

ADMINISTRATIVE LAW ADL41B0/ADR0021

SEMESTER TEST SEPTEMBER 2020 MEMO

QUESTION 1: TOPIC 1

[10]

1.1) TRUE

AllPay 2 – even in a contractual setting, CPS (private company) found to be performing a public function i.e., country-wide administration of payment of social grants to millions of vulnerable grant beneficiaries on behalf of SASSA (state organ) OR

AMCU – contract between Trade Union and Mining Companies (two non-state actors), decision to conclude & extend **collective bargaining agreement** in terms of s 21(3)(d) of Labour Relations Act was an exercise of public power OR

AAA Investments – Micro Finance Regulatory Council incorporated in terms of Companies Act (private entity) in the context of developing rules to regulate the micro-lending industry perform public functions

Other possibilities:

- *Ndoro v SA Football Association* (private association regulating football found to exercise public power)
- *Dawnlaan Beleggings* – decisions of JSE found to be public power, even when functionary private

Note: although some judgments (*Chirwa*, *Logbro*, *Cape Metro* for example) set out some of the considerations relevant to determining whether the nature of the power is public or private, in those judgments the functionaries in question were public (2)

1.2) FALSE

AllPay 2- where the Constitutional Court found that the power of a private company to administer social grants derived from three sources: the South African Social Assistance Agency Act, 2004, s 27 of the Constitution which regulates the right to social assistance as well as the contract between the private company.

Students may also draw on the definition of empowering provision in PAJA itself, on contract/admin nexus cases (as in *Logbro*), or on cases on the constitution of a voluntary organisation (as in *Ndoro*) (2)

1.3) FALSE

Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) where the Appellate Division found that a private club was bound by the requirements of procedural fairness in respect of disciplinary proceedings.

They may also cite *Ndoro. Van Zyl v National Party; Max v Independent Democrats* (2)

1.4) TRUE

Omar & Others v Minister of Law and Order & Others; Fani & Others v Minister of Law and Order & Others; State President & Others v Bill 1987 (3) SA 859 (A) (*Omar*) OR

Staatspresident v United Democratic Front 1988 (4) SA 830 (A) (*United Democratic Front*)

In these cases the court found that the relevant ouster clauses effectively prevented review of emergency regulations where the challenge was based on the ground of vagueness.

(2)

1.5) TRUE

International Trade Administration Commission v SCAW South Africa (Pty) LTD OR

First Certification judgment – here the court emphasized the importance of judicial deference as part of the doctrine of the separation of powers. (2)

QUESTION 2: TOPIC 2

[15]

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.

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

2.1) First, the student should define the doctrine of subsidiarity as the principle that the more detailed or specific norm must first be relied on and exhausted, before the more general norm is resorted to. As authority for this, a student may cite *My Vote Counts*. 2 marks

2.2) Next, the student should note that the doctrine of subsidiarity is relevant to administrative law, in that the provisions of PAJA constitute the more detailed or specific norms, and the more abstract norms are the right in section 33 and the principle of legality. As authority for this, a student may cite *New Clicks*. 2 marks

2.3) Next, students should discuss how courts have approached the doctrine. Students should bring a critical analysis to this, and must indicate yes or no to whether the approach has been consistent.

The approach has not been consistent. Some judgments emphasize that PAJA codifies the field, and thus that its provisions cannot be avoided (see, for example, *New Clicks* and *Motau*, which sets out that the order of the enquiry is first to determine whether the decision constitutes AA under PAJA, and only if it does not then to resort to the principle of legality). In practice, courts frequently avoid applying PAJA. This is most clearly demonstrated in the *Albutt* judgment, where the CC declined to determine whether PAJA applied and instead went straight to the principle of legality as the review pathway. This has the effect of inconsistent, patchy application of the doctrine of subsidiarity. 5 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)

2.4) Next, students must consider why courts may favour the principle of legality over PAJA. Students should note that the overly complicated definitional components of AA mean that courts sometimes prefer not to engage with the threshold requirements (and could cite *Grey's Marine* as authority for the definition being overly complex). Students can also make the point that the principle of legality is general and flexible, and does not impose as stringent procedural requirements (as in *Gijima*).

[Note: one of my slides in Topic 2 Part 3 sets this out. Students should not simply list the wording of the slide word for word, but should explain and critically discuss. 4 marks]

2.5) Students should consider whether this promotes the avoidance of PAJA by indicating yes or no, and providing a reason for why this is the case. 1 mark

Finally, a discretionary 1 mark is 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: TOPIC 3

[25]

3.1) No, the delegation may still be permissible. In terms of the common law principle of *delegatus delegare non potest* delegation was (strictly speaking) not allowed (the function had to be performed by the organ to whom the power was allocated). In terms of the Constitution, there is now a general authorization to delegate power, as long as the

delegation is consistent with the empowering provision. Therefore, express authorizations of delegation and implied authorization of delegation (which is consistent with the empowering provision) are permissible. (3)

3.2) The courts have recognised that delegation is a necessary reality given the growing complexity of the task of governance in the world today and that, at times, an implied power to delegate should be recognised for the effective administration of governance in the country.

It would be possible to review the Minister's delegation on the grounds of lawfulness. In this case it should be investigated whether an implied authorization to delegate may be inferred and if such delegation is consistent with the legislation in terms of which the power is exercised.

In order to determine whether there is implied authorisation to delegate, students should *apply the factors* that have been developed to ascertain whether or not an **implied power to delegate** can be said to exist:

1. **The complexity and breadth of the discretionary power** – are we dealing with a power that is 'mechanical' opposed to one that is highly discretionary? Mechanical powers involve little or no discretion and are thus more easily delegated.

