(e)(ii) | 364 |
5.2.1 | Ulterior purpose under the common law | 365 |
5.2.2 Ulterior motive
5.2.3 The use of an unauthorised procedure to achieve an otherwise lawful object
5.3 The action was taken because irrelevant considerations were taken into account or relevant considerations were not considered – section 6(2)(e)(iii)
5.3.1 Judicial decisions dealing with relevant and irrelevant considerations
5.4 The action was taken because of the unauthorised or unwarranted dictates of another person or body – section 6(2)(e)(iv)
5.4.1 Unauthorised or unwarranted dictation
5.5 The action was taken in bad faith – section 6(2)(e)(v)
5.6 The action was taken arbitrarily or capriciously – section 6(2)(e)(vi)

Chapter 18 The review of irrational, unreasonable and disproportionate decision-making – section 6(2)(f) and (h)

1 Introduction
2 Section 6(2)(f)(i) – the action contravenes a law or is not authorised by the empowering provision
3 The constitutional requirement of rationality
   3.1 Rationality under the Interim Constitution
   3.2 Rationality under the 1996 Constitution
   3.3 Rationality review in terms of PAJA
      3.3.1 The action is not rationally connected to the purpose for which it was taken – section 6(2)(f)(ii)(aa)
      3.3.2 The action is not rationally connected to the purpose of the empowering provision – section 6(2)(f)(ii)(bb)
      3.3.3 The action is not rationally connected to the information before the administrator – section 6(2)(f)(ii)(cc)
      3.3.4 The action is not rationally connected to the reasons given for it by the administrator – section 6(2)(f)(ii)(dd)

Unreasonableness as a ground of review
1 Introduction
2 Unreasonable administrative action at common law
   2.1 The symptomatic or traditional approach to unreasonable administrative action
   2.2 The extended formal yardstick
3 Reasonableness in the new constitutional order
   3.1 Reasonableness under the Interim Constitution
   3.2 Reasonableness under the 1996 Constitution
4 Unreasonableness as a ground of review under PAJA
   4.1 The meaning of “unreasonableness”
<table>
<thead>
<tr>
<th>Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1.1 The meaning of “unreasonableness” in English law</td>
<td>400</td>
</tr>
<tr>
<td>4.1.2 The meaning of unreasonableness in South Africa law</td>
<td>402</td>
</tr>
<tr>
<td>5 Application of the reasonableness requirement to the various functions of the administration</td>
<td>405</td>
</tr>
<tr>
<td>5.1 The application of reasonableness in the sphere of subordinate legislation</td>
<td>405</td>
</tr>
<tr>
<td>5.2 The application of the reasonableness requirement to tribunals</td>
<td>406</td>
</tr>
<tr>
<td>5.3 The application of the reasonableness requirement to “purely” administrative action</td>
<td>407</td>
</tr>
<tr>
<td>The role of proportionality in controlling administrative action</td>
<td>407</td>
</tr>
<tr>
<td>1 Introduction</td>
<td>407</td>
</tr>
<tr>
<td>2 A comparative overview of the principle of proportionality</td>
<td>408</td>
</tr>
<tr>
<td>2.1 English law</td>
<td>408</td>
</tr>
<tr>
<td>2.2 Canadian law</td>
<td>409</td>
</tr>
<tr>
<td>2.3 German law</td>
<td>409</td>
</tr>
<tr>
<td>2.4 The European Court of Justice</td>
<td>411</td>
</tr>
<tr>
<td>3 Proportionality in South African law</td>
<td>411</td>
</tr>
<tr>
<td>3.1 Introduction</td>
<td>411</td>
</tr>
<tr>
<td>3.2 The judicial interpretation of proportionality</td>
<td>412</td>
</tr>
<tr>
<td>3.3 Objections to the acceptance of disproportionality as a ground for review</td>
<td>414</td>
</tr>
<tr>
<td>The levels of scrutiny adopted by the courts pertaining to irrationality, unreasonableness and disproportionality</td>
<td>414</td>
</tr>
<tr>
<td>1 Guidelines for establishing whether administrative action is rational, reasonable and proportional</td>
<td>416</td>
</tr>
<tr>
<td>1.1 Rationality</td>
<td>416</td>
</tr>
<tr>
<td>1.2 Reasonableness</td>
<td>416</td>
</tr>
<tr>
<td>1.3 Proportionality</td>
<td>417</td>
</tr>
</tbody>
</table>

