THE JUDICIAL INTERPRETATION OF ADMINISTRATIVE JUSTICE WITH SPECIFIC REFERENCE TO

ROMAN v WILLIAMS 1997(2) SACR 754(C)

by

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SUMMARY

This study evaluates the court's approach towards the interpretation of administrative justice with specific reference to *Roman v Williams* 1997(2) SACR 754(C). Section 33 of the Constitution Act 108 of 1996 guarantees the right to administration justice. The elements of this right are lawfulness, reasonableness and procedurally fairness.

Our courts are bound constitutionally to promote, develop, advance and protect the fundamental rights. This study provides the most effective approach towards the development of the fundamental right in our democratic society where the Bill of Rights binds legislature, executive and judiciary.

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1 INTRODUCTION

The facts in the case of *Roman v Williams*[1] are as follows: the applicant had been placed under correctional supervision by the Commissioner of Prisons (respondent) after having served one year of a five year sentence. He was summoned to the respondent's office to attend the hearing of a complaint received from the correctional officer, who had recorded number of breaches of correctional supervisions. The respondent issued a warrant for the arrest and detention of the applicant. The applicant applied for a review of the Commissioner's decision on the basis that it was unconstitutional and that his arrest and re-imprisonment ought to be declared unlawful. The respondent in turn, submitted that his decision was justifiable in accordance with the constitutional requirements.

In this dissertation the constitutional right to administrative justice will be discussed with reference to the case law, academic writers and more particularly the decision in *Roman v Williams*. The right to administrative justice is laid down in section 33 of the Constitution of the Republic of South Africa Act 108 of 1996. It reads as follows:

> 33 (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted to give effect to these rights, and must -
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsection (1) and (2) and
>
> (c) promote an efficient administration.

National legislation has been promulgated in the form of the Promotion of Administrative Justice Act 3 of 2000. However, this Act has not yet come into operation and the question is whether the administrative justice clause of the interim Constitution applies or whether the administrative justice clause of the 1996 Constitution[2] applies.

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1 1997 (2) SACR 754 (C)

2 Constitution of the Republic of South Africa

I submit that the 1996 Constitution applies since the legislation has been enacted within the stipulated period of three years as required by section 23(2) of Schedule 6 of the 1996 Constitution. The effect, therefore, is that the administrative justice clause of the interim Constitution no longer applies, and that the relevant clause is that contained in section 33 of the 1996 Constitution.

2 THE DEFINITION OF "ADMINISTRATIVE ACTION"

There is no definition of "administrative action" in either the interim or 1996 Constitutions. In a country such as Germany, administrative action is statutorily defined. Section 35 of the *Verwaltungsverfahrensgesetz* of 1976 defines administrative action as an order, decision or other sovereign measure taken by an authority for the regulation of a particular case in the sphere of public law and directed at immediate external legal consequences. In essence, administrative action must be directed at a particular consequence, the action must also be directed at the general public or be performed in public interest.

In *Goodman v Transnet*[3], the court found that the awarding of a tender by the respondent (Transnet) amounted to the management of Transnet's affairs, and that the process by which a tender is considered must of necessity be classified as an administrative act. The process, and the consideration and award of the tender thus constitutes administrative action.

Traditionally administrative action has been classified into three categories, namely, legislative, judicial and administrative acts. Legislative acts include the power to create, vary or terminate rules of general application. Administrative acts involve the implementation of legislation. A judicial act relates to the judicial function of administrative tribunals, such as the Film and Publications Review Board, created in terms of the Films and Publication Act 65 of 1996.

In *Bushbuck Ridge Border Committee v Government of Northern Province*[4] the court followed the decision in *Fedsure Life Assurance v Greater Johannesburg Transitional*

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3 1998(4) SA 989 (WLD) at 996 C-F
4 1999(2) BCLR 193(T) at 199 H

Metropolitan Council[5], the court held that the promise made to incorporate Bosbokrand into Mpumalanga by government officials was not made in terms of any statute, law or regulation. The court held that the promise was made by a political party and that a political party does not exercise administrative action.

In *President of the RSA v SARFU*[6], the Constitutional Court discusses the concept "administrative action" in detail. The test for determining whether conduct constitutes "administrative action" is not whether the action is performed by a member of the executive arm of government. The focus in determining the matter in each case is the function, rather that the functionary. The question is whether the task itself is administrative or not. In this case the court said that the administration is that part of government which is primarily concerned with the implementation of legislation.

In general the implementation of legislation is an administrative function, while the formulation of policy is not. The court conceded that the borderline between the two fields might be difficult to determine. What constitutes administrative action should be done on a case-by-case basis in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration.

According to the Constitutional Court the functions of the President and the Premier of a Province in assenting to bills and referring bills back to the appropriate bodies, or referring a bill to the Constitutional Court to test its constitutionality, do not constitute administrative action. Also excluded are: appointments made by the President under the Constitution or other legislation, (unless he is acting as head of the national executive); appointing commissions of inquiry; calling a national referendum, receiving and recognising foreign diplomatic and consular representatives; appointing ambassadors, pardoning offenders and conferring honours.

