

# The duty to act fairly

## A flexible approach to procedural fairness in public administration

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### ABSTRACT

Administrative action or decision-making which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. This right to fair administrative action has been constitutionalised by the *Constitution of the Republic of South Africa* 1996 and fleshed out (given content and meaning) in the *Promotion of Administrative Justice Act* 3 of 2000. The latter Act gives effect to the scope and meaning of this constitutional right by prescribing particular procedures which public officials must follow in the performance of their daily functions, in particular those related to a fair procedure. This duty to act fairly ensures that the public official applies his/her mind to a matter by adhering to specific procedural requirements, by acting fairly and by giving the individual an opportunity to be heard. Although all of this may sound very rigid the flexible nature of procedural fairness is clearly recognizable in almost every procedural requirement. The article seeks to explain what the duty to procedural fairness is, what the real nature and content of procedural and substantive fairness is, what exceptions exist with regard to the duty to act fairly, how a breach of procedural fairness is corrected, and what the relationship is between procedural fairness on the one hand and efficiency and effectiveness in public administration on the other hand.

### INTRODUCTION

Administrative action or decision-making which materially and adversely affects the rights or legitimate expectations of any person must be procedurally

fair. This right to fair administrative action has been constitutionalised by the 1996 Constitution of the Republic of South Africa and fleshed out (given content and meaning) in the *Promotion of Administrative Justice Act* (PAJA:2000). The latter Act gives effect to the scope and meaning of this constitutional right by prescribing particular procedures which public officials must follow in the performance of their daily functions, in particular those related to a fair procedure. Procedures in public administration are usually associated with a rigid set of procedural rules. However, the most significant characteristic of procedural fairness is indeed its flexibility. The purpose of this article is to explain the practical functioning of the duty to act fairly in public administration. At the same time it is also the intention to shed some light on the flexible nature of procedural fairness in public administration. The objective of procedural fairness is to ensure a fair and proper hearing for affected individuals. Listening fairly to both sides is a duty resting on every public official who decides anything. This means that individuals must be properly informed, they must be given an opportunity to put their side of the story, they must be able to challenge adverse allegations by die public administration and must be provided with reasons.

## **DUTY TO ACT FAIRLY SECTION 3(1) OF THE PAJA**

In giving effect to section 33 of the 1996 Constitution the PAJA sets out the requirements for the procedural fairness of administrative action impacting on individual persons (the individual relationship)(section 3) and members of the public (the general relationship)(section 4). However, a particular administrative decision may well have an impact on the general public and a special impact on individuals or *vice versa*. An example of such a twofold impact is a decision by a local government authority to increase property rates in its municipal area, a decision which will then have both a general and an individual effect on members of the community. The focus of this article will be on procedural fairness impacting on the individual.

Administrative action needs to be fair. Or as the PAJA states it in legal terms: "*administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair*" [my emphasis] (section 3(1)). This imposes a legislative duty on public officials to use fair procedures for any administrative action which materially and adversely affects the rights or legitimate expectations of any individual. The qualification of being materially and adversely affected implies a marked deprivation or diminution in the right or legitimate expectation of the individual since a mere determination of rights or expectations will not

suffice. The requirement that the rights or legitimate expectations be affected *materially* as well as adversely is not restrictive because it merely indicates that the adverse effects of the actions must not be trivial in nature (Hoexter 2007:358). The PAJA separates the elements of procedural fairness into the following four categories:

- a case-specific duty to procedural fairness;
- a set of compulsory (or mandatory) elements to procedural fairness;
- a set of discretionary (or directory) elements to procedural fairness; and
- procedural fairness as a fair but different procedure.

