A GUIDE TO ADMINISTRATIVE AND LOCAL GOVERNMENT LAW IN ZIMBABWE

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by

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Preface

This Guide provides a basic introduction to the Administrative Law of Zimbabwe. It gathers together all the important Zimbabwean cases on the various aspects of Administrative Law. It will be a useful reference work for both law students and legal practitioners.


As English Administrative Law has also influenced Zimbabwean Administrative Law, the leading English texts on this subject are also useful reference works for Zimbabwean purposes.

This Guide is subdivided into two main segments. The first part deals with Administrative Law All the major legislation on Administrative Law such as the Administrative Justice Act and the Administrative Court Act is set out in full for reference purposes. The second part deals with Local Government Law.
ADMINISTRATIVE LAW

Nature of Administrative Law

As the name of this branch of the law clearly implies, Administrative Law is the law relating to the administration of the State. Administration of the State is the detailed and practical implementation of the policies of the central government aimed at the running of the State.

Purpose of Administrative Law

Administrative Law regulates legal relations between public authorities and private individuals and bodies, and between a public authority and other public authorities. One of the primary functions of Administrative Law is to exert reasonable legal control over the way in which administrative authorities exercise their functions in order to ensure that these authorities do not exceed or abuse their powers. Administrative Law also has the positive role of facilitating good administration by enforcing the rules that are conducive to sound administration. It is not the function of the courts to usurp the role of administrators, and it is certainly not the role of the courts to obstruct the implementation of progressive legislation. The law thus tries to promote effective use of administrative power, whilst at the same time providing protection against misuse of power. It has been said that it tries to achieve a balance between public authorities and those with whom they interact, and in the process to ensure the maintenance of public interest.

Administrative Law has developed a set of remedies that are available to persons who have suffered as a result of illegal or irregular administrative action.
The Public Service

Structures of public administration

Public administration is carried out by the public service.

The President appoints Ministers to head various Ministries. The President also appoints the Secretary to the Cabinet and Secretaries of the Ministries in consultation with the Public Service Commission. The President must inform Parliament if he makes such an appointment on a basis that is not consistent with the recommendation of the Public Service Commission. (s 77 of Constitution). The Public Service Commission (PSC) appoints other members of the public service.

The PSC consists of a chairperson and not less than 2 and not more than 7 other members. The President appoints the members of the PSC. He must chose as Commissioners persons with ability and experience in administration or who have professional qualifications or who are otherwise suitable for appointment. The chairperson and at least one other member must be persons who have held a post or posts of a senior grade in the public service for periods which in the aggregate amount to at least 3 years. (s 74 of the Constitution)

The PSC appoints both permanent and contract public servants, assigns and promotes them to offices, posts and grades in the public service and fixes their conditions of service. (s 8 of the Public Service Act [Chapter 16:04].) When considering candidates for appointment to or promotion within the public service, the PSC must—

- have regard to the merit principle, that is, the principle that preference should be given to the person who, in the Commission’s opinion, is the most efficient and suitable for appointment to the office, post or grade concerned; and
- ensure that there is no discrimination on the ground of political opinions.

(s 18 of the Public Service Act).

Access by public to services provided by public service

It is laid down in Article 21(2) of the United Nations Declaration of Human Rights that “everyone has the right to equal access to the public service in his country”. In other words, everyone is entitled to have equal access to the public service, regardless of his or her gender, political affiliation, race or ethnic origins.

The prohibition upon discriminatory practices by public servants when dealing with members of the public is also contained in s 23 of the Constitution of Zimbabwe. In summary, this section provides—

- a law make not make any provision that is itself discriminatory or in its effect;
- a person may not, acting on the basis of a statute, treat another in a discriminatory manner;
- a person performing the functions of any public office or public authority may not
treat another in a discriminatory manner.

A law and treatment under a law will amount to discrimination if it prejudices persons by
imposing restrictions or disabilities on persons or by withholding privileges or advantages
wholly or mainly on the basis of their political opinions, sex, race, ethnicity or religion.
Delegated or Subsidiary Legislation

Legislation can be divided into—

- primary legislation, that is legislation passed by Parliament; and
- subsidiary or subordinate legislation, that is legislation created by bodies or individuals under powers delegated to them by Parliament. These powers empower them to create such legislation.