The Promotion of Administrative Justice Act 3 of 2000 has included a definition of

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5 1998(12) BCLR 1458 (CC)
6 1999(10) BCLR 1059 (CC) at 1119 D-E, 1122 B-I

administrative action[7]. In essence the Act follows the findings of the court in *President v SARFU* case.

3 THE ADMINISTRATIVE JUSTICE CLAUSE

It has already been said that section 33 of the 1996 Constitution is the relevant administrative justice clause, which applies to any administrative act. This means that every administrative act must be lawful, procedurally fair and reasonable. In *Roman v Williams*[8], the court regarded section 33 as the new constitutional test, which must be objectively determined.

It should be pointed out that the achievement of administrative justice is supported by a number of state institutions supporting democracy. These include a Human Rights Commission, a Commission on Gender Equality, a Public Protector, the Auditor-General and an Electoral Commission. These bodies assist and support the individual in the enjoyment and protection of his/her individual rights. The courts are the most important body controlling administrative action, since they perform a "watchdog function" in protecting individual rights.

Section 1(a) of the Constitution - the founding provision - states that the Republic of South Africa is one sovereign democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms. Section 7(1) and (2) provides that the Bill of Rights is the cornerstone of democracy in South Africa - it enshrines the rights of all people and affirms these democratic values of human dignity, equality and freedom.

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7 In terms of section 1 of the Administrative Justice Act 3 of 2000, "administrative action" means any decision or any failure to take a decision, by
- a) an organ of state, when
  - i) exercising the power in terms of Constitutional or a provincial constitution; or
  - ii) exercising a public power or performing a public function in terms of any legislation; or
- b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include –
  - i) the executive power or function of the National Executive
  - ii) the executive powers of functions of the Provincial Executive
  - iii) the executive powers or functions of a municipal council
  - iv) the legislative function of Parliament, a provincial legislature or a municipal council
  - v) the judicial functions of a judicial officer of a court and judicial functions of a traditional leader under customary law or any other law
  - vi) a decision to institute or continue a prosecution
  - vii) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission
  - viii) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act of 2000
  - ix) any decision taken, or failure to take a decision in terms of section 4(1) of the Act

The administrative justice clause, section 195 and the principles of co-operative governance laid down in Chapter 3 of the Constitution, provide the framework within which government officials and organs of state must perform their administrative functions. Further, section 195 of the Constitution lays down basic values and principles, which govern the public administration. These include a high standard of professional ethics, impartiality, and equitability, without bias and accountability.

It should be pointed out that section 39(1) also promotes administrative justice rights. This section provides that in interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on humanity, equality and freedom. The Bill of Rights recognises the existence of any other fundamental rights or freedoms that are conferred by common law, customary law or legislation to the extent that they are consistent with the Bill.

All constitutional provisions referred to above, serve to endorse the commitment to the achievement of administrative justice, for it is only in a state where administrative justice applies that these democratic values are properly upheld. The attraction of an administrative justice clause is that all members of the state (organs of state) are required to comply with its principles prior to the making of a decision, thereby setting the parameters within which official functions are performed.

Let us examine the specific subsections of the administrative justice clause, with particular emphasis on procedural fairness.

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8 Fn 1 at 765

3.1 *Lawfulness*

Administrative action must comply with the provisions of the Constitution, particularly, the administrative justice clause. It is submitted that South Africa is a state based on law. In the apartheid era, Parliament was the supreme legislative authority. Laws were passed that excluded judicial scrutiny of the violation of fundamental rights by the government. It is submitted that the term "lawfulness" means that the administrative action must comply with the Constitution, the Administrative Justice Act, enabling legislation and the common law. According to Burns[9] "lawfulness" thus becomes an umbrella concept encompassing all the requirements for valid administrative action. In order for an administrative act to be lawful, it must, therefore, comply with the following.

(a) The 1996 Constitution

Administrative action must comply with the provisions of section 33 of the Constitution[10]. The Constitution is the supreme law and all administrative organs and bodies are constitutionally bound to comply with the principles of administrative justice, namely, lawfulness, procedural fairness and reasonableness. The failure to do so will result in the invalidity of the action in question.

As it has been said, section 33 is the constitutional test. In *Roman v Williams*[11], the court held that judicial review no longer has an independent existence apart from the constitutional review. The court further held that it needs only concern itself with the constitutional test of legality as laid down in section 33.

(b) The Administrative Justice Act

The administrative action must also be in compliance with the recently promulgated Promotion of Administrative Justice Act, once this Act has come into operation. This Act ensures that

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9 Burns Y: *Administrative Law under the 1996 Constitution* (1998) at 138
10 See Introduction
11 Fn 1 at 764

administrative action is valid by setting out the grounds for a valid administrative act (section 6). In essence, this Act includes all the common law requirements for valid administrative act by setting the standards and parameters within which the state administration must perform its duties.