## **PROCEDURAL FAIRNESS AS A CASE-SPECIFIC DUTY SECTION 3(2)(A) OF THE PAJA**

Flexibility or variability is one of the trademarks of procedurally fair administrative action (Burns & Beukes 2006:224). The principles of fairness need not be applied by rote identically in each situation. Fairness is not something that can be reduced to a one-size-fits-all formula. Instead, fairness is a nuanced assessment of the demands imposed by a particular situation. The standards of fairness may change with the passage of time, both in general and in their application to administrative actions and decisions of a particular type. It is therefore not surprising that the PAJA prescribes that a fair administrative procedure depends on the circumstances of each case (section 3(2)(a)). This implies that the *content* of procedural fairness depends on the *context* of the administrative action or decision (i.e. the particular circumstances of each case in terms of complexity and seriousness) and varies from case to case (with regard to the position of the affected individual). The context of procedural fairness is important in the sense that the application of fairness is not static but needs to be tailored to the particular circumstances of each case. What is fair depends on the circumstances. Procedural fairness is thus a principle of good public administration that requires a sensitive rather than a heavy-handed application. The advantage of this flexibility is that it also permits a movement away from conceptualism which is the tendency to rely heavily on concepts such as *rights* and *expectations* in order to solve problems (Hoexter 2007:363). But flexibility alone cannot determine the content of procedural fairness. Fairness is both contextual and relative. Ultimately, procedural fairness depends in each case on the balancing of various relevant factors including the nature of an administrative action or decision, the *rights* or *expectations* affected by it, the circumstances in which it is made, and the possible consequences resulting from it. In short, it enables everyone to enjoy the minimum content of fairness.

## **PROCEDURAL FAIRNESS AS A SPECIFIC DUTY SECTION 3(2)(B) OF THE PAJA**

A specific duty is placed on public officials to give an individual procedural fairness (the so-called mandatory procedures) in order to give effect to the right to procedurally fair administrative action (section 3(2)(b)). The mandatory procedures are a set of minimum fair procedures that must be provided for in every case (section 3(2)(b)), unless a departure (or exemption) is reasonable and justifiable under the circumstances (section 3(4)). Where a deprivation or diminution of rights or expectations occurs the public official is obliged by the PAJA to do the following (i.e. the minimum requirements of fairness) in order to ensure that the administrative action concerned is procedurally fair:

- give adequate notice of the nature and purpose of the proposed administrative action;
- give a reasonable opportunity to make representations;
- give a clear statement of administrative action;
- give adequate notice of the right of review or internal appeal; and
- give adequate notice of the right to request reasons.

These are the procedures a public official must follow when making decisions and taking administrative action affecting an individual. They are the core minimum content of the duty of public officials to act fairly, that is, the right of individuals to procedural fairness. As such the requirements should be seen as a package in which they all link up with each other and follow a practical sequence in the administrative process. They seem to be interrelated by their very nature. In a perfect world the clear statement of the administrative action would always come after making representations, and the opportunity to make representations should ideally be offered before any decision is taken, and thus before there is any question of a clear statement of the administrative action. Let us consider each of the requirements for fairness in more detail.

## **ADEQUATE NOTICE OF PROPOSED ADMINISTRATIVE ACTION SECTION 3(2)(B)(I) OF THE PAJA**

The aim of this notice is to inform individuals of the nature and purpose of the proposed administrative action and to provide them with the opportunity to make presentations prior to a decision being taken. The reference to *proposed* administrative action requires that the notice must be prior notice, that is, notice before the administrative action or decision is taken and not afterwards. The use of the word *adequate* (notice) leaves some room for flexibility as to the precise