Section 32 of the Constitution provides that—

32  (1) The legislative authority of Zimbabwe shall vest in the Legislature which shall consist of the President and Parliament.
   (2) The provisions of subsection (1) shall not be construed as preventing the Legislature from conferring legislative functions on any person or authority.

(Emphasis added)

Types of delegated legislation

There are various types of delegated or subsidiary legislation. Most pieces of subsidiary legislation are contained in Statutory Instruments. (The title Statutory Instrument was adopted as from SI 381 of 1979. Prior to this, what are now known as Statutory Instruments were referred to previously as Government Notices. This designation applied up to GN 380A of 1979.)

There are various particular types of subsidiary legislation—

- **Proclamations.** For example, the President has power to make proclamations on such matters as the proroguing of Parliament and the setting of the date of an election. These proclamations are published in the Government Gazette.
- **By-laws.** For example, local authorities such as urban councils have power to make by-laws. (See, for instance, the provisions of the Urban Councils Act [Chapter 29:15].)
- **Rules.** For example, the courts have power to make rules governing their own procedures.
- **Regulations.** For example, the Minister has power in terms of s 159 of the Rural District Councils Act [Chapter 29:13] to make regulations for various purposes and the Zimbabwe Electoral Commission has the power in terms of section 192 of the Electoral Act [Chapter 2:13] to make regulations on various matters pertaining to the holding of an election.

- **Statutory Instrument.** This is defined in s 3 of the Interpretation Act [Chapter 1:01] to mean “any proclamation, rule, regulation, by-law, order, notice or other instrument having the force of law, made by the President or any other person or body under any enactment.”

Reasons for delegated legislation

In the modern State, central government intervenes in many spheres and regulates a many different activities. Its activities will include such measures aimed at providing employment, housing, medical services, transport, food supplies, energy and rural development... Parliament
itself cannot realistically be expected to pass all the multifarious rules and regulations necessary to run the complex modern State. Thus, what often happens is that Parliament passes legislation that simply establishes broad policies and then delegates to subordinate authorities the power to pass subsidiary legislation in order to bring those broad policies into effect in detailed form. The delegate may, for instance, be a Minister who is able to call upon technical expertise within his Ministry when deciding how the broad policies can best be brought into operation, or the delegate could be a local authority which is able to decide how best to implement the policies in the light of local conditions.

Need for controls

Although it is now accepted that in the modern State delegated legislation cannot be avoided, there is nonetheless concern that the exercise of delegated legislative powers be properly controlled to ensure that they are not abused to the detriment of citizens.

Types of control

Parliamentary controls

One of the most effective controls is for Parliament in the first place carefully to spell out the limits of the delegate’s law-making powers so that there can be no doubt when the delegate is exceeding his powers. If the provisions in the enabling legislation that set out the powers of the delegate are vague or ambiguous then the limits of the powers of the delegate will be unclear and control over the exercise of these powers will be made more difficult.

The primary legislation should also spell out clearly—

- which person or body is to exercise the power to create subsidiary legislation;
- for what purposes such delegation may be created and the factors the delegate is to take into account when creating the legislation.

There are also certain controls that are applied after subsidiary legislation has been passed. In terms of s 36 of the Interpretation Act [Chapter 1:01], copies of all delegated legislation must be laid before Parliament on one of the thirty days on which Parliament next sits after publication of such delegated legislation in the Gazette. However, it would seem that delegated legislation is not rendered invalid by the failure to lay it before Parliament. See *R v Daniels* 1936 CPD 331 and 1983 *Public Law* 43.

Given the many other calls upon the time of Parliamentarians, it is unlikely that they will scrutinise much of the huge amount of delegated legislation that is laid before the House. Presently, there is no specialist Parliamentary sub-committee tasked with examining delegated legislation to ensure that the delegated authority has not been abused. All we have is the Parliamentary Legal Committee, the main function of which is to scrutinise all statutory instruments published in the *Gazette*, and any draft statutory instruments referred to it, to determine whether they are in conformity with the provisions of the Declaration of Rights. (See s 40B(1)(d) of the Constitution of Zimbabwe.) It is provided that very much as a secondary function that when the Legal Committee examines statutory instruments it may report to
Parliament or the Minister whether the statutory instrument is *ultra vires* the enabling Act. (See s 40B(3) of the Constitution.)