(c) Enabling legislation

Enabling legislation defines the nature, content and powers of administrative action. It defines the parameters within which a specific administrative organ must function. It also stipulates procedures to be followed any specific qualifications necessary to perform any administrative action. Any statute passed regulating administrative action must comply with the Administrative Justice Act when it comes into operation.

In *Roman v Williams,* section 84B of the Correctional Services Act 8 of 1959 for example defines the functions and powers of administrative organ. Section 84B (1) reads: If the Commissioner is satisfied that a probationer has failed to comply with any condition to which he is subject in relation to correctional supervision either by agreement or as may be determined by the court of the Commissioner, he may issue a warrant for the arrest of such a probationer, which may be executed by any peace officer as defined in section 1 of the Criminal Procedure Act 51 of 1977, and which shall serve as authorisation for the detention of such a probationer in a prison until he –

is lawfully discharged or released therefrom;
is placed under correctional supervision by the Commissioner in his discretion.

(d) Common law

The Constitution does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill.

When determining whether administrative justice has been complied with the courts will also examine the common law. The common law therefore gives meaning to the content of the term "administrative justice".

Common law requirements include the requirement relating to the author of the act. The form of administrative action, the purpose of the administrative action and the requirement relating

to *bona fides*. Most of these requirements are stipulated in the enabling statutes. The statute often sets out the powers and function, the limitations, as well as requirements relating to the specific qualifications of the author of the administrative action.

In *Roman v Williams,* the court held that common law review grounds are inapplicable to the case as it needs to concern itself with constitutional test of legality. Van Deventer J, said that the constitutional test overrides the common law review grounds[12]. It is therefore, submitted that common law review grounds are subsumed under the Constitution. Common law derives its enforcement from the Constitution. In other words, common law is subject to the control of the Constitution.

The approach in *Roman v Williams* is in accordance with the decision in *Pharmaceutical Manufactures of SA: In re: Ex parte Application of RSA*[13]. In this case the Constitutional Court found that common and constitutional law grounds of review are not two separate systems of law. There is only one law shaped by the Constitution and all law including common law is subject to constitutional control.

3.2 *Procedural fairness*

In *Ramburan v Minister of Housing (House of Delegates)*[14], the applicant was not afforded an opportunity to defend himself before the administrative decision was taken. The court found that the denial of a fair procedure is a fatal irregularity, which invalidates the administrative action.

There are different school of thought concerning the content of the constitutional right to procedural fairness. Burns, submits that this constitutional right is strictly speaking confined to procedure rather than substantive fairness. Substantive fairness is included in the form of the justifiability and reasonableness of the administrative action[15].

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12 *Ibid at 264B*
13 2000(3) BCLR 241(CC) at 260 F-G
14 1995(1) SA 353 (WLD) at 364
15 Fn 9 at 167

In *Administrator, Transvaal v Traub*[16], Corbet CJ following *Ridge v Baldwin*(1964) AC 40 said that the duty to act fairly is simply another, and preferable way of saying that the decision-maker must observe the principle of natural justice. The court in *Maharaj v Chairman, Liquor Board*[17], held that procedurally fair administrative action is more than just the application of the *audi alteram partem and nemo iudex in sua causa* rules. It involves the principles and procedures which are right, and which must be fair in the particular circumstances.

It is submitted therefore that procedural fairness should be given an extensive meaning to include substantive procedure. In *Roman v Williams*, the court held that the role of the court in judicial review is no longer limited to the way in which administrative decision is reached. It extends to the substance and merits of the decision[18]. Principles which are right, just and fair are based on the substance of the administrative action. Aronson and Franklin[19] state that in England "fairness" is increasingly being used in a substantive sense as a description of the abuse of discretion. They also submit that procedural fairness may serve other purposes as well as opening the process of government broadening public participation in decision-making to the extent that the disclosure of material and giving of reasons is required.

The Constitutional Court in *President of RSA v SARFU*[20], held that the requirement of procedural fairness is not necessarily relevant to every exercise or public power. The court further held that there is no authority for the proposition that whenever prejudice may be anticipated, a functionary exercising public power must give a hearing to the person likely to be affected by the decision.

Procedural fairness depends on the circumstances of each case[21]. In *Dladla v Administrator,*

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16 1989 (4) SA 731 (A) at 758 G

17 1997(1) SA 273 (NPD) at 277

18 Fn 1 at 767H

19 *Review of Administrative Action* (1997) at 108

20 Fn 6 at 1149 F-G

21 In the English case; *Doody v Secretary of State for Home Department* (1993) All ER 92 (HL) at 106 d-h
Lord Mustill stated the following, "What does fairness require in the present day? My lord I think it is unnecessary to refer by name or to quote from any of the often-cited authorities in which the court has explained what is essentially intuitive judgement. They are far too well known. From them I derive the following:

(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.

