



**SUBJECT : ADMINISTRATIVE LAW**

**CODE : ADL41B0/ADR0021**

**DATE : 6 NOVEMBER 2020**

**DURATION : 3 HOURS**

**WEIGHTING : 50% OF FINAL MARK**

**TOTAL MARKS : 80**

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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 lecturer via email or Whatsapp within the allocated three and a half 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.
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.
7. Students must make specific reference to the National Treasury Instruction NO. 5 of 2020/21: Emergency Procurement in Response to National State

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- 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.

**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 (iii)

1.2 (ii)

1.3 (iv)

1.4 (ii)

1.5 (ii)

**[10]****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.**

**(20 Marks)**

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## MARKING GUIDELINES

Students must not only show understanding of the material, but should also refer to relevant authority. For this reason, when allocating marks a student can pass but cannot do well if they only answer broadly, without reference to any authority.

**NB:** If students simply copy and paste portions of Konstant's article without explaining anything in their own words they should be heavily penalised, and not awarded any marks for the material that has been plagiarised.

The question has five components, though they should not be equally weighted:

- First, the student should indicate whether or not they agree with Konstant, and provide justification for why.  
**2 mark**
- Second, the student should explain the principle of legality as a pathway to review. The student should note that the principle of legality is sourced in section 1(c) of the Constitution and the rule of law (*Fedsure; Pharmaceutical Manufacturers*)  
**2 marks**
- Next, the student should indicate whether the principle of legality has been used as a 'pragmatic tool'. Points that the student can raise is that PAJA's definition of administrative action is unwieldy (relying on *Grey's Marine*), that courts have sometimes preferred the principle of legality's flexibility (relying on *Albutt*), including with respect to procedural requirements (*Gijima*).  
**2 marks**
- Next, the student should discuss the grounds of review that were originally available under the principle of legality. These were lawfulness and rationality (*Fedsure; Pharmaceutical Manufacturers*). The student should explain how the principle of legality has become a parallel universe of administrative law, with the expansion of grounds of review.

On rationality, the student should explain that this ground was recognised early under the POL (*Pharmaceuticals Manufacturers*), and has since been expanded to incorporate other grounds of review (*DA v President; Scalabrini; Predator Breeders; JSC v Cape Bar; Albutt*).

Next, the student should note that a key development has been the expansion of the contents of the principle of legality. While the principle was previously restricted to lawfulness and rationality, the grounds of review now available under the principle have started to look much more like PAJA. As examples, procedural fairness has, depending on the circumstances, been a ground for review under the POL (*Albutt; Motau*), as has the duty to give reasons (*JSC v Cape Bar*).

**8 marks**

This is the substantive core of the question, so it is important that students engage with this aspect in order to pass the question.

- Next, the student should discuss whether there are any grounds that remain exclusively available under PAJA. Here, the student should specifically speak about reasonableness, which is a higher threshold of review than rationality. Reasonableness = rationality + proportionality. For this reason, courts are hesitant to apply reasonableness as a ground of review under the principle of legality, for separation of powers / deference reasons (*Bato Star*). The student may note, however, that the SCA has suggested that in practice, rationality and reasonableness could come down to the same thing (*Calibre*).

**4 marks**

Finally, a discretionary **2 marks** are available to be allocated, on the basis of whether the student has provided a critical, well-reasoned and structured answer with reference to relevant legal authority.

**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]**

### Answer

Here students are expected to show they understand how the procedural fairness provisions operate.