The Constitution also provides that the Parliamentary Legal Committee shall perform such other functions as are provided for an Act of Parliament or the Standing Orders of Parliament. Paragraph 201 of the Standing Rules and Orders of Parliament provides that in addition to the functions set out in the Constitution, the Parliamentary Legal Committee will have the additional functions of ensuring that no statutory instrument—

- contains matters more appropriate for parliamentary enactment;
- makes the rights and liberties of persons unduly dependent upon administrative decisions which are not subject to review by a judicial tribunal; and
- changes an Act of Parliament.

The Committee is also given powers in terms of the Standing Orders—

- to call for the correction of any error or omission in a statutory instrument or a Bill;
- to ensure that no bill derogates from the exercise of legislative power; and
- to review existing law and interact with the Law Development Commission.

**Court controls**

For subsidiary legislation to be valid, it must satisfy a number of requirements. If these requirements have not been satisfied, a person who is directly affected by the subsidiary legislation, or who is being prosecuted under that legislation, can challenge the validity of the legislation. The court must then make a ruling on whether or not the legislation is valid. The requirements for validity of delegated legislation are these—

**Promulgation**

Both under common law and in terms of s 51(5) of the Constitution of Zimbabwe all legislation becomes binding, unless otherwise specified, only when it is promulgated, that is, published in the *Government Gazette*. This requirement is also laid down in s 20 of the Interpretation Act [*Chapter 1:01.*] See also *R v Gluck* 1923 AD 149 at 151.

In the case of *Hayes v Baldachin & Ors (2)* 1980 ZLR 422 at 427 (S); 1981 (1) SA 749 (ZS) at 754, Fieldsend CJ said this—

> It is a recognised principle in Zimbabwe that no law becomes effective until it has been published in the *Gazette*. But the general rule that before a law or any regulation or by-law having the force of law can become operative it must be duly promulgated, must be read subject to the qualifications that the word ‘law’ in the rule must not be given too wide a connotation and that the enabling enactment must be looked to in order to see whether the necessity for promulgation is or is not excluded.

The court went on to rule that an administrative direction did not have to be promulgated before it became operative.

**Follow prescribed procedures**

Prescribed procedures laid down in the enabling Act for the passing of such subordinate legislation must be fully observed Thus for instance, the procedures laid down for the passing
of by-laws in terms of s 228 of the Urban Councils Act [Chapter 29:15] must be fully adhered to otherwise by-laws will be invalid. See R v Kahn 1945 NPD 304 at 307 and R v Carto 1917 EDL 87 at 92.

**Consistent with general law**

Delegated legislation cannot make unlawful something that is lawful under the general law and cannot make lawful something that is unlawful under general law. It must also not interfere with the administration of justice. See van Heerden NO v Queen’s Hotel (Pty) Ltd 1972 (2) RLR 472; 1973 (2) SA 14 (RA); de Villiers v Pretoria Municipality 1912 TPD 626 and Gentel v Rapps [1902] 1 KB 160.

There is a presumption against alteration in the common law by statute law, unless the words of the statute are plain and unambiguous and an intention to alter the common law is evident from the wording of the enactment. It is therefore doubtful that subsidiary legislation can be employed to effect an alteration to the common law. See Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S).

**Certain and positive**

Delegated legislation must indicate with reasonable clarity the act required or prohibited; if it does not do this it may be struck down as being void for vagueness. See Zacky v Germiston Municipality 1926 TPD 380; R v Dembo 1952 (2) SA 244 (T); Naidoo v Pretoria Municipality 1927 TPD 1013; R v Jopp 1949 (4) SA 11 (N); R v Pretoria Timber Co (Pty) Ltd 1950 (3) SA 163 (A); PF ZAPU v Minister of Justice(1) 1985(1) ZLR 261 (H) (Prohibition contained in regulations both ultra vires and void for vagueness); PF-ZAPU v Minister of Justice (2) 1985 (1) ZLR 305 (S); Natural Stone Export Co (Pvt) Ltd & Anor v Director of National Parks and Wildlife Management & Ors 1997 (2) ZLR 215 (H).