content of the notice. What will constitute adequate notice will differ in each instance, depending on the circumstances of the affected person, the seriousness of the matter and its consequences. A case in point is the Department of Welfare in the Eastern Cape Province, which reviewed the disability grants of illiterate and legally unsophisticated people and provided a generalised notice through pamphlets, printed notices and broadcasts which was considered inadequate. Subsequently an individual notification in each recipient's grant envelope was considered to be adequate (*Bushula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000:855). The more serious and complex the matter, the more detailed the information in the notice must be. Another facet of an adequate notice is that it must be timely, that is, sufficiently early to allow the individual enough time to collect the necessary information and prepare his/her case. It is important to note that the notice given to individuals affected by the administrative action or decision must include the reasons for the proposed administrative action. However, it is clear that sufficient information must be provided to individuals in order for them to know the case they have to meet and to enable them to make meaningful representations. Sufficient information implies that the individual must be notified of the gist or substance of the case against him/her, any particular information that will adversely affect him/her and any significant policy considerations or legislative provisions that apply to the proposed administrative action or decision (Klaaren & Penfold 2006:63/96). A case in point is where officials of the Department of Home Affairs unfairly failed to disclose adverse information and adverse policy considerations to an applicant for permanent residential status (*Foulds v Minister of Home Affairs* 1996:148H-149B). If the public official is in possession of material or factual considerations which may adversely affect or be prejudicial to the individual concerned, it would be unfair not to disclose that information and allow them an opportunity to deal with it (Hoexter 2007:335). It is a minimum requirement that the notice must also indicate the nature and purpose of the proposed administrative action to enable the individual to adequately prepare his/her case.

### **Reasonable opportunity to make representations section 3(2)(b)(ii) of the PAJA**

In cases of individual rights, fairness will usually require notice of the impending administrative action and an opportunity to make representations prior to a final decision being taken. This requirement affords the affected individual a real opportunity to be heard (i.e. to hear the other side). The use of the words *reasonable opportunity* (to make representations) in this provision can be regarded as open-ended enough to leave some room for flexibility of interpretation as to the precise content of the opportunity to make representations within the

particular context. What will constitute a reasonable opportunity to make representations will differ from case to case. Where the affected individual is an illiterate person a personal appearance may be essential but in other cases written submissions will suffice. In one instance fairness might require an oral hearing in a disciplinary proceeding but in another context the filling in of a form might qualify as a reasonable opportunity to make representations.

The opportunity to make representations may be used either before a decision is taken with a view to produce a favourable result, or after the decision is taken, with a view to ensure a modification of the decision, or both. However, it is easier to sway a decision-maker who has not yet decided, and harder to persuade a decision-maker to change a decision that has already been made. Occasionally, circumstances such as urgency and practicality may justify departures from these procedures. A case in point is a decision that had to be taken urgently and expeditiously to accommodate flood victims. Prior consultation with all those with an interest in the choice of the location of the transit camp would certainly have been contentious and drawn out (*Minister of Public Works and Others v Kyalami Ridge Environmental Association* 2001:105).

### **Clear statement of administrative action section 3(2)(b)(iii) of the PAJA**

This requirement seems to demand a clear statement of the administrative action once it has been taken (action already taken) or to indicate what administrative action is likely to be taken (proposed action). The requirement also demand that administrative action and decision-making should by its very nature be clear and certain to ensure transparency and accountability. This not only advances proper administrative behaviour by the public administration but also contributes to legal certainty (Burns & Beukes 2006:228). The word *clear* (statement) probably has a similar meaning to the word *adequate* used in the context of the notice of administrative action referred to above. The intention is clearly that the affected individual should at least be able to tell from the statement what has been decided, when, and by whom, and on what legal and factual basis (Hoexter 2007:337). The link with the following requirement (notice of review or internal appeal) is obvious. Without the information in this statement a notice of any right of review or appeal would be pointless. The individual will need enough information to be able to convince the decision-maker that he/she was wrong. The intention of a clear statement is not to provide reasons (yet another requirement hereunder) although the legal and factual basis of the administrative action could go some way towards explaining the action. However, a public official may choose to give such reasons as part of the statement.

