



**SUBJECT** : **ADMINISTRATIVE LAW**

**CODE** : **ADL41B0/ADR0021**  
**SUPPLEMENTARY EXAM**

**DATE** : 21 January 2021

**DURATION** : 4 HOURS

**WEIGHTING** : 50% OF FINAL MARK

**TOTAL MARKS** : 80

**EXAMINERS** : DR R LAUBSCHER  
MRS R CACHALIA

**MODERATOR** : PROF D DE VILLIERS

**NUMBER OF PAGES** : 9 PAGES

**INSTRUCTIONS:**

1. Please answer all four questions.
2. Answers must be typed and saved in a Word document/PDF or handwritten, photographed and saved as PDF. Photographed papers must be clear and legible.
3. All questions must be clearly numbered, but may be done in any order.
4. All answer scripts must be electronically uploaded under the Turn-it-In link on Blackboard. If this is not possible for whatever reason, the student must electronically submit the script to the lecturer via email or Whatsapp within the allocated four hour exam period (or as soon as possible thereafter). For this purpose, the lecturers' email addresses and Whatsapp numbers are as follows: rventer@uj.ac.za/0731602903; raisac@uj.ac.za/ 0713648466. The lecturers will be available on email, phone and Whatsapp for the duration of the exam.
5. The Promotion of Administrative Justice Act 3 of 2000 is abbreviated to 'the PAJA'.
6. Regarding essay questions, the use of footnotes is not required.

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7. Students **must** refer to all applicable statutory provisions and case law when answering questions.
  8. **Students will not be awarded marks for simply pasting part of the question or the provisions of the PAJA into their answers. Students must demonstrate that they actually understand the provisions they are relying on.**
  9. By submitting their exam script students agree to adhere to UJ's policy on plagiarism and rules related to the writing of tests and exams. **This includes pasting portions of the course material (powerpoint presentations) or the contents of other academic articles into your answers (without attributing the ideas to that person), rather than explaining the material in your own words.** Students may under no circumstances contact any other person for assistance in answering the exam paper. Turn-it-In will pick up on copied answers. Any academic transgressions will be followed by disciplinary action by the University.

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**Question 1**

Read the following statements carefully and indicate which multiple choice option applies. You may only choose one in each case. There is no need to qualify or explain your conclusion: **simply write down the number of each question and write the roman numeral next to it.**

- 1.1 When a 'jurisdictional fact' is missing, the resulting decision will be reviewable. Which of the following grounds of review in the PAJA will be applicable?

- (i) Section 6(2)(a)(iii)
- (ii) Section 6(2)(d)
- (iii) Section 6(2)(e)(iii)
- (iv) Section 6(2)(b)

[2]

- 1.2 Which of the following is **least** relevant to establishing that an administrator was biased?

- (i) That the decision-maker has a family relationship with one of the parties
- (ii) That the hearing given is 'fair but different'
- (iii) That an applicant is in business with the administrator
- (iv) That the decision-maker has strong views about the case

[2]

- 1.3 In *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC), the Constitutional Court said that the duty to act rationally under the principle of legality encompasses:

- (i) the duty to act reasonably
- (ii) the duty to take account of relevant considerations
- (iii) the duty to follow a rational process and reach a rational outcome
- (iv) Only (ii) and (iii)

[2]

- 1.4 Which of the following statements about private bodies under sections (a) and (b) of the definition of 'administrative action' in the PAJA is **incorrect**?

- (i) Private bodies can never perform administrative action but they can exercise public power
- (ii) Public bodies can only perform administrative action if they are acting in terms of the Constitution, a provincial constitution or legislation
- (iii) Private bodies can perform administrative action and exercise public power
- (iv) All of the above

[2]

1.5 Which of the following factors will **not** assist a court in determining whether there are 'exceptional circumstances' warranting the remedy of substitution in section 8(1)(c)(ii)(aa) of the PAJA?

- (i) If the outcome is foregone
- (ii) If the administrator who took the decision was biased or incompetent
- (iii) Where the court is not in as good a position as the administrator to take the decision itself
- (iv) Where a further delay would cause unjustifiable prejudice to the affected party

[2]

(10 Marks)

### Question 2

In *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) (para 29), Deputy Chief Justice Moseneke wrote about the purposes of remedies in administrative law:

'It goes without saying that every improper performance of an administrative function would implicate the Constitution and **entitle the aggrieved party to appropriate relief**. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that **ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function**. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. **Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.**' (Emphasis added.)

Against this backdrop, critically discuss how the overarching approach to administrative law remedies, as developed by our courts, supports the broad remedial purposes in the above dictum of the Constitutional Court.

In your answer, you must engage *all* the applicable constitutional and statutory provisions governing administrative law remedies as well as the relevant case law that informs the remedial approach. Your answer should engage the following key themes:

- the two-staged approach to remedies;
- the nature and importance of the 'corrective principle';
- the particular circumstances in which the corrective principle may be departed from; and

- the exceptional remedies that are available to a court if they follow the corrective principle.

**Note: this is an essay question. You must develop a legal argument and demonstrate that you understand the material in your own words (eg, do not simply copy and paste material from the powerpoint slides). Please follow an essay format whereby an argument is developed through an introduction, body and conclusion. You may use sub-headings where appropriate.**

**(20 Marks)**

### **Question 3**

Section 10 of Social Assistance Act, 2004 (as amended) provides that a person is 'eligible for an older person's grant if –

- (a) in the case of a woman, she has attained the age of 60 years; and
- (b) in the case of a man, he has –
  - (i) after 1 April 2008, attained the age of 63 years;
  - (ii) after 1 April 2009, attained the age of 61 years; or
  - (iii) after 1 April 2010, attained the age of 60 years.'