(2) The standards of fairness are not immutable. They may change with the passage of time both in general and in application to decisions of a particular type.

(3) The principles of fairness are not to be applied identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all aspects

Natal[22] applicants were denied legal representation at disciplinary inquiries held as a result of their participation in a stay-away. The court held that the disadvantage from which they suffered on that score was aggravated by differences of race, culture, language and background that distanced them from officials, impairing the prospects of shared insights and mutual understanding. Further, the refusal to allow them legal representation was vitiated by the failure of those responsible for the decision to exercise proper discretion in reaching it. Their need for legal representation to defend them was strong in all circumstances.

Since the content of procedural fairness is determined in accordance with but not limited to the principles of common law. We should examine the common law principles of natural justice.

(i) Audi alteram partem rule

This rule connotes the opportunity to be heard and that the affected party must be informed of considerations which have been made against him. In *Administrator, Transvaal v Theletsane*[23], Henochsberg J held, What the *audi* rule calls for is a fair hearing. Fairness is often an elusive concept; to determine its existence within a given set of circumstances is not always an easy task. No specific encompassing test can be laid down for determining whether a hearing is fair, everything will depend upon the circumstance of the particular case. There are at least two fundamental requirements that need to be satisfied before a hearing can be said to be fair, there must be notice of the contemplated action and proper opportunity to be heard.

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(4) An essential feature of the context is the statute which creates the system within the decision taken.
(5) Fairness will very often require that a person who may adversely be affected by the decision will have an opportunity to make representations on his own behalf either before the decision will have an opportunity to make favourable results or after it is taken, with view to procuring its modification or both.
(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weight against his interests fairness will very often require that he is informed of the gift of the case which he has to answer.

22 (1995) 16 ILJ 1418 (H), 1423 F
23 1991 (2) SA 192(A) at 206 C

(ii) Opportunity to be heard

Opportunity to be heard means that affected person must be given an opportunity to present his case. In *R v University of Cambridge*[24] Lord Fortescue said that, the laws of God and man both give the party the opportunity to make his defence, if he has any. He held that even God himself did not pass sentence upon Adam and Eve before they were called upon to make their defence. It is therefore submitted that the person affected must be consulted and be heard.

In *Arepee Industries v Commissioner for Inland Revenue*[25], Galgut J held, that according to the *audi alteram partem* rule, a party to an administrative proceeding which may lead to action, or decision affecting his rights, is entitled to present his case. He held that it provides that before such a interference the official or body concerned must, as the Latin words indicate, hear his side of the matter. The court held that the reason for such an entitlement is that without being informed, a person will not know what it is that might be held against him.

In *Director Mineral Development, Gauteng Region v Save the Vaal Environment*[26] the court examined the provision that required the director to enquire into the nature of the terrain which would be violated by relevant mining operations. The court found that the effect of such violation and the law in which the terrain could and should be rehabilitated, would have to take into account the likelihood of damage. This creates legitimate concerns, and the director would therefore have to give the affected person an opportunity to be heard at that stage, unless there are provisions which require them to defer raising the environmental concern to a later stage.

Opportunity to be heard also requires that an affected person be given adequate notice of impending administrative action. In *Cekeshe v Premier, Eastern Cape*[27], the court held that generally the principle of natural justice requires that persons likely to be affected by administrative decisions, acts, proceedings be given adequate notice of what is proposed so

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24 1 Str 557, 93 Eng. Rep. 689 (K.B) 1723
25 1993 (2) SA 216 (NDP) at 220 F-1
26 1999 (8) BCLR 845 (SCA) at 851 J-852 A-B
27 1998 (4) SA 935 (Tk) at 962B

that they may be in a position to make representations on their behalf should they so wish.

The court in *Ansell v Wells*[28] held that each party must be told the substance of anything adverse to him and that the case being advanced by the other party. In *Nisec v Western Cape Provincial Tender Board*[29], the court held that a right to a hearing includes the provision of such information that which would render the hearing meaningful. In other words, the aggrieved party must be given an opportunity to know all the ramifications of the case against him and be provided with the opportunity to meet such a case.

Fair notice is an important part of procedural fairness. Jones de Villars[30] states that it is impossible to give a fair hearing to a person who has no notice whatever of the action which a statutory delegate proposes to take. It is therefore submitted that the reason behind the notice is that a person cannot properly prepare his case without knowing what to expect.

An aggrieved party must also be informed of his right to legal representation when there are difficult legal issues. In *Pete v Greyhound Racing Association*[31], Lord Denning said that it is not every man who has the ability to defend himself on his own, he cannot bring the points in his own favour or the weakness in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. The court held that if justice is to be done, he ought to have help of a counsel or solicitor.