## **Adequate notice of right of review or internal appeal section 3(2)(b)(iv) of the PAJA**

This is a mandatory notice of the internal remedies of review or internal appeal (so-called departmental appeal) to an affected individual and applies to action which has already been taken. The fact that the PAJA stipulates that internal remedies must be exhausted before the courts can be approached for relief (section 7(2)(a)) leaves the impression that the reference to review here refers to review by a superior administrative authority (i.e. an internal review). Correctability is an important requirement for procedural fairness as it makes provision for internal review, appeal and even redress of an irregularity in the public administration. This mandatory notice is therefore important to inform an affected individual of his/her options. It may even be crucial because an individual aggrieved by administrative action may be illiterate or form part of a disadvantaged group and may thus be unaware of the right of review or internal appeal.

Review relates to the legality or irregularity of the action itself (a reconsideration of the public official's decision where the scrutiny is focused on legality rather than the merits) and an appeal relates to the merits of the matter (as to whether the public official's decision was right or wrong). This internal appeal will not only be an examination of the merits of the matter but may also examine the legality of the matter (Burns & Beukes 2006:229).

In terms of the Regulations on Fair Administrative Procedures (regulation 25) the public official must provide the affected individual with full details relating to the procedures which must be followed in exercising these rights, such as the relevant person to be approached on appeal or review, how it should be worded, before which date it must be submitted, and other formal requirements. Clearly, the intention with this duty to give notice of internal remedies does not relate to ordinary review by courts of law, the notice of which would then be extremely onerous on public officials. The remedy of judicial review is nonetheless available either by way of the PAJA, the Constitution or the common law, but that remedy is clearly not the object or intention of this notice (Hoexter 2007:338).

## **Adequate notice of right to request reasons section 3(2)(b)(v) of the PAJA**

The intention here is that individuals affected by administrative action must be notified that they have a right to request written reasons for that action in terms of section 5 of the PAJA. Adequate notice of the right to request reasons applies to action which has already been taken. In addition, the giving of reasons is

part and parcel of procedural fairness. The word *adequate* indicates that the public official must provide full details of the procedure to be followed when requesting reasons. The Regulations on Fair Administrative Procedures provide a list of the procedures to be followed when requesting reasons (regulation 27). In other words, the intention of this notice is to ensure that sufficient information is provided to an affected individual to put that person in a position to exercise his/her right to reasons effectively. The mandatory nature of this notice will ensure transparency and accountability in public administration.

### **Discretionary procedural fairness section 3(3) of the PAJA**

As mentioned earlier, the PAJA separates the elements of procedural fairness into a set of compulsory elements and a set of discretionary elements. The discretionary elements are not compulsory because a public official may, in his/her discretion, provide the elements described by section 3(3). Departures from the discretionary elements (in terms of section 3(4)) are not necessary because they are only discretionary in nature. Where the discretionary procedures are inappropriate or unnecessary for achieving fairness, the public official will simply choose not to use them. The use of these requirements is therefore flexible and dependent on the circumstances of each case but must be exercised justly, lawfully and reasonably. A failure to allow for these elements where they are clearly needed in the interests of procedural fairness will constitute an unreasonable decision on the part of a public official (Klaaren & Penfold 2006:63/98). Where a deprivation or diminution of rights or expectations occurs the public official has the discretion to allow an individual the opportunity to do the following in order to ensure that the administrative action concerned is procedurally fair:

- obtain assistance and, in serious or complex cases, legal representation;
- present and dispute information and arguments; and
- appear in person.

### **Obtain assistance and, in serious or complex cases, legal representation section 3(3)(a) of the PAJA**

The opportunity to allow an individual to obtain assistance is important to ensure that less sophisticated and vulnerable persons (owing to a lack of expertise, illiteracy, disability or even youth) are assisted and are able to comply with unfamiliar and complicated administrative procedures. It is true that there is no general right to legal representation and the opportunity to have assistance and legal representation may not generally apply to most day-to-day administrative proceedings, however, it must certainly be afforded where procedural fairness

so requires. In unusual complex cases involving complex evidence or legal issues, legal representation might be regarded as a *sine qua non* for fairness. The obtaining of assistance and legal representation in complex cases which have serious consequences should not be left solely to the discretion of the public official since this undermines the inherent right to procedural fairness. Whether assistance or legal representation is required will depend on the circumstances of each case and the consideration of all relevant facts (Burns & Beukes 2006:231). Such an approach provides the flexibility to allow legal representation where it is warranted. A case in point is the *Hamata*-case, where the court found that the absence of legal representation at a disciplinary hearing was not procedurally fair and that there had indeed been an improper exercise of discretion (*Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002: para 21).