Delegated legislation must also be positive in the sense that it must contain a clear prohibition or command leaving no doubt that it is to be obeyed; it should not be merely an expression of desire that a certain act should be done or a state of affairs be achieved.

**Ultra vires**

The delegate can only create legislation on matters upon which it has been empowered to legislate. If it creates legislation on matters upon which it has not been given power to legislate it is acting ultra vires (beyond or in excess of its powers).

See van Heerden NO v Queen’s Hotel 1972 (2) RLR 472 (A); 1973 (2) SA 14 (RA); S v Delta Consolidated (Pvt) Ltd & Ors 1991 (2) ZLR 234 (S) and S v Dube 1977 (2) RLR 108 (G).

In Minister of Justice, Law and Order & Anor v Musarurwa 1964 RLR 298 (A); 1964 (4) SA 209 (SRA) the court found there had been improper use of powers delegated under two different Acts to achieve a combined result which is unlawful.

If only part of the subsidiary legislation is ultra vires, the court may strike down that part, provided that what is left can stand on its own.

In deciding whether the delegated legislation is intra vires the enabling Act, the courts will
have to decide whether the power to make that type of legislation was expressly or impliedly
delegated to the subordinate authority by Parliament. See S v Delta Consolidated (Pvt) Ltd &
Ors 1991 (2) ZLR 234 (S). It will, for instance, consider whether the power was impliedly
necessary for or reasonably ancillary to the full and effective exercise of the powers expressly
conferred by the enabling statute. See Middleburg Municipality v Gertzen 1914 AD 544 which
dealt with the situation when a power is impliedly necessary for or reasonably ancillary to the
full and effective exercise of the powers expressly conferred by the enabling statute.

**Gross unreasonableness**

Delegated legislation can be declared *ultra vires* if it is grossly unreasonable. As laid down in
the English case of Kruse v Johnson [1898] 2 QB 91, pieces of legislation can be ruled to be
invalid on the grounds of their unreasonableness—

... if, for instance, they were found to be partial and unequal in their operation as between different
classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive
and gratuitous interference with the rights of those subject to them as could find no justification in
the minds of reasonable men, the court may well say, ‘Parliament never intended to give authority
to make such rules; they are unreasonable and *ultra vires.*’

Baxter at 522-533 argues that gross unreasonableness is present when the provisions are
discriminatory or disproportional or are vague and uncertain.

The test enunciated in Kruse v Johnson has been adopted in our law in cases such as R v
Jeremiah 1956 (1) SA 8 (SR); R v Campbell (Pty) Ltd 1956(1) SA 256 (SR); Caterers &
Entertainers (Pvt) Ltd v City of Salisbury 1974 (2) RLR 65 (G); PF-ZAPU v Minister of
Justice, Legal & Parliamentary Affairs 1985 (1) ZLR 305 (S); S v Nyamapfukudza 1983 (2)
ZLR 43 (S) and S v Delta Consolidated (Pvt) Ltd & Ors 1991 (2) ZLR 234 (S).

In S v Delta Consolidated (Pvt) Ltd & Ors 1991 (2) ZLR 234 (S) the court ruled that it has
inherent jurisdiction to declare null and void subsidiary legislation on the ground that it is *ultra vires* if it cannot be construed so as to accord with the intention of a reasonable legislature. It is
presumed that Parliament, which is the maker of primary legislation, intended that regulations
should be imposed only where reasonably necessary to further the objects of the primary
legislation.

In Marufu v Minister of Transport & Ors 2009 (2) ZLR 458 (H) the facts were that the
applicant lived in a suburb within the Bulawayo City Council’s area of jurisdiction. The
respondent Minister had promulgated the Roads Toll (Regional Trunk Road Network
(Amendment) Regulations 2009 (SI 39 of 2009). These regulations declared the Bulawayo-
Victoria Falls Road to be a toll road in terms of the Tolls Roads Act [Chapter 13:13] and had
fixed a point within the Council’s area of jurisdiction to be a tolling point. The effect of this
was that the applicant would have had to pay a toll to access the city, to take his children to
school, to go shopping, and so on. The court held that the Minister was an administrative
authority in terms of s 2(1)(c) of Administrative Justice Act and as such was enjoined by s 3(1)
to act lawfully, reasonably and fairly. The Regulations were partial and unequal in their
operation as between people who are ratepayers and residents of the City of Bulawayo. The
objective of the location of this toll point, that is, to enhance traffic catchment, was
disproportionate to the financial oppression it is causing to residents of the same suburb as the applicant. The declaration was partial and unequal in its operation as between different groups of Bulawayo ratepayers. Delegated legislation can be declared *ultra vires* the primary legislation if it is grossly unreasonable. Gross unreasonableness is present when the provisions of an enactment entail discrimination, are disproportionate, vague or uncertain, as these regulations were.