#### (1) Is s 3(1) triggered?

- Students should first consider whether 'any person' has been affected, and the answer is yes given that juristic persons/ entities such as WASA qualify (1/2 mark)
- 'Material and adversely affected' – WASA has clearly been adversely affected because they were unable to trade (but students could note that any impact seems to satisfy this requirement based on *Grey's Marine/ Joseph*) (1/2 mark)
- 'rights or legitimate expectations'-
  - Students should realise that from the facts that there may be a legitimate expectation in the form of regular practice, not an express promise (*Traub* case as applied in *Walele*) (2 marks).
  - But their constitutional right to practice their profession has also been negatively impacted (ie, taken away) because wine makers cannot trade. Based on the fact that a pre-existing right has been taken away (*Walele*), this requirement has been satisfied. It is also more than a 'mere interest' (2 marks)

Generally students should conclude that s 3(1) has been triggered and then move on to assess whether the contents of PF have been satisfied.

- (2) Now students should look at whether the mandatory requirements have been satisfied in light of what was said at s 3(2). In general students should not list all of these requirements but just look at which ones were not complied with. In general, they were not complied with at all. For example, no opportunity was given to provide representations at all was provided (eg, to argue for why a partial opposed to total ban ought to be imposed) ito s 3(2)(b)(ii) and no notice as to possible avenues for internal review or appeal (s 3(2)(b)(iv) or of the right to request reasons (s 3(2)(b)(v)) were provided.

Students should thus recognise that s 3(2)(b) was not fully complied with and argue for it (2 marks)

- (3) Then students should make an argument as to whether any of the discretionary requirements in s 3(3) ought to have been complied with. Here students should be given leeway as to how they argue. For example, they could say that this is a 'complex' case requiring that in addition to making written representations that they be allowed to make representations and in person and be represented by a qualified legal professional and also be allowed to dispute information eg, on the basis that there are legal arguments that may support only a partial domestic ban but does not prevent WASA from trading on the global market (2 marks)
- (4) Students should then look at s 3(2)(a) together with s 3(4), which states that fairness depends on the circumstances of the case and that means that the court will consider the context in which the decision was taken to determine how strictly the onerous PF requirements ought to be complied with. And specifically assess whether it is 'reasonable and justifiable' to depart from the mandatory requirements in s 3(2). In so doing the court will consider the fact that the Minister was regulating in a time of global crisis, which suggests that the requirements of PF should be less onerous or students could say that the right to practice one's profession is too important a right to justify not imposing the requirements strictly (2 marks)
- (5) Students should then reach a conclusion as to whether the decision was procedurally unfair or not and make specific reference to it being reviewable or not reviewable under s 6(2)(c) of the PAJA based on the arguments made (1 mark)

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]

#### Answer

Yes, this question concerns the statutory delay rule in s 7(1) read with s 9(1)(b) of the PAJA and impacts on whether a court will be willing to entertain the substantive merits of the review (1 mark)

**The rule follows a two-step enquiry. In general students must demonstrate that they understand each leg of the rule. The case law is not as important as showing that they understand how the rule operates in substance with reference to the relevant provisions in the PAJA.**

- (1) At step 1, s7(1) directs us to the question of delay. the question is whether a litigant has delayed unreasonably (if review proceedings are brought within 180 days) (1 mark), but if the proceedings are brought outside of the 180 day-period then the delay is presumptively unreasonable (*Buffalo City* case). In this case review proceedings were brought outside of the 180 days and is thus presumptively unreasonable. (1 mark)

Note: Students could also highlight the fact that no internal remedy seems to have provided for and also that WASA probably received notice in May 2020 but these points are not the core focus of the answer so no additional marks are provided but it could affect the overall impression of the answer.

- (2) At step 2: The court is empowered to condone the >180 day delay in terms of s 9(1)(b) of the PAJA if it is in the interests of justice. This is only where parties have not agreed to vary the time period. In general this is a context specific enquiry that is similar to the second leg of the common law rule and asks whether there are goods reasons that the delay should be overlooked in the circumstances of the case (1 mark). Conventional factors that a court will consider are: the quality of the explanation for the delay; the extent of the prejudice (eg, the fact that the wine industry could go bankrupt) and the nature of the decision (eg, implicates the right to practice ones profession). Mootness would also be a factor now given that the ban has been lifted. (1 mark)

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

[3]

### Answer

Here students are directed to assess whether the Minister's reason that a total ban was 'necessary to prevent South African hospitals from being inundated with alcohol-related injuries' meets the adequacy standard.