### **Present and dispute information and arguments section 3(3)(b) of the PAJA**

The essence of a fair hearing is that an affected individual must have the opportunity to present evidence (i.e. present information) in support of his/her case and to challenge any evidence (i.e. present arguments) against the case. But what would the position be if a public official were to receive further representations from other parties or new information from another source? A reasonable opportunity to reply to and a possible rebuttal of this information and arguments will depend on the significance of the new information and on the seriousness of the case (Hoexter 2007:341). It is true that this could become very tedious on the administrative process but one would suggest that an affected individual must be afforded proper procedural fairness rather than putting the efficiency (or convenience) of the public administration first (Burns & Beukes 2006:233). It is clear that a public official should not exercise his/her discretion in this important aspect of procedural fairness in a manner which could create the appearance of bias.

### **Appear in person (section 3(3)(c) of the PAJA**

The public official has the discretion to allow a personal appearance (i.e. an oral hearing). However, in practice this does not always happen because the demands of fairness then require the presence of all the affected parties throughout the hearing. It would certainly be wrong to exclude one party while hearing another (Hoexter 2007:342). The administrative process therefore favours written submissions from the affected parties. The reason for this seems to be a practical one in that written submissions (hearings on paper) are much

cheaper, quicker and can be dealt with immediately. However, it would be an infringement of the constitutional right to procedural fairness to expect of illiterate and uneducated individuals to express themselves in writing. It would be equally unrealistic to expect the illiterate and uneducated to always seek assistance from someone to write such submissions for them (Burns & Beukes 2006:228). The purpose of the discretion here is to achieve procedural fairness and not administrative convenience.

## **PROCEDURAL FAIRNESS AS A FAIR BUT DIFFERENT PROCEDURE SECTION 3(5) OF THE PAJA**

A public official may also follow a fair but different procedure (section 3(5)). This allows for a deviation from the compulsory procedures for fairness and some degree of flexibility. However, the different procedure is subject to the following two requirements:

- The different procedure must be fair; and
- There must be an empowering provision which authorises the public official to follow a different procedure.

This happens when, for example, an Act of parliament (i.e. an empowering provision or enabling statute) mandates a public institution to use its own fair procedure which may differ from the compulsory procedure laid down in the PAJA. This implies a procedure which is different from the specific duty to act fairly prescribed by the PAJA in section 3(2)(b) but still fair in terms its content. Fairness, as always, depends on the circumstances. The enabling statute thus creates the context in which the administrative action or decision takes place. The administrative context of the decision (or the legislation governing it) will bring special features or meanings to the concept of fairness. A case in point is the case of *Atlantic Fishing Enterprises* which quoted the *Marine Living Resources Act* 18 of 1998 (section 80(3)) as stipulating that “every person with an interest in the matter” has an opportunity to state his/her case with regard to an appeal before the Minister (*Minister of Environmental Affairs and Tourism v Atlantic Fishing Enterprises (Pty) Ltd* 2004:181D-E).

An empowering provision in terms of the PAJA means a law (enabling legislation), rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action is taken. The question is whether departmental circulars will qualify as an empowering provision? Because of their lack of accessibility to the general public such a document would not pass the test of public knowledge and thus not qualify in terms of a fair but different procedure (Burns & Beukes 2006:237). The

recognition of existing procedures provides for flexibility and ensures that unrealistic burdens are not placed on public institutions. However, the procedures followed must still be fair (and allow, for example, for the affected individual to be heard), or else they would have to be supplemented with one or more of the requirements of section 3(2)(b) of the PAJA. Where no existing procedure is prescribed by the enabling legislation the public official must follow the section 3(2)(b) procedure.