The onus of proving that regulations are *ultra vires* on the ground of unreasonableness is on the person who seeks to prove their unreasonableness. See *S v Delta Consolidated (Pvt) Ltd & Ors* 1991 (2) ZLR 234 (S).

The courts, however, cannot review on the grounds of unreasonableness regulations made by a body that has been given direct power in terms of the Constitution to create regulations. See *Chairman of the PSC & Ors v Zimbabwe Teachers Association & Ors* 1996 (1) ZLR 91 (S).

**Delegation to Executive of Primary Law Making Power**

An important question that arises is whether it is constitutional for Parliament to delegate to the President or the Executive the power to amend legislation passed by Parliament.

In South Africa the Constitutional Court has ruled in the case of *Executive Council Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) that it is unconstitutional for Parliament to delegate to the President or executive the power to amend or repeal Acts of Parliament when there is no state or emergency and such delegation was not justified by urgent necessity. The court said that delegating to the Executive the power to amend or repeal Acts of Parliament was quite different to delegating subordinate legislative powers. Under the Constitution it is Parliament that is given the power to make and amend legislation.

In Zimbabwe the President has wide powers to make regulations under the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*]. Under this Act the President can make regulations that override other laws (including Acts of Parliament.) These regulations last for six months. The President can make such regulations–

- where it appears to him that a situation has arisen or is likely to arise which needs to be dealt with urgently in the interests of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest; and
- the situation cannot adequately be dealt with in terms of any other law; and
- because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation. (s 2)

The regulations must be laid before Parliament within 8 days of when Parliament next sits after the regulations have been made and if Parliament resolves that the regulations should be amended or repealed, the President must do this. (s 4)
The Act provides that Presidential regulations will prevail over any other law to the contrary to the extent of any inconsistency with such law. (s 5)

These powers, which are available to the President even when there is no declared state of emergency, are arguably unconstitutional.

**Sub-Delegation**

Whether or not it is permissible for the delegate to further delegate a law-making power granted to it will depend upon whether the Legislature intended the delegate to exercise the power itself. Sub-delegation will thus be impermissible where the legislature did not expressly or impliedly intend that the power be delegated.

Various criteria will be taken into account in deciding whether sub-delegation is permissible. For instance, sub-delegation would not have been envisaged where the legislature had delegated the power to create subordinate legislation to a person or body with special expertise in that field. On the other hand, if the subordinate legislation required was purely mechanical or of a petty nature and many such regulations needed to be passed, the court may decide that sub-delegation was envisaged.

In the case of *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S) the court said that while it is normal for Ministers, to whom statutory powers and duties are given, to delegate the exercise of those powers and duties to responsible officials in their departments, this does not apply where the Minister is given responsibility of exercising a discretion which nature of the subject matter and the language of the Act show can only be properly exercised in a judicial spirit.

See also *S v Seedat* 1977(1) RLR 102 (A) and *Arenstein v Durban Corporation* 1952 (1) SA 279 (A).

**Administrative Decision-Making**

Many decisions pertaining to administrative matters are made by administrative officials or bodies rather than courts of law. Public officials, public bodies and administrative tribunals make a wide variety of decisions that affect members of the public.

It is important when Parliament delegates decision-making powers that it spells out clearly by whom the decision is to be made and the factors that should be taken into account in making the decision.