Chapter 19 Failure to take a decision as a ground of review – section 6(2)(g)

| Introduction | 419 |
| The position under common law | 419 |
| The failure to take a decision under the new dispensation | 420 |
| 3.1 Section 6(3)(a) of PAJA | 421 |
| 3.2 Section 6(3)(b) of PAJA | 421 |

Chapter 20 Action that is otherwise unconstitutional or unlawful – section 6(2)(f)

| The subsection as a catch-all residual or all-embracing provision | 423 |
| The phrase “otherwise unconstitutional” | 423 |
| The phrase “otherwise unlawful” | 423 |
| 3.1 Vague and embarrassing administrative action | 423 |
| 3.2 The use of an incorrect administrative procedure | 427 |
### Chapter 21 State liability

1. **Introduction** .................................................. 429
2. **The contractual liability of the state** .................. 429
   2.1 The basis of the liability of the state ............... 429
   2.2 Contractual liability ............................................ 430
3. **Delictual liability** .............................................. 432
   3.1 Introduction ....................................................... 432
   3.2 The vicarious liability of the state for the delictual actions of its servants or employees ..................... 433
   3.3 Is the state liable for its lawful administrative actions? .................................................. 435
   3.4 Unlawful administrative action ......................... 437
     3.4.1 The elements of unlawful administrative action ................................................. 437
4. **"Special categories" of delictual liability** .......... 441
   4.1 The delictual liability of the police .................. 441
     4.1.1 The control test .............................................. 444
     4.1.2 The influence of the Constitution and the new Police Act on state liability .................. 445
   4.2 Liability of the state for military personnel ....... 446
   4.3 Liability of municipalities ................................. 447
5. **State liability for the actions of the judiciary** .... 448
6. **State liability for legislative action** ................ 448
7. **State liability for purely administrative action** .... 449
8. **The limitation of state liability by virtue of the presumption that the state is not bound by its statutes** .................. 450
9. **The state has the power to alter its liability by way of legislation** ............................................. 451
   9.1 The liability of the state where amnesty has been granted ............................................... 451
10. **The payment of compensation by the state** ........ 452
    10.1 Introduction ..................................................... 452
     10.1.1 Workmen’s compensation ............................... 453
     10.1.2 Compensation for occupational injuries and diseases ............................................ 453
     10.1.3 Compensation in the sphere of land reform .................. 453

### Part 4 Procedural issues surrounding the judicial review of administrative action

### Chapter 22 Procedural issues surrounding judicial review

1. **Jurisdictional issues** .......................................... 461
   1.1 Introduction ...................................................... 461
   1.2 The jurisdiction of the Constitutional Court, the Supreme Court of Appeal and the High Courts ............................................. 461
   1.3 The jurisdiction of magistrates’ courts ................ 462
## Requirements relating to statutory time limits

### 2.1 Introduction

### 2.2 The interpretation and application of time limits

### 2.3 The constitutionality of time limits

### 2.4 The judicial approach to time-limits

#### 2.4.1 Pre-1994 judicial decisions

#### 2.4.2 Post-1994 judicial decisions

### 2.5 Unreasonable delay under PAJA

#### 2.5.1 Review proceedings must be instituted within 180 days of the conclusion of internal remedies

#### 2.5.2 Review proceedings must be instituted 180 days from the date when the person concerned was informed of or became aware of the action and the reasons for it

#### 2.5.3 The calculation of 180 days

#### 2.5.4 Variation of the 180-day limit

### 2.6 The ripeness of the action

### 2.7 Mootness

## The exhaustion of internal remedies

### 3.1 Introduction

### 3.2 Exhaustion of internal remedies under PAJA

#### 3.2.1 Interpretation of the phrase “any other law”

#### 3.2.2 Judicial decisions

#### 3.2.3 The factors considered in determining whether judicial review is excluded where internal remedies have not been exhausted