## SUBSTANTIVE FAIRNESS

Procedural fairness is aimed at securing justice for the individual. However, is the right to procedural fairness limited only to procedure or is there also a substantive element to it? It is important to note that the right is to *procedural* fairness and does not safeguard *substantive* fairness (*Bel Porto School Governing Body & Others v Premier, Western Cape, & Another* 2002: para 88). Procedural fairness is thus concerned with the manner in which decisions are taken (i.e. a fair and proper procedure followed) and does not relate to whether the decision itself is fair or not. The “procedural” qualification is thus significant in that it indicates the focus of the kind of fairness which is not substantive in nature. Fairness in terms of the 1996 Constitution and the PAJA does not promise rightness in a substantive sense. Our courts have also refused to lay down rigid rules concerning the content of fairness (Hoexter 2007:328).

However, substantive fairness is something which should be important to the public administration. To determine substantive fairness one must decide whether a decision or action was substantively fair or reasonable in the light of issues like the public interest, government policy and the effect on the individual (Burns & Beukes 2006:214). One will then have to enter into the merits of the decision to be able to determine whether the decision was right or wrong or substantively fair. Substantive fairness deals with the question whether the *reasons* for a decision are fair. Substantive fairness is thus protected by virtue of the concept “reasonable”. If a public official for instance complies with all the procedural requirements but the decision is unreasonable, the administrative decision may still be invalid. A case in point is where a school governing body suspends a learner for having the wrong haircut. The decision is likely to be overturned even if all the correct procedures were followed because the decision is not reasonable (Squelch 2000:363). Substantive fairness is thus implicit in the requirement of *reasonable* administrative action which forms part of section 33(1) of the 1996 Constitution. However, that debate is for another day.

## DEPARTURES OR EXEMPTIONS FROM THE REQUIREMENTS FOR FAIRNESS SECTION 3(4) OF THE PAJA

A public official may depart from any of the compulsory elements for procedural fairness prescribed in the PAJA (section 3(2)) if to do so is reasonable and justifiable in the circumstances (section 3(4)(a)). This is another sign of the flexible nature of procedural fairness (Klaaren & Penfold 2006:63/98). In determining whether a departure is indeed reasonable and justifiable the public official must take all relevant factors into account such as, the objects of the empowering provision, the nature and purpose of, and the need to take the administrative action, the likely effect of the administrative action, the urgency of the matter and the need to promote an efficient public administration (section 3(4)(b)). A departure is only permissible when a public official has considered the particular circumstances (applied his/her mind) and can justify a departure in the light of these circumstances. Such a departure is also referred to by some as a *savings clause* (Van Rensburg 2001:65) or a *loophole* (Hoexter 2007:343) for the public official who normally follows a fair procedure but, because of the circumstances of a particular case, has to dispense with one or more of the requirements of a fair procedure. A reasonable and justifiable departure is therefore not a breach of fairness. However, situations which do not comply with the compulsory elements of fairness and which cannot be justified in terms of a legitimate departure are procedural deficiencies or procedural failures (Currie & Klaaren 2004:44).

## BREACH OF FAIRNESS

When a public official realises that a particular administrative action or decision does not comply with the prescribed compulsory procedures, does not constitute a fair but different procedure, and a departure is also not justified, then he/she must take the necessary steps to have the procedure amended to bring it in line with the relevant provisions of the PAJA. This is called a correction (or rectification) of a procedural deficiency and is the provision of a procedural element subsequent to an initial failure to provide that element. It is thus an administrative response to a situation of inadequate compliance with the compulsory procedures for fairness after the action or decision has been taken (Currie & Klaaren 2004:45). However, procedural fairness is situation and context specific and it may, therefore, in some instances, be impossible to rectify an unfair procedure by subsequent administrative correction. Let us consider a few examples (cf. Currie & Klaaren 2004:45-46):

- A failure **to provide adequate notice** in advance of a decision (as prescribed in section 3(2)(b)(i)) cannot be corrected because notice given after the

decision has been made by the official is simply not notice at all. If the notice has not been provided and the failure cannot be justified as a departure (on, for example, grounds of urgency), then there has been non-compliance with the PAJA and the decision will be unfair.