2. **Extent of power being transferred** – has the original decision-maker retained a level of control or supervision over how the power is exercised? In other words, are we dealing with a partial transfer of power (opposed to a total transfer) or have sufficient guidelines been provided as to how the power ought to be exercised? Partially transferred/ more circumscribed powers are more susceptible to delegation.

3. **Importance of the original decision-maker** – has the decision-maker been chosen for their special abilities/qualifications or is the power capable of being exercised by a person or entity without special skills? Non-specialist powers are more amenable to delegation.

4. **Practical necessity** – is it practically feasible for a particular administrator to exercise the power personally or is it the kind of task that, for practical reasons, requires delegation to another official/body to ensure the effective discharge of the power? The latter instance points against delegation.

5. **Impact of the power on the public** – does the exercise of the particular power impact on eg, an individual opposed to the public at large? A significant public impact points against delegation.

6. **Existence of an express delegation clause** – is there a clause empowering an administrator to delegate a power or an aspect of that power to a *particular* official or body, which suggests that delegation to another body/official would not be appropriate.

The application of these factors may be seen in the **New Clicks** judgment.

The case dealt with the validity of regulations made to govern the pricing of medicines. The Minister of Health was empowered by the Medicines Act, 1965 to make the regulations based on the recommendations of a pricing committee. In addition, and with the assistance of the pricing committee, the Minister was also responsible for determining a methodology for conforming to international pricing benchmarks. This methodology was a crucial component of the entire pricing system, as it would ultimately determine the 'single exit price' of every medicine sold to the public on the open market.

The Minister decided to delegate to her Director-General (DG) the power to determine the methodology, and she made a regulation (Reg 5(2)(e)) to this effect. Objection was taken to the above regulation on the ground that it unlawfully delegated a power to the DG, which was not authorised by the Medicines Act (ie, the empowering provision). The Constitutional Court struck down the regulation as an instance of unlawful delegation. It reasoned that the power involved a **broad subjective discretion** (factor (1) above) and that there were **no clear objective criteria** to guide the establishing the methodology, which was a crucial part of the pricing system (factor (2) above).

The DG would thus have to decide for himself questions such as: the relevance of various influences on price; which medicines were equivalent for the purposes of benchmarking; and what countries to use for the purpose of benchmarking. Furthermore, determining the methodology was pre-eminently a task for the Minister herself and the pricing committee, which had been appointed because of its special expertise and that '[p]olicy considerations require the Minister's involvement as well. They must determine the pricing system themselves, and not delegate this function to the Director-General' (factor (3) above). The Minister, however, went even further by deciding to delegate to herself *alone* the power to review the single exit price from time to time, contrary to what was said in the empowering statute. This, too, was found to be unlawful. The court reasoned that the legislature had vested the power jointly in the Minister and the pricing committee, and that there was 'no practical necessity' for this change (factor (4) above).

Finally the fact that the methodology would ultimately determine the single exit price of every medicine or Scheduled substance sold in the country clearly has a significant public impact (factor (5) above).

In this scenario:

- 1) The power (to issue passports and travel docs) is rather of a mechanical nature – which would point to implied authorisation to delegate.
- 2) There would be guidelines as to the circumstances where passports should be granted (therefore circumscribed power) – which points to implied authorisation.
- 3) It does not seem very important that the Minister should exercise all the powers himself.
- 4) It is also not practical to expect that the Minister should personally consider all passport applications himself.

5) The powers have a more individual impact as it only has an impact on those individuals who apply for travel documents and passports – which points to implied authorisation to delegate.

Conclusion: when considering all the factors, it would seem that there is an implied authorisation to delegate and the delegation in this instance is consistent with the legislation.

[10]

3.3) a) Section 6(2)(a)(i) of PAJA “the authorised administrator must act”, since the regulation must be made “in consultation with” which means that the decision must be made together (which implies that the Minister of Home Affairs cannot act alone in this regard) and section 6(2)(b) of PAJA “mandatory and material procedure or condition prescribed by an empowering provision was not complied with”. (2)

b) Section 6(2)(e)(iv) of PAJA “decisions must be made by the administrator him or herself and must not follow the prescripts of another”. (1)

[3]

3.4) a) s 6(2)(e)(v) of PAJA “the decision must not be made in bad faith” – this may refer to fraud, dishonesty or corruption. (1)

b) s 6(2)(e)(i) action taken ‘for a reason not authorised by the empowering provision’ and s 6(2)(i) action that is ‘otherwise unconstitutional or unlawful’. (2)

c) 3 reasons to recognise bad faith a separate ground of review:

1. Remedies (damages and substitution) – may, for instance, affect the amount of damages that could be awarded if the official acted in bad faith.
2. Fairness to administrator if acted mistakenly
3. Policy reasons – Constitution and principles of transparency and accountability require that public power is exercised ‘conscionably’ and in ‘good faith’. (3)

[6]

3.5) S 6(2)(e)(ii) of PAJA: decision is reviewable if ‘action was taken for an ulterior purpose or motive’. Earlier cases didn’t distinguish but Hoexter says ‘purpose’ is objective - ‘motive’ more subjective (and difficult to prove), even sinister. But still distinguishable from ‘bad faith’.

Specific purpose sometimes clear from EP but often courts have to uncover the purpose through process of interpretation (***Gambling Board case***)

Gambling Board case: MEC had the power to remove the board in terms of legislation, but exercised this power because the Gambling Board refused to make available office space in their building for another (private) company. This is therefore not a purpose which is authorised (or consistent) with the purpose of the legislation. (3)

TOTAL: 50