Mrs. Dudu Sango is 62 years old. She lives in the Loskop area in the foothills of the Soutpansberg mountains, more than two hours away from any large city. She is illiterate and very poor, supported sporadically by a son who works in Johannesburg. She travels to Polokwane, the nearest reasonably-sized town about once every two years. On 20 February 2018, Mrs. Sango applied to the Department of Home Affairs in Limpopo for a pension. On 20 April 2018 she received a letter from the Department stating that *'in terms of the applicable law, your application for a pension is unsuccessful'*. Mrs. Sango approaches you, an attorney in Polokwane, on 24 February 2019 asking you for assistance in reviewing the decision to deny her a pension.

- 3.1 Can Mrs Sango challenge the reasons she was given? Explain your answer with reference to the applicable provisions in the PAJA, relevant case law and particularly the 'adequacy standard' for assessing the quality of reasons.

**[6]**

- 3.2 Will she be able to review the decision despite 180 days having lapsed from the date upon which she was informed of the refusal of her application? Explain fully with reference to the applicable provisions in the PAJA.

Would your answer be different if the PAJA was not applicable? If so, how?  
**Note: your answer should cover only the procedural considerations, not the merits of the case.**

**[8]**

- 3.3 Mrs Sango feels deeply aggrieved by the decision and particularly the fact that she was never given an opportunity to be heard in person. Having regard to the requirements in section 3(1) of the PAJA, does Mrs Sango have a 'right' to be heard? **Explain your answer with reference to applicable case law as well as the 'deprivation' and 'determination' theories of rights.**

[8]

- 3.4 Assume that you conclude that Mrs Sango was treated procedurally unfairly in the circumstances. With reference to applicable case law and the provisions of section 6(2)(c) and section 8 of the PAJA, what remedy would be available to Mrs Sango in the circumstances?

[3]

(25 marks)

#### Question 4

The Minister has recently amended, among other things, the definition of '*broadcasting service*' in the Electronic Communications Act of 2005 ('ECT Act' or 'the Act') to cater for '*local and international streaming services*' and thus requiring those performing such a service, as defined, to obtain a licence in accordance with the Act in order to operate in South Africa. Netflix, an international streaming giant, has applied to the Independent Communications Authority of South Africa ('ICASA') for an 'individual licence' in terms section 5(1) of the ECT Act, which states that ICASA '*may... grant individual and class licences.*'

According to section 2, the objects of the ECT Act are diverse:

'The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to—

- (a) ....;
- (b) ...;
- (c) ...;
- (d) encourage investment, including strategic infrastructure investment, and innovation in the communications sector;
- (e) ...;
- (f) promote competition within the ICT sector;
- (g) promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services;

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- (h) promote broad-based black economic empowerment, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities;
  - (i) encourage research and development within the ICT sector;
  - (j) ...;
  - (k) ...;
  - (l) ...;
  - (m) ...;
  - (n) promote the interests of consumers with regard to the price, quality and the variety of electronic communications services;
  - (o) ...;
  - (p) ...;
  - (q) ...;
  - (r) promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public;
  - (s) ensure that broadcasting services, viewed collectively -
    - (i) promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education and information;
    - (ii) provide for regular –
      - (aa) news services;
      - (bb) actuality programmes on matters of public interest;
      - (cc) programmes on political issues of public interest; and
      - (dd) programmes on matters of international, national, regional and local significance;
    - (iii) cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled;
  - (t) ...;
  - (u) ...;

- (v) ensure that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic;
- (w) ...;
- (x) ....;
- (y) refrain from undue interference in the commercial activities of licencees while taking into account the electronic communication needs of the public'

- 4.1 ICASA has considered Netflix's application but has decided to accept it subject to the condition that it offers 100% local South African content ('the conditional acceptance'). The consequence of this decision is that Netflix would not be able to operate at all given that the essence of its service offering is to provide access to material that is diverse and global.

**Having regard to these facts, the 'objects' of the ECT Act (section 2) above, the applicable provisions in the PAJA and relevant case law**, advise Netflix on whether the decision to reject its application is rational **and** reasonable within the meaning of the PAJA?

In your answer you should explain:

- (i) the nature of rationality as a ground of review in the PAJA;
- (ii) how it is different from reasonableness as a ground of review in the PAJA; and
- (iii) evaluate whether the conditional acceptance of Netflix's application was **irrational or, alternatively, unreasonable** in light of the facts you have been given. You must deal with **both** rationality and reasonableness as separate grounds of review.

[15]

- 4.2 Assume ICASA rejected the application because the head of the South African Broadcasting Corporation ('SABC') put pressure on the Authority to focus on making the SABC viable again by rejecting Netflix's application.

Advise on two possible **lawfulness** grounds of review in section 6(2) of the PAJA that speak to these facts. In your answer, you must explain the nature of each of the grounds of review relied on with reference to case law and demonstrate how it applies to the facts at hand.

[6]

- 4.3 What ground of review would be applicable if ICASA rejected Netflix's application because it relied on the definition of '*Broadcasting service*' **before**



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the amendment was effected, as ICASA was of the view that the amendment had not taken effect? Explain your answer with reference to case law.

**[4]**

**(25 marks)**

**TOTAL: 80**