- A failure **to provide a reasonable opportunity to make representations**, that is, a hearing in advance of a decision being made (as prescribed in section 3(2)(b)(ii)) may only be allowed on the basis of justified departures, for example *the need not to defeat the purpose of the administrative action* (section 3(4)(b)(ii)) and also *the need for urgency* (section 3(4)(b)(iv)).
- A failure **to provide a clear statement of the administrative action** (as prescribed in section 3(2)(b)(iii)) can be corrected because an official could just withdraw an insufficiently clear statement of an action or decision and replace it with a clear one.
- A failure **to provide adequate notice of the rights of appeal and review** (as prescribed in section 3(2)(b)(iv)) can be corrected by the subsequent provision of a proper notice of the internal remedies available.
- A failure **to provide adequate notice of the right to request reasons** (as prescribed in section 3(2)(b)(v)) can be corrected by the subsequent provision of a proper notice of the right to reasons.

From the examples above it becomes apparent that a breach of the PAJA's compulsory requirements for fairness must be assessed on a flexible, case-by-case basis. In most cases (clear statement and information about further remedies: section 3(2)(b)(iii-v)) a subsequent administrative correction by a public official of some formal defects in a decision-making process (for example a failure to mention the right to an internal appeal) can effectively cure the decision of unfairness. However, in a few cases, particularly those procedural requirements corresponding to the *audi alteram partem* principle (notice and a hearing: section 3(2)(b)(i-ii)), a failure to comply with the requirements (for example a failure to give adequate notice of disciplinary proceedings) will result in an unfair decision.

## Creating a culture of accountability

As a founding value of our democracy the 1996 Constitution provides that those who are chosen to rule must be accountable to those they govern (section 1(d)). As an executive instrument of those in government the public administration must also be subject to the foundational values of democracy. Accordingly, the 1996 Constitution provides that the public administration must be held accountable (section 195(1)(f)). Accountability is therefore a basic constitutional value and principle of democracy in the governing of our public administration. Ultimately the importance of an accountable public administration is also asserted in the

Bill of Rights chapter of the 1996 Constitution, which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair (section 33(1)). Accountability in this sense means that the public administration has to justify its decisions (i.e. the manner in which decisions are taken) to the people they serve. This means that decisions must be reasonable and must be seen to be reasonable. The process of justifying administrative actions and decisions in terms of fair procedures serves the value of accountability in a direct way.

A primary rationale for procedural fairness in public administration is that it improves the quality of administrative action and decision-making by ensuring that all relevant information, interests and points of view are placed at the public official's disposal. This ensures that the public official has an open mind and a complete picture of the facts and circumstances within which administrative action is performed. Procedural fairness thus promotes informed, rational and legitimate decision-making and reduces the risk of arbitrary decisions. In so doing, procedural fairness enhances the constitutional principles of openness, accountability and participation. This also explains the inclusion of section 195(1)(g) in the Constitution, which provides that one of the basic values and principles governing the public administration is that transparency must be fostered in the public administration and the inclusion of section 195(1)(e) which encourages the public to participate in policy-making.

Procedural fairness is an important instrument for fostering participation because it gives the individual affected by the decision a chance to participate in and influence that decision-making process. It is also true that an individual will accept a decision of a public official that is negative or affects him/her adversely, if they believe that the manner (i.e. the procedure) by which the decision was arrived at was fair (Pearce 2007:12). It leaves them with the knowledge that their views have been taken into consideration in the decision-making process.

