



**SUBJECT : ADMINISTRATIVE LAW**

**CODE : ADL41B0/ADR0021**

**DATE : 6 NOVEMBER 2020**

**DURATION : 4 HOURS**

**WEIGHTING : 50% OF FINAL MARK**

**TOTAL MARKS : 80**

**EXAMINERS : DR R LAUBSCHER  
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**MODERATOR : PROF D DE VILLIERS**

**NUMBER OF PAGES : 7 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 lecturers 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, raisac@uj.ac.za and 0731602903 or 0713648466. The lecturers will be available on email, phone and Whatsapp for the duration of the exam. **Emailed exam scripts must clearly show the surname and student number of the student concerned.**
5. Regarding essay questions, the use of footnotes are not required.
6. Students **must** refer to all applicable statutory provisions and case law when answering questions.

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7. Students must make specific reference to the National Treasury Instruction NO. 5 of 2020/21: Emergency Procurement in Response to National State of Disaster (NT Instruction) when answering Question 4. The NT instruction is attached to this exam question paper.
  8. The Promotion of Administrative Justice Act 3 of 2000 is abbreviated to 'the PAJA'.
  9. **Students will not be awarded marks for simply pasting part of the question into their answers or pasting the provisions of the PAJA into answers. Students must demonstrate that they actually understand the provisions they are relying on.**
  10. 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 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 Which pathway to judicial review is appropriate when testing the constitutionality of legislation against the prescripts of the right to just administrative action in the Constitution?

- (i) Special statutory review
- (ii) The PAJA
- (iii) Section 33 of the Constitution
- (iv) The common law

[2]

1.2 In the *Sokhela* case, which was upheld by the Constitutional Court in *Motau*, the High Court explained what “of an administrative nature” means for purposes of section 1 of PAJA. Which of the following statements does not form part of that meaning?

- (i) One should establish that the decision is positively administrative in nature
- (ii) One should establish that the decision has external effect
- (iii) One should not conclude that a decision is administrative action simply from the fact that it has not been expressly excluded from the definition
- (iv) None of the above

[2]

1.3 A court sometimes has to decide whether there is an *implied* (opposed to an *express*) power to sub-delegate. Which of the following is not a factor that the court will take into account in making this decision?

- (i) Practical necessity
- (ii) How much power is being transferred
- (iii) Whether the administrator has special expertise
- (iv) Financial interest

[2]

1.4 Which of the following statements least reflects the purpose of the duty to give reasons in section 5 of the PAJA?

- (i) the duty to rationalise a decision taken
- (ii) the duty to provide a statement of information
- (iii) the duty to justify a decision
- (iv) the duty to explain a decision

[2]

1.5 Which of the following is an accurate description of the *De Jong* precedent?

- (i) Remittal and compensation are mutually exclusive remedies in all circumstances
- (ii) Remittal and compensation are mutually exclusive remedies only under the PAJA
- (iii) Remittal and compensation are mutually exclusive remedies under both the PAJA and the principle of legality
- (iv) none of the above

[2]

**(10 marks)**

## **QUESTION 2**

With reference to case law, critically discuss and evaluate the following:

“The principle of legality has become a pragmatic tool in the hands of the courts and has, over time, been filled systematically with various grounds of review that are ordinarily found in PAJA. At this point, it is difficult to determine just which grounds of review fall outside the ambit of the principle of legality and remain exclusive components of PAJA review.”

(Konstant, A “Administrative Action, the Principle of Legality and Deference” (2018) 4 *Constitutional Court Review* 69)

Do you agree with Konstant? In your answer, make sure you refer to relevant legal authority, and consider:

- How courts have used the principle of legality as a “pragmatic tool”;
- What grounds of review were traditionally available under the principle of legality, and whether this has shifted; and
- Whether there are any grounds of review which “remain exclusive components of PAJA review”.

**Note: you will be heavily penalised if you simply copy and paste excerpts from Konstant’s article in your answer. You must develop a legal argument and demonstrate that you understand the material in your own words. In doing so, please follow an essay format whereby an argument is developed through an introduction, body and conclusion. You may use sub-headings where appropriate.**

**(15 marks)**

### QUESTION 3

In accordance with the Minister's broad powers to combat the Covid-19 crisis, the Minister took a decision to continue to prohibit all "sale, dispensing and distribution of liquor" across South Africa when the country was moved down from alert level 5 to alert level 4 in May 2020. Before doing so, the Minister gave all key stakeholders in the liquor industry notice of its proposed decision. The Minister explained that the decision to impose the total ban was necessary to prevent South African hospitals from being inundated with alcohol-related injuries. No invitation was extended to any of the relevant role-players to make representations in relation to the decision.