**Administrative Tribunals**

**Nature of and reasons for tribunals**

The ordinary courts deal with legal disputes. Administrative tribunals are bodies other than
courts of law that are given the power to resolve disputes and to decide cases. Most tribunals are set up by legislation. These tribunals are referred to as statutory tribunals. Statutory tribunals are established outside the ordinary court structure in order to resolve conflicts and decide matters within specific areas. There are various reasons that have led to the setting up of numerous tribunals outside the ordinary court system. The main reasons are–

- it would completely overburden the courts if they had to deal with all the many, varied matters which have been allocated to tribunals to deal with;
- tribunals can deal more expeditiously with cases because their procedures are less formal than those used in ordinary court cases. This means that they are less costly to run than ordinary courts;
- tribunals can be manned by persons who possess technical expertise within the specialist areas being dealt with by the tribunals.

As already pointed out, tribunals are not courts of law. They are supposed to operate on an informal and flexible basis. They are therefore not bound to observe the formal and rigid rules of procedure and of evidence that apply in court cases. They must, however, adopt procedures that allow for a fair hearing of cases and, if they do not do so, the handling of the case can be reviewed by the High Court. (See below for the grounds upon which review cases may be brought.)

Whereas courts of law find the facts and then proceed to apply the appropriate law to those facts, the decisions of administrative tribunals are arrived at more on the basis of policy considerations. With statutory tribunals, although the Legislature may have laid down certain factors which the tribunal may or must take into account, the tribunal finally reaches its conclusion not on the basis of the automatic application of clearly established law to the facts but instead upon the basis of policy considerations, some or all of which may be incorporated into the factors laid down by the Legislature.

A few examples of statutory tribunals in Zimbabwe are such tribunals as–

- the Liquor Licensing Board under Liquor Act [Chapter 14:12] (deals with liquor licence applications);
- the Medicines Control Authority under Medicines and Allied Substances Control Act [Chapter 15:03] (regulates licensing of drugs, conduct of clinical trials etc);
- the Industry and Trade Competition Commission under Competition Act [Chapter 14:28] (encourages and promotes competition in all sectors of the economy, reduces barriers to entry into any sector of the economy or to any form of economic activity; and investigates, discourages and prevents restrictive practices; to ensure that there is reasonable competition);
- the Intellectual Property Tribunal established in terms of the Intellectual Property Tribunal Act [Chapter 26:08] (determines any reference, application, appeal or other matter in terms of the Industrial Designs Act [Chapter26:02], the Patents Act [Chapter 26:03], the Trade Marks Act [Chapter 26:04], the Copyright and Neighbouring Rights Act [Chapter 26:05], the Geographical Indications Act [Chapter 26:06] or the Integrated Circuit Layout-Designs Act [Chapter 26:07];
- the Rent Boards under Housing and Building Act [Chapter 22:07] (deals with disputes relating to rent control);
the Civil Aviation Authority under Civil Aviation Act [Chapter 13:16] (deals with applications for air operator’s certificates);
the Commissioner under War Victims Compensation Act [Chapter 11:06] (deals with applications for compensation under the Act);
Lotteries and Gaming Board under Lotteries and Gaming Act [Chapter 10:26] (deals with applications for gaming licences);
Licensing authorities under Shop Licences Act [Chapter 14:17] (deals with shop licence applications).

Various professional bodies are empowered by legislation to regulate and discipline members of their professions, for instance the Law Society, the Architects Council, the Institute of Chartered Accountants and the Estate Agents Council.

By statute decision-making powers can be granted to individuals rather than tribunals. For instance, in terms of section 93 the Labour Act [Chapter 29:01] labour officers are given the power to settle through conciliation a dispute or a complaint of an unfair labour practice.

Tribunals can also be established by voluntary contractual arrangement between private parties. These are referred to as domestic tribunals. Examples of domestic tribunals are bodies such as disciplinary committees of private clubs and other private institutions.