An added benefit is that fair procedures and fair treatment generate loyalty and cooperation and affirms the equal worth and human dignity of the affected individual (Klaaren & Penfold 2006:63/82). If people trust a public institution then they are more likely to consider its procedures to be fair and participatory democracy is promoted (Pearce 2007:13). Participation then enhances the legitimacy of the administrative action by emphasising openness, consultation and reasoned decision-making.

## **MAINTAINING AN EFFECTIVE AND EFFICIENT PUBLIC ADMINISTRATION**

In terms of the 1996 Constitution, efficiency, effectiveness and economy are basic underlying values in public administration (section 195(1)(b)). A warning has

been sounded, however, that some may interpret the requirement of efficiency and effectiveness in public administration as providing a green light to public officials to act without any regard for “procedural niceties” (Jowell 2006:17). Others are believed to argue that public officials may regard procedural fairness as a “restriction invented by lawyers” which may be an obstacle to efficiency and effectiveness in public administration (Wade & Forsyth 2004:440). However, an administrative action or decision made without bias, and with proper consideration of the views of the individuals affected by it, will not only be more acceptable but will also be of better quality. It is believed that fair administrative procedures can be an instrument for reconciling the conflicting interests of an affected individual to have his/her rights adequately protected on the one hand and to promote the governmental interest in an efficient and effective public administration on the other hand (Grote 2002:475).

Justice and efficiency can go hand in hand – but how? A possible explanation is that the PAJA use concepts like *rights* and *expectations* (section 3(1)) to narrow the field of application of procedural fairness and thus limit the burden on the public administration and allow for efficiency. The PAJA also employs the opposite approach to widen the application of procedural fairness by ensuring variability and flexibility through the idea that the principles of fairness need not be applied uniformly in every case. The notion that *a fair administrative procedure depends on the circumstances of each case* (section 3(2)(a)) allows one to apply procedural justice to all administrative action while tailoring the content of that fairness to suit the particular occasion and again allow scope for efficiency. There is thus a need to balance the interests of the individual affected by the administrative action against the public interest in having an efficient and effective public administration (Devenish, Govender & Hulme 2001:8; Klaaren & Penfold 2006:63/84). To achieve the latter it is important to ensure the ability of the public administration to act efficiently and promptly. A case in point is disciplinary hearings in public institutions where the administrative decision-makers do not have to adopt the technical rules of evidence used in courts. They can actually use any procedures provided that they observe the principles of fair play. Such a flexible approach is indeed allowed by the PAJA which expressly recognises, again, that a fair procedure “*depends on the circumstances of each case*” (section 3(2)(a)). This flexible approach is not only in the interests of efficiency and effectiveness in public administration but also helps to prevent an over-judicialisation of the administrative process.

## CONCLUSION

In an effort to provide some kind of guidance to public officials, the PAJA has identified a set of minimum rules and some discretionary procedures to clarify

the procedural duties of officials while, at the same time, retaining situation-specific flexibility (contextual fairness) as well as the flexible option of a fair but different procedure (more contextual fairness) within those rules. The rigidity of the rules is softened in a number of ways, in particular by including open-ended standards into the rules themselves, such as, *adequate notice*, *reasonable opportunity*, and *clear statement* and by allowing departures from the minimum rules. Procedural fairness is concerned with the manner in which decisions are taken (i.e. a fair and proper procedure followed) and does not relate to whether the decision itself is fair or not. The latter has to do with substantive fairness. Clearly substantive fairness is something which should be important to the public administration. Procedural and substantial fairness promotes informed, rational and legitimate decision-making and reduces the risk of arbitrary decisions. In so doing, procedural fairness enhances the constitutional principles of openness, accountability and participation. The right to procedurally fair administrative action is clearly aimed at purposefully facilitating accountability on the part of the decision-maker and should thus be one of the fundamental features of an accountable public administration. However, there is also a need to balance the interests of the individual affected by the administrative action against the public interest of having an efficient and effective public administration. This balance is indeed to be found in the flexible approach which is allowed by the PAJA in practising procedural fairness in public administration.

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