#### 3.2.4 The exemption from the obligation to exhaust internal remedies

### 3.3 The constitutionality of section 7(2) of PAJA

### 3.4 The court’s power to review administrative action despite the failure to exhaust internal remedies

### 3.5 Procedural powers and duties of tribunals

#### 3.5.1 Oral or written representations

#### 3.5.2 Legal representation

#### 3.5.3 Cross-examination

#### 3.5.4 Evidence

#### 3.5.5 Public hearings

#### 3.5.6 Majority decision

#### 3.5.7 Substituting a decision

#### 3.5.8 Precedent system

#### 3.5.9 Reasons

#### 3.5.10 Contempt of tribunal

#### 3.5.11 The legal force of decisions by tribunals

## The requirements relating to legal standing (locus standi in iudicio) to institute an action

### 4.1 Introduction
4.2 Standing under section 38 of the Constitution ................................................................. 480
4.3 The interpretation of section 38 ......................................................................................... 481
4.4 Section 38(a) – anyone acting in their own interest ....................................................... 482
   4.4.1 The interest required to establish standing ................................................................. 483
   4.4.2 Should the interest be a direct interest? ..................................................................... 484
   4.4.3 Should the interest be a personal one? ..................................................................... 485
4.5 Section 38(b) – anyone acting on behalf of another person who cannot act in their own name ......................................................................................................................... 486
4.6 Section 38(c) – anyone acting as a member of, or in the interest of, a group or class of persons .............................................................................................................................................. 488
   4.6.1 The Report on the Recognition of Class Actions and Public Interest Actions in South African Law .......................................................................................................................... 491
4.7 Section 38(d) – anyone acting in the public interest ....................................................... 491
   4.7.1 Timing in the assessment of public interest litigation ................................................ 493
   4.7.2 Evidence required in public-interest litigation .......................................................... 494
4.8 Section 38(e) – associations acting on behalf of their members ...................................... 494
5 The application procedure .................................................................................................... 496
5.1 Urgent applications ............................................................................................................ 497
   5.1.2 The application of Rule 6(12)(a) .............................................................................. 497
5.2 Ex parte applications ......................................................................................................... 498
5.3 The appropriate rule in review applications – Rule 6 or Rule 53? ................................ 498
6 The burden of proof (onus) .................................................................................................. 499
6.1 Introduction ....................................................................................................................... 499
6.2 Sufficiency of proof ......................................................................................................... 499
6.3 Onus of proof under PAJA .............................................................................................. 500
   6.3.1 Exceptions to the general rule .................................................................................. 501
7 Oral evidence ....................................................................................................................... 502

Part 5 Remedies available to an aggrieved person and orders of court
Chapter 23 Remedies and orders
1 Introduction ......................................................................................................................... 505
2 The general power to grant an order that is “just” and “equitable” .................................. 507
   2.1 The meaning of the term “just and equitable” ............................................................... 507
   2.2 “Reading in” as appropriate relief ................................................................................ 508
3 Specific orders in terms of section 8(1) of PAJA ............................................................. 509
   3.1 An order directing the administrator to give reasons .................................................... 509
   3.2 An order directing the administrator to act in the manner the court or tribunal requires (section 8(1)(a)(ii)) .............................................................. 510
      3.2.1 Where the end result is a foregone conclusion and it would serve no purpose to refer the matter back to the original decision-maker .................................................. 511
      3.2.2 Where further delay would cause undue prejudice to the applicant .................. 512
3.2.3 Where the original decision-maker exhibits bias or incompetence to such a degree that it would be unfair to expect the applicant to submit to its jurisdiction again ........................................ 512
3.2.4 Where the court is in as good a position as the original decision-maker to make the decision ......................................................... 513
3.2.5 The willingness of the administrator to re-apply its mind to the issues at stake ........................................................................ 513
3.2.6 Change in circumstances – as they exist now as opposed to when the matter was decided by the administrator .......................... 514
3.3 An order prohibiting the administrator from acting in a particular manner .................................................................................. 514
3.4 An order setting the administrative action aside .................................... 515
3.4.1 Setting aside the administrative action and remitting the matter for reconsideration, with or without directions ......................... 515
3.4.2 Setting aside the matter and in exceptional cases substituting or varying the administrative action, or correcting a defect .................. 516
3.4.3 Setting aside the administrative action and in exceptional cases ordering the payment of compensation ..................................... 516
3.5 An order declaring the rights of the parties ............................................ 520
3.6 An order granting a temporary interdict or other temporary relief .......... 522
3.7 An order as to costs ........................................................................... 523
4 Specific orders in terms of section 8(2) of PAJA .................................... 523
5 Other remedial orders which may be ordered by the court ....................... 524
5.1 The interdict .................................................................................... 524
5.1.1 Mandamus or mandatory interdict .................................................. 525
5.1.2 Final interdicts ............................................................................. 526
5.2 The common-law remedy of defence in a criminal case ....................... 527
Table of cases ...................................................................................... 529
Table of statutes .................................................................................. 551
Index .................................................................................................... 555