Students should say something about the purpose of adequate reasons being to rationalise/ explain thus to help a litigant understand how and why a decision was taken (*Phambili Fisheries, Maimela*). It also helps litigants identify a possible basis to challenge the decision (ie, based on a ground of review) (*Kiva*) (1 mark)

Core focus of the answer should be on the adequacy standard and whether the reasons given are consistent with this standard as developed by the courts. Essentially the students must provide an argument as to why the reasons given either are or are not adequate based on the factors listed in the slides (2 marks)

In general, the reasons given here do contain a statement of the decision, they also speak to the administrator's findings of facts (ie, that hospitals are being inundated with alcohol-related injuries), the reasons are clear and not ambiguous and they are informative in the sense that they rationalise the decision and state why the decision was taken.

Note students should generally be given leeway here to develop an argument but should be penalised if they confuse reasons with grounds of review. So, eg, perhaps the reasons show that the decision was unreasonable because a partial ban could have satisfied the purpose but that does not mean that the reasons are not still adequate, which on the face of it they are (- 2 marks, but marker has a discretion as to how to deduct)



(20 marks)

.../6

#### 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]

### Answer guideline

Students are required to demonstrate a basic understanding of the reasonableness ground of review as informed by the O'Regan J's *Bato Star* judgment. In general, students may wish to explain what the reasonableness ground entails; namely that it is concerned with the **justifiability** of the decision itself (rather than the means used to reach the decision, which is what is what rationality testing is about) and that it embraces an element of **proportionality**. Moreover, the unreasonableness need not be of the gross or egregious kind (which was the pre-democratic position informed by the English *Wednesbury* judgment). Rather, read in conformity with s 33 of the Constitution, the ground of review simply means that an administrative decision will be reviewable if it is one that a reasonable decision maker could not. What is reasonable depends on facts & circumstances of case.

It will also be based on a *non-exhaustive* list of factors to determine whether a decision maker reached a '*reasonable equilibrium*' between competing considerations and expertise of decision maker. Factors that help court determining whether 'reasonable' equilibrium was struck [45]:

1. Nature of decision (eg policy decisions)
2. Identity and expertise of decision-maker (eg, is decision-maker an expert or not?)
3. Range of factors relevant to decision (many factors suggest complex decision)
4. Reasons given for decision (eg, do reasons given actually support decision?)
5. Nature of competing interests involved (eg, is it a right or mere interest at stake?)
6. Decision's impact on lives & well-being of those affected (NB this factor is about proportionality)
  - Is the measure in question **suitable or effective** to achieve the desired aim? (often requires administrators balance factors such as, for instance, cost-effectiveness and efficiency)?
  - Is the measure **necessary** in sense that no lesser form of interference with the rights of a person was possible in order to achieve the desired aim?
  - Does the measure place an **excessive burden** on the affected person, which would be regarded as disproportionate in relation to the public interest at stake?

### Marking guidance:

A student will not pass (less than 5/10) if *Bato Star* and the factors that inform the reasonableness ground are not mentioned. Some marks may be given for general comments about the nature of the reasonableness enquiry.

To pass this question (**more than 5/10**) a student must identify *Bato Star* as the relevant case and at least list the six factors above and make some attempt at applying the factors to the facts of the case.

To average this question (**5.5/10-6.5/10**) a student must identify *Bato Star* as the relevant case, list the six factors above and demonstrate some understanding of the content of the factors as well as begin to apply them to the factual scenario sketched. Students who engage with the provisions of the NT instruction will tend to do better.

To do well on this question (**7/10 +**) a student must identify *Bato Star* as the relevant case, list the six factors above and demonstrate a competent to good understanding of the content of the factors and be able to apply them to the factual scenario sketched. Students who engage with the provisions of the NT instruction will tend to do better.