**Special Courts**

Section 92(4) of the Constitution of Zimbabwe lists the special courts as—

(a) the Administrative Court established by section 3 of the Administrative Court Act [Chapter 7:07];
(b) the Fiscal Appeal Court established by section 3 of the Fiscal Appeal Court Act [Chapter 23:05];
(a2) the Special Court for Income Tax Appeals established by section 64 of the Income Tax Act [Chapter 23:06];
(a3) any court or other adjudicating authority established by law which exercises any function that was vested in a court referred to in paragraph (a), (a1) or (a2) on the date of commencement of the Constitution of Zimbabwe Amendment (No. 15) Act, 1998;
(b) any court or other adjudicating authority established by law, other than—
(i) a local court; or
(ii) a court established by or under a disciplinary law; or
(iii) a court established by or under an Act of Parliament for the adjudication of small civil claims;
if there is no right of appeal, directly or indirectly, from a decision of that court or adjudicating authority to the Supreme Court or the High Court;
(c) any court or other adjudicating authority established by law which is declared by that law to be a special court for the purposes of this section.

The Labour Court established in terms of section 84 of the Labour Act [Chapter 28:01] is a special court which deals with appeals in relation labour disputes that cannot be resolved by Labour Officers.
One advantage of special courts are they are specialist courts dealing with a specific areas and are able to develop expertise in these areas, such as taxation or labour dispute resolution. They adopt more informal procedures than ordinary courts of law and are able to deal with disputes more expeditiously and with less expense than courts of law. Their processes are easier for non-lawyers to understand.

The Administrative Court

The Administrative Court was set up in 1979. The Act governing this court is the Administrative Court Act [Chapter 7:01].

Presidents of the Administrative Court

The Presiding Officer in the Administrative Court is called the President of the court. In terms of s 92(1) of the Constitution the State President in consultation with the Judicial Service Commission appoints Presidents of this court. To be qualified for appointment as a President of this court the person must be—

- qualified for appointment as a judge of the High Court or Supreme Court; or
- have been a magistrate in Zimbabwe for not less than seven years; or
- a former judge of the High Court or Supreme Court.

Assessors

The President may sit with assessors. There are provisions relating to assessors in the Administrative Court Act and each enactment which confers powers on the Administrative Court will specify how many assessors must sit and what qualifications these assessors must have.

The Administrative Court Presidents prepare a list of not less than ten assessors in respect of each enactment with which the court deals. The persons appointed as assessors have wide experience and expertise in the areas for which they are appointed. For instance, when the court dealt with an application for the right to use public water for mining purposes, the two assessors who sat were a government water engineer and a mining commissioner or a mining engineer.

The decisions of the court are taken on the basis of a majority. Assessors do not take part in decisions on questions of law.

Jurisdiction of Court

The Administrative Court deals with cases of an administrative nature. It mostly deals with appeals against decisions made by various public authorities but in some cases it exercises original jurisdiction and in some cases it has review jurisdiction. Presidents also sit as Chairperson of various statutory bodies.

See Archipelago (Pvt) Ltd v Liquor Licensing Board 1986 (1) ZLR 146 (H); 1986 (4) SA 397
The Administrative Court does not have any jurisdiction in criminal matters.

**Review even where appeal to Court**

Even where there is a right of appeal in terms of legislation to the Administrative Court against the decision of the original administrative body, the High Court can still exercise its powers of review. See *Archipelago (Pvt) Ltd v Liquor Licensing Board* 1986 (1) ZLR 146 (H).

The following are some of the enactments with which the Administrative Court deals—

**Access to Information and Protection of Privacy Act [Chapter 10:27]**
The court has jurisdiction to hear appeals against decisions of the Media Information to refuse registration to a mass media service. [s 69(3)] However, s 90A(4) provides that if the Administrative Court upholds the appeal, the mass media service is not entitled to be registered but instead the Court must remit the matter to the Commission for re-determination.

There is apparently no right of appeal to the Administrative Court by a journalist who has been refused accreditation in terms of s 79 of the Act.

**Atmospheric Pollution Prevention Act [Chapter 20:03]**
The court has jurisdiction to hear appeals against certain decisions of the Chief Health Officer in terms of this Act. [s 22]

**Co-operative Societies Act [Chapter 24:05]**
The court has jurisdiction to hear appeals by persons aggrieved by a decision made by the Minister in terms of this Act. [s 116(2)]

**Disabled Persons Act [Chapter 17:01]**
The court has jurisdiction to hear appeals in respect of adjustment orders made by the National Disabilities Board [s 1(5)]

**Environmental Management Act [Chapter 20:27]**
The court has jurisdiction to hear appeals against decisions made on appeal to the Minister under the Act. [s 130(4)]

**Estate Agents Act [Chapter 27:05]**
The court has jurisdiction to hear appeals by persons aggrieved by certain decisions, directions, orders or actions of the Council. [s 31] See also the Estate Agents (Appeals) Regulations 1987.