(iii) Nemo iudex in sua causa

In terms of this rule an administrative organ must be free from bias and prejudice. This stems out of the maxim justice must not only be done, it must also be seen to be done. In *Liebenberg v Brakpan Liquor Licensing Board*[32] the mayor of the town involved himself by being present when an applications for liquor licence was heard. His brother was one of the applicants and his application was approved. The court found that the mayor's relationship

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28 (1982) 43 A.L.R. 41 at 62
29 1997 (3) BCLR 367 (C), at 371 H
30 *Principles of Administrative Law* (1994) at 247
31 (1969) 1 Q.B. 125 at 132
32 1944 WLD 52

had lead to bias and the decision was set aside.

The accusation of bias must be substantiated. In *Roman v Williams*, the court held that the applicant's counsel considered that there were no factual grounds on which the accusation of bias could be justified[33].

3.3 *Justifiability/reasonableness*

In terms of section 33 of the 1996 Constitution all administrative action must be reasonable. However, no reference is made to the requirement of justifiability. It is submitted that justifiability still plays a part in determining whether an administrative action is valid or not.

Cachalia *et al*[34] state that administrative justifiability requires a decision to be rational, coherent and capable of being reasonably sustained having due regard to the reasons for the administrative decision. Davis *et al*[35] concurred. They state that justifiable administrative action entails rationality between the decision itself and the reasons given.

De Ville[36] says that the word "justifiable" is open ended and the recognition of the right to a justifiable action suggests an intention to create and entrench a new requirement of legality. He submits that only administrative action that is suitable and necessary to achieve the statutory purpose and the proportional harm to an individual can be said to be justifiable.

Burns[37], summarises justifiable administrative action as requiring that a decision be rational, and based on logic and sound reason. The reasons advanced for the action must show that the action is adequately just or right, it must comply with the limitation clause of the constitution, and lastly that the principle of proportionality, in the sense of reasonable, fair and good administrative behaviour be applied.

Our courts have played an important role in the interpretation of the term "justifiability". In

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33 Fn 1 at 770
34 *Fundamental Rights in the New Constitution* (1994) at 74
35 *Fundamental Rights in the Constitution: Commentary and Cases*, (1997) at 161
36 "Proportionality as a Requirement of Legality in Administrative law in terms of the New Constitution" (1994) 9 *SAPR/L*, at 365.
37 Fn 8 at 195

Carephone v Marcus[38], the court referred to the New Shorter Oxford Dictionary, holding that according to the dictionary meaning, "justifiable" means "able to be legally or morally defined, able to be shown to be just, reasonable'. The court thus held that section 24(d) of the Interim Constitution 200 of 1993 introduced a requirement of rationality in the outcome of the administrative decision.

In *Kotze v Minister of Health*[39], the court also made reference to the Shorter Oxford English Dictionary. It held that "justifiable" means capable of being justified or shown to be just, and that which can be defended. The court held that section 24(d) requires that the reasons advanced must show that the action is adequately just or right based on the accurate application of the law and findings.

It is submitted that administrative justifiability should be objectively determined. The court must assess the surrounding facts and circumstances and consider the relevant facts. In *Roman v Williams*, the court held that in order to prove justifiability an administrative action must be objectively tested against the requirements of suitability, necessity, and proportionality. They involve the test of reasonableness. The court further held that the constitutional test embodies the requirement of proportionality between the means and end[40].

In *Mbelu v MEC for Health and Welfare, Eastern Cape*[41], nurses were dismissed for engaging in industrial action strike. They were prohibited to strike in terms of section 19 of the Public Service Labour Relation Act 105 of 1994, despite the constitutional right to strike. The court found that the prohibition on striking, (in terms of section 19) was a reasonable and justifiable limitation. The Court held that the nursing profession constitutes an essential service. It is a vulnerable profession and the withholding of service could endanger lives.

The same principles were applied in *Dabelstein v Hilderbrandt*[42]. In this case the court had to determine the justifiability of the Anton Piller order. Farlam J held that the power to grant

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38 1998 (10) BCLR 1326 (LAC), at 1336 F
39 1996(3) BCLR 497 (T), 425
40 Fn 1, at 767 G-H
41 1997 (2) SA 823 (Tk), 835 E-H
42 1996(3) SA 42 (CPD) 65E, 166 C-D

such an order in appropriate cases is necessary in our society, provided orders granted pursuant to such power contain adequate safeguards. He further held that the requirement of proportionality must also be satisfied, even if the interests to be balanced by the court in applying the requirement of proportionality include those of dignity, property and so on.

It is submitted that justifiable administrative action refers to good, proper and suitable administrative action. There must be a reasonable explanation between the means and ends of the administrative action. This means that there must be a reasonable connection between the administrative action and the reasons given for such an action.

Some writers equate justifiability and reasonableness. According to Basson[43] the right to administrative action which is "justifiable" in relation to the reasons given and the right to "reasonable" administrative action should be given the same meaning. Basson's submission is confirmed by the decision of the court: In the dictionary meaning referred to in *Carephone* case, "justifiable" means "able to be shown to be reasonable".