The Wine Makers Association of South Africa (**WASA**), who are dissatisfied with the decision to impose a total ban on all liquor sales (locally and abroad), has approached the High Court to challenge this decision in judicial review proceedings. For purposes of this question assume that the decision to continue the alcohol ban qualifies as "administrative action" in terms of the PAJA.

- 3.1 What are WASA's prospects of success in reviewing the decision based on section 6(2)(c) of the PAJA in light of the requirements in sections 3(1)–3(5) of this legislation. In your answer you should argue whether section 3(1) has been triggered and only thereafter engage with the applicability of sections 3(2)–3(5). You should also consider the fact that,
- on previous occasions, when government intended to impose regulatory restrictions on the industry, it did engage with WASA; and
  - the Minister issued the regulations during a time of a global crisis. One should consider the implications of these circumstances on the Minister's duty to act in a procedurally fair manner.

**Please note that you will not be awarded marks for simply quoting or restating the provisions of sections 3(1)-3(5) of the PAJA, you must develop a legal argument and, in so doing, demonstrate that you understand the contents of these provisions in light of the relevant case law.** [12]

- 3.2 Would it matter to your answer if WASA waited until December 2020 to challenge the decision? If so, how? Please refer to any relevant case law and/or provisions in the PAJA. [5]

- 3.3 Were the Minister's reasons adequate for purposes of section 5 of the PAJA? Explain with reference applicable case law. [3]

**(20 marks)**

## QUESTION 4

Further to the decision to declare a National State of Disaster in South Africa to combat the Covid-19 pandemic, the Minister of Finance introduced new regulatory measures that would allow for the emergency procurement of personal protective equipment (**PPE**) and protective clothing to help fight the crisis. These measures allow for the procurement of certain listed items without the relevant government departments having to follow a formal tender process, as required by section 217 of the Constitution.

In response, various state entities have invoked these emergency measures to award contracts for the procurement of PPE. One such department is the South African Police Service (**SAPS**), which awarded a contract for the supply of specially-branded cloth masks by a foreign company, Pandemic Solutions International (**PSI**) whose head office is situated in the Cayman Islands. Recently, PPE Monitoring, a civil society body that has been monitoring Covid-19 procurement in South Africa, uncovered various irregularities in the award of the contract. Acting in the public interest, PPE Monitoring has approached the High Court to review and set aside the decision to award the contract to PSI.

4.1 Having regard to the attached “National Treasury Instruction No. 05 of 2020/21: Emergency Procurement in Response to the National State of Disaster” (**NT Instruction**) and with specific reference to the PPE specifications of the NT Instruction (section 4 read with Annexure “A”), answer questions 4.1.1-4.1.2 below.

**In your answers you must demonstrate an understanding of each of the grounds of review relied on with reference to relevant case law and apply them to the facts of the case. You may assume that the decision to award the contract to PSI is an “administrative action” for purposes of section 1 of the PAJA.**

4.1.1 Assume that the masks were procured at a cost of R25,00 each with the Minister of Police deciding that each member of SAPS required 6 masks. The Department of Public Works (**DPW**), which is similar to SAPS in terms of its size and PPE needs, had recently procured branded cloth masks from a local company Mzansi Cloth Masks (Pty) Ltd (**MCM**) at R20,00 a mask. Unlike SAPS, the DPW had allocated only 2 masks per person (requiring employees to clean their masks on alternate days). Advise whether the decision to enter into the contract with PSI was unreasonable for purposes of section 6(2)(h) of the PAJA.

[10]

4.1.2 Assume that the cloth masks were procured at a price of R27,00 per mask. The Minister justified the higher cost per mask on the basis that he wanted SAPS officials to have fancier looking masks than officials from other departments. With reference to section 4 of the NT Instruction and applicable case law, discuss two possible grounds of review in section 6(2) of the PAJA that may be invoked by PPE Monitoring in review proceedings.

[5]

.../7

- 4.2 Assuming that you have concluded that the award of the contract to PSI was unlawful, you need to determine the appropriate remedy. You should take account of the fact that the requested cloth masks have neither been paid for, nor delivered to SAPS, as well as the fact that the CEO of PSI is one of the Minister's close friends. Media reports have shown pictures of the two holidaying together in the Cayman Islands. There was also a tape leaked to the media where the CEO of PSI jokes to the Minister *'you should look forward to many other holidays in the future if all goes well here...'*

**With reference to relevant case law**, critically discuss:

- 4.2.1 The default or ordinary approach that courts follow in deciding the appropriate remedy for an invalid administrative action;

[5]

- 4.2.2 Whether there are grounds for departing from the ordinary approach **in this case** (and particularly, whether a court should set aside the award of the contract)?; and

[5]

- 4.2.3 Whether, given the urgency of obtaining cloth masks for SAPS officials, it would be appropriate for the court to order that PSI be substituted for MCM?

[10]

**(35 marks)**

**TOTAL: 80**