**Hazardous Substances and Articles Act [Chapter 15:05]**
The court has jurisdiction to hear appeals by persons aggrieved by decisions of the Board in relation to licence applications and cancellation or variations of licences. [s 27]
Housing and Building Act [Chapter 22:07]
In the regulations under this legislation, the court exercises appellate jurisdiction. The relevant regulations are the Rent Regulations 1982 (SI 626 of 1982). The court also has review jurisdiction under the Act. The court exercises appellate jurisdiction under the Commercial Premises (Lease Control) Act [Chapter 14:04].

Interception of Communications Act [Chapter 11:20]
Persons aggrieved by the issuing of a warrant, directive or order in terms of this Act has a right of appeal to the Administrative Court. The appeal must be lodged within one month of being notified or becoming aware of the measure. [s 19].

Land Acquisition Act [Chapter 20:10]
The Administrative Court used to deal with applications by the acquiring authority for orders authorizing or confirming acquisition where acquisitions are contested. However, Constitutional Amendment No 17 now precludes persons with a right or interest in land from challenging the legality of the acquisition. It provides that a person “shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge.” However, this provision still provides that a person with a right or interest in land—

may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.

The Administrative Court will thus still continue to deal with appeals against the amount of compensation payable for compulsorily acquired land. Section 29D provides that if a claimant for compensation or an acquiring authority considers that the Compensation Committee, in assessing the compensation payable in respect of the acquisition of any agricultural land required for resettlement purposes, has not observed any of the prescribed principles, he may appeal to the Administrative Court. It is further provided in that section that in such an appeal “neither the Administrative Court nor any other court shall set aside an assessment unless the court is satisfied that the Compensation Committee, in making the assessment, did not observe any of the principles prescribed.”

Liquor Act [Chapter 14:12]
The court has jurisdiction to hear appeals from persons aggrieved by certain decisions of the Board or by the Minister in terms of the Act. [s 19].

Medicines and Allied Substances Control Act [Chapter 15:03]
The court has jurisdiction to hear appeals from persons aggrieved by decisions of the Authority in terms of this Act. [s 62]

Mines and Minerals Act [Chapter 21:05]
The court has jurisdiction to hear appeals against certain decisions of the Board. [s 227]

National Social Security Authority Act [Chapter 17:04]
The court hears appeals from persons aggrieved by decisions of the Board. [s 37]
Plant Breeders Rights Act [*Chapter 18:16*]
The court hears appeals from decisions of the Registrar under the Act [s 21]

Plant Pests and Diseases Act [*Chapter 19:08*]
The court exercises original and appellate jurisdiction. Under s 25 it can hear appeals against orders of destruction of plants.

Procurement Act [*Chapter 22:14*]
The court hears appeals against decisions of the State Procurement Board. [s 43]

Regional, Town and Country Planning Act [*Chapter 29:12*]
The Administrative Court deals with various disputes arising out of the operation of this Act.

For instance, the court also determines various issues such as objections when these matters are referred to it [s 16(3)(b)] and determines certain compensation claims [s 53].

The court exercises appellate jurisdiction in respect of appeals by persons aggrieved

- by what has been done to implement a local plan [s 11];
- by certain planning decisions and other decisions such as building orders. [s 38]
- by decisions relating to applications for certain permits. [s 44].

Road Motor Transportation Act [*Chapter 13:15*]
The court has jurisdiction to hear cases appeals by persons aggrieved by decisions, directions, order and actions of the Commissioner in terms of this Act. [s 34]

Shop Licences Act [*Chapter 14:17*]
The court has jurisdiction to hear appeals against decisions of the licensing authority. [s 39].

State Service (Disability Benefits) Act [*Chapter 16:05*]
A President of the court is *ex officio* chairman of the Disablement Benefits Appeal Board, which hears appeals under the Act. [s 10(2)(a)]

Sports and Recreation Commission Act [*Chapter 25:15*]
The court has jurisdiction to hear appeals against decisions by the Board or