In general, in applying the above factors to the factual scenario, not all need to be engaged in depth. The most important is (6) which is about impact/proportionality of procuring a more expensive solution from a foreign supplier when a more cost effective product is available from a local supplier. Students should also be able to engage (1), namely that this is not a policy decision that courts need to defer to the decision maker nor are issues of specialist expertise in issue (2), which would also require a court to be deferent. Factor (3) is also not in issue as there are fairly circumscribed guidelines for awarding cloth masks (rather than a complicated weighing of disparate considerations which requires a value judgement to be made).

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]**

### **Answer**

Many grounds in s 6(2) could be triggered, markers have a discretion based on the quality of a student's arguments and engagement with case law. Some possible grounds of review are:

- Mistake of law in s 6(2)(d): basically a misunderstanding of clause 4.8 as to what qualifies as a 'justifiable reason' for procuring masks more than 10% the set rate. Students must argue that this was 'material' to outcome (*Hira v Booysen*; *JMM CC* case) – most important ground.
- For an unauthorised reason s 6(2)(e)(i)
- Relevant/ irrelevant considerations s 6(2)(e)(iii)

Marking guidance:

In answering this question students must identify two grounds of review and explain why they are applicable by demonstrating an understanding of the nature of that ground of review (3 marks – 1.5 for each ground)

Student must then apply that ground of review to the facts of the case (2 marks – 1 for each ground)

- 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]

### Answer

The ordinary approach is that a court must first make a declaration as to the unlawfulness of the contract (stage 1) and this is ordinary followed by stage 2 setting aside --'corrective principle' set out in the *AllPay 2* judgment. Setting aside is usually coupled with an order of remittal to the original decision maker to revisit the decision.

### Marking guidance

Student must mention the two stage approach and show they understand each (1 marks) and if they mention *AllPay 1* and *AllPay 2* (1 mark)

Students must explain the corrective principle (2 marks)

Students must mention *AllPay 2* as being the authoritative source of the corrective principle (1 mark)

- 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]

### Answer

Courts may depart from the ordinary approach where there are good reasons, whether principled or practical (1 mark). Relevant cases are *AllPay 2*, *Millennium Waste Sapela*, *Eskom* which are authority for this proposition. (1 mark)

Here students could highlight the fact that there are not any practical considerations that prevent a court from setting aside the contracts. There will be no disruption to an important public service (*AllPay 2*, *Millennium*), the contract has not been implemented (*Sapela*) but can practically be set aside (*Eskom*). Also the courts tend to set aside where there is suspected malfeasance (inappropriate relationship between Minister and CEO of PSI). A court would likely set it aside and remit (3 marks) – marker has a discretion based on the quality of the arguments but in general students need to engage with whether there are any practical (including public interest) concerns that justify departing from the corrective principle.

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]

### Answer

Students must engage the test for exceptional circumstances laid down in the *Trencon* judgment of the constitutional court.

A student will not pass this question (less than 5/10) if they do not mention *Trencon* and the factors the CC relied on in that case.

To pass this question (5/10) a student must rely on *Trencon* and mention the factors.

To average this question (5.5/10-6.5/10), a student must rely on *Trencon* and demonstrate a basic understanding of the court's construction of the test and the factors.

To do well on this question (7/10+) a student must rely on *Trencon* and demonstrate a competent to good understanding of the court's construction of the test and the factors.

In general, a student who grasps the fact that courts should generally not do the work of government and are not in as good a position as decision makers to determine the needs of institution (factor (1)) as well as the fact that there are probably multiple other suppliers like MCS in the market, meaning that giving the contract to MCS is not a foregone conclusion (factor (2)) would do better. Bias may be an issue but given that factors (1) and (2) are considered before bias, substitution is unlikely to follow. Note, urgency is not a factor to consider in the test.

(35 marks)

**TOTAL: 80**