The court in *Afrisum Mpumalanga v Kunene*[44] also held per Southwood J, that section 33 of the Constitution clearly envisages rational decision making by administrative bodies and tribunal. Held further that reasonableness and justifiability must be given the same meaning as appears from the provision of section 23(2)(b) of schedule 6 of the Constitution.

It is interesting to note that recently promulgated Promotion of Administrative Justice Act 3 of 2000 does not make specific provisions for justifiability. The Act does however, make provision for a rational decision (section 6(1)(f) (ii). The Act also provides that decisions which are so unreasonable that no reasonable person could have so exercised that function, are invalid.

3.3.1 *Rationality*

Rationality means that administrative action must be based on reasons or made according to

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43 *South Africa's Interim Constitution: Text and Notes* (1994) 35-36

reasons. In *Council of Civil Service Unions v Minister for Civil Service*[45], Lord Diplock held that an irrational decision is a decision which is so outrageous in its defiance of logic or logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Jowell and Lester [46] commented on Lord Diplock's decision. They say that Lord Diplock has shown that even though a decision may be legal in that it falls within the legislative powers, it may also be substantively lawful.

3.3.2 Reasonableness

Our courts traditionally adopted a narrow approach to the question of unreasonableness. According to this approach, the courts will intervene where the administrative action is so gross that something else can be inferred from it such as *mala fides,* ulterior motive, the failure to apply one's mind to the matter. The courts were generally reluctant to substitute their opinion for that of the official, who was assumed to have the necessary expertise to exercise the power.

In *Shidiack v Union Government*[47], Innes ACJ said, " Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgement *bona fide* expressed, the court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a court of law either to make him change his mind or to substitute its conclusion for his own."

In *Union Government v Union Steel Corp*[48], the court found that there is no authority known of and none has been cited for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of its unreasonableness. The court further states that unreasonableness must be so gross that something else can be inferred from it, such as

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44 1999(5) BCLR 549 (T), 574
45 1985 AC 374
46 "Beyond Wednesbury: substantive principles of administrative law" 1987 *Public Law* 368, at 369.
47 1912 AD 642
48 1928 AD 220. Wiechers, *Administrative Law* (1985) at 241 commented about the decision of the court. He says that the emphasis falls not

mala fides, ulterior motive or failure to apply one's mind. The decision is based on the subjective state of mind of the administrator[49].

In *Theron v Ring van Wellington NG Sendingkerk in Suid-Afrika* [50], Jansen JA went beyond this traditional/narrow approach when he adopted an extended formal yardstick. According to this yardstick, unreasonable administrative action constitutes an independent ground for judicial review. This was unfortunately not a majority's view and the decision was related to judicial administrative acts only, having the position of purely administrative acts unresolved.

Gross unreasonableness is no longer a requirement for the review of administrative action. The court in *Standard Bank of Bophuthatswana v Reynold*[51] held that the test of "gross unreasonableness" (in view of the testing rights given to the court in the interim Constitution), does not accord with the modern approach of judicial review particularly when applied to a constitution such as the South African one, which contains a Bill of Rights. The court adopted the less stringent test of reasonableness.

In *Roman v Williams,* Van Deventer J said that justifiable administrative action must be objectively tested against the three requirements of suitability, necessity and proportionality which requirements involve a test of reasonableness[52].

It is interesting to note that the Constitution simply refers to reasonable administrative action without any indication as to whether it will be "gross" unreasonableness or not. The Administrative Justice Act does, however, refer to unreasonableness in section 6. It refers to an action which is so unreasonable that no reasonable person would have so exercised the power. How will the courts interpret this provision? It appears to be a reference to the older, narrow approach to reasonableness and the question is whether this provision is constitutional or not.

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on the unreasonable effect and consequences on the act as such, but on the unreasonable state of mind of the administrative organ.

49 Judicial intervention was permitted only where the administrative decision was so gross that something else can be inferred from it, such as mala fides, ulterior motive or when administrative organ has failed to apply his mind to the matter. Unreasonableness was equated to mala fides, ulterior motive and other ground of invalidity. Unreasonableness, alone was not ground of invalidity.

50 1976 (2) SA 1(A)

51 1995 (3) SA 74 (B) at 94

3.3.3 *Proportionality*

The principles of proportionality guide the process by which administrative decisions are reached. It requires a rational link between an administrative action, its objective and the merits of the matter. The words such as "unduly burdensome, excessive, disproportionate" reflect the essence of the principle of proportionality.

Joseph states the following: "The principle of proportionality holds simply that excessive means should not be employed to achieve given ends. If attaining a legitimate legislative goal requires circumscribing freedoms, then the limitation must not be wider than is necessary. The principle also logically imports the need for a 'rational connection' between the limitation and desired legislative policy (the limitation must secure the object sought)"[53].

We may examine comparative law to see how proportionality is approached in countries such as Australian, English, German, Canadian and South African law.

(i) Australian law

The principle of proportionality is determined by "unreasonableness" and lack of evidence. Douglas and Jones[54] say, "The evidence test requires no more than that there should be some evidence to justify the decision - a requirement that is also what one would expect of most administrative decisions". In the case of unreasonableness they say that a test is formulated in a manner which at least on its face, decision-maker may not make decisions which are so unreasonable that no reasonable decision-maker acting according to law could have made.

The court in *Minister of Immigration, Local Government and Ethnic Affairs v Pashmfoosh*[55], held that federal legislation emphasises the need for reasoned decision making and the decision may be set aside on the basis of insufficiently supported reasons. It could be arbitrary because of no evidence or other material.

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52 Fn 1 at 767 G
53 *Constitutional and Administrative Law in New Zealand* (1993) at 714
54 *Administrative law : Commentary and Materials* (second edition) (1996) at 442
55 Federal Court 28/06/89, unreported, at 11

(ii) English law

Jowell and Lester[56] say that proportionality is applied as a principle that requires a reasonable relation between a decision, its objective and the circumstances or a given matter. They say that it requires the pursuit of legitimate ends by means which are not oppressively excessive.

According to Jowell[57] proportionality originated in German administrative law. It provides that when a broad discretionary power has been conferred upon a decision-maker, the means used to achieve the legitimate aims of that power must be appropriate and necessary and not excessive. He also states that proportionality requires a balance between the relative merits of the different interests. The decision-maker must not place disproportionate emphasis on some interests. The least harmful means must be adopted in balancing the interests.

Proportionality is connected to the substance of administrative action rather than the manner in which it has been reached. It also requires the adoption of alternatives suitable for the administrative decisions.

In *R v Goldstein*[58] Lord Diplock says that in plain English "proportionality" means "You must not use a steam hammer to crack a nut, if a nutcracker would do". The reviewing court determines the relationship between the objective of the administrative action and the means to achieve it[59].

(iii) German law

In Germany, the *Bundesverfassungsgericht* declares the principle of proportionality as being central and of general importance. The advantages and disadvantages of administrative action are compared and determined as suitable or proper. Administrative action is exercised in terms of the principle of *Verhältnismässigkeit*. This requires the compliance with the principle of

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56 Proportionality "neither novel nor dangerous" in *New Directions in Judicial Review*, Jowell and Oliver eds (1988) 51 at 67

57 *Administrative Justice in Southern Africa* (1997) at 180-181 introduced and edited by Corder and Maluwa.

58 1983 (1) WLR 151 at 155

59 *Halsbury's Law of England* Vol. 14 fourth edition (re-issue) 1989, at 144 states, "the court will quash the exercise of discretionary power in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, where punishments imposed by administrative bodies or inferior courts, are wholly out of proportion to the relevant misconduct".

suitability, necessity and proportionality.

Singh [60] says that proportionality limits administrative organs from exercising their discretions as they wish. Administrative organs have to balance the community and individual interest. They must also abstain from taking action that causes heavy burdens on the existence of an individual.

(iv) Canadian law

The court in *R v Oakes*[61] held that the principle of proportionality requires that administrative action must be reasonable and demonstrably justified. The court also held that proportionality requires the reasonableness means to achieve the object of administrative action. The means (administrative decision) must be carefully made to attain the object of administrative action. They must not be arbitrary, unfair or based on irrational consideration. In short, the court further held that the measures (administrative action) must be rationally connected to the administrative objectives. The administrative action must impair as little as possible the right or freedom in question. The effects of administrative measure must also be proportionate.

(v) South African law

Proportionality is included in the limitation clause of the Constitution. Section 36(1) of the Constitution reads thus: The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

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60 *German administrative law: in common law perspective* (1995) at 91
61 (1986) 26 DLR (41H) 200 (SCC) at 277

The court in *Roman v Williams* held that there must be proportionality between the means and end, this means that there must be a link between the administrative means and the end[62]. This approach is line with that approach adopted in countries such as, Germany, Canada, Australia, and United Kingdom.

In *Moletsane v Premier of the Free State*[63], the applicant was suspended for alleged misconduct. The court held that proportionality clauses indicate the correlation between the action taken and reasons furnished. The court also held that the more drastic the administrative action taken, the more detailed the reasons which are advanced should be. The degree of seriousness of the administrative action should determine the peculiarity of the reasons furnished. The court further held that notice of suspension unequivocally states that the suspension is "pending a departmental investigation into alleged misconduct", administrative action was justifiable in relation to the reasons advanced, having due regard to the applicant's rights affected.

Necessity and suitability are elements of proportionality. Necessity is the last administrative measure after all other administrative measures or actions are proved insufficient to the circumstances of the matter. De Ville[64] says that necessity must be determined once various suitable means to achieve ends have been determined. The administrative organ must choose means which cause least harm and if there is only one suitable measure it will be regarded as necessary.

The court in *S v Makwanyane*[65] held that the limitation of Constitutional rights for a purpose that is reasonable and necessary involves the weighing up of competing values and ultimately an assessment based on proportionality. The court also held that the balancing process must be made considering the provision of the limitation clause.

In *United Democratic Front (Western Cape Region) v Van der Westhuizen*[66], the

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62 Fn 1 at 767
63 1996 (2) SA 95 (0) at 98 G-H, 99 C
64 Fn 36 at 366
65 1995 (6) BCLR 665 (CC) at 708
66 1987 (4) SA 926 (C) at 930-931

commissioner of police prohibited the holding of a meeting. The applicant, opposing the decision, argued that the commissioner failed to consider alternatives to the prohibition. The court held that it was unreasonable to prohibit outright the holding of a meeting, when the objectives which the commissioner had in mind and provision made by law could have been achieved by imposing the condition to protect and establish the objectives.

Suitability should also be established from the empowering legislation. The court must establish the purpose of the exercise of power and it must also be legally authorised.

From this brief discussion, it is apparent that the concepts of "justifiability", "proportionality", and "reasonableness" play an important role in determining administrative justice. Justifiability and reasonableness have acquired a similar juridical meanings and content.

4. THE DECISION IN *ROMAN v WILLIAMS*

In this case, as it has been said, the respondent terminated the applicant's correctional supervision and reinstated imprisonment, it was contended on the one hand that the decision in issue be set aside on one or more of the common law grounds of review. On the other hand, it was contended that the decision was unjustifiable in relation to the reasons given for it, as laid down in section 33 of the 1996 Constitution[67].

It has already been said that the court did not find the common law review grounds relevant. Van Deventer J said that they were inapplicable and the court need only concern itself with the constitutional test of legality. Van Deventer J also said that like the test of reasonableness, the constitutional test must be objective. Further, in order to qualify as justifiable in relation to the reasons given for it, three requirements must be met, namely, suitability, necessity and proportionality[68].

With regard to reasonableness or justifiability, the court thus accepted that the decision of the respondent was rationally connected to the reasons given for it. The court objectively tested

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67 Fn 1 at 763 D-E

the respondent's decision. It considered the main objects of correctional supervision, the substance and the merit of the case. The court held that the success of any probationary programme aimed at rehabilitation depends on the strict adherence to supervisional conditions. Correctional supervision should be strictly administered and constantly monitored.

The court found that the applicant refused to pay maintenance as ordered by the divorce court, and he interfered with his ex-wife's right of custody by taking their minor son without her permission. He did not submit to discipline. His correctional supervisor complained about his hostile attitude and the applicant was given warnings. The court, thus considered the respondent's decision based on character assessment, impressions and personal experience.

The respondent complied with the requirements of procedural fairness. The applicant was given an opportunity to be heard. In other words, the requirements of *audi alteram partem* rule were complied with. The respondent said, "I gave him a hearing in front of Mrs Lodewyk. I looked at his status report. I saw for example that in annexure 'CER8' my predecessor, Mrs. Truter, had given him final warning on the 10th September 1996 regarding his attitude in respect of payment of maintenance. I also annex hereto marked 'B' a written warning issued on the 23rd August 1996 given to the applicant for breaching his conditions of supervision."[69]

The court accepted the respondent's version, holding that the applicant was fully apprised of the contraventions complained of and the respondent's reasons. The applicant was also given an adequate notice as warnings were issued to him. The second leg of the rules of natural justice, namely, *nemo iudex in sua causa,* was also adhered to. The applicant's counsel conceded that there was no factual grounds on which the accusation of bias could be justified. In essence all the requirements for a fair procedure were, therefore, complied with.

The court held that the respondent has shown good and sufficient grounds for his decision in that the applicant was an unsuitable probationer for the discipline and objectives of correctional supervision[70]. The decision of the respondent was justifiable in relation to reasons given for it. Held further that the applicant displayed a lack of appreciation and co-operation.

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68 *Ibid* at 764-765
69 *Ibid* at 762G-H

He was convicted of attempted rape of a woman in an awful manner. He was given the chance of serving four-fifths of his sentence outside prison walls.

5. CONCLUSION

In conclusion, one can say that the case of *Roman v Williams* illustrates the court's approach in testing the requirement of just administrative action. The respondent acted lawfully, reasonably and procedurally fair. He complied with the requirements laid down in section 33 of the Constitution.

In *Roman v Williams* Van Deventer J found that the applicant had acted improperly, unlawfully and in conflict with the conditions of his correctional supervision. He further said that the applicant had not submitted to discipline and that he had abused the opportunity to serve his sentence outside the prison walls. The court found that the decision of the respondent in terms of section 84B(1) of the Correctional Service Act to re-imprison the applicant was justifiable in relation to the reasons given for it[71].

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70 *Ibid* at 771B-C
71 Fn 1 at 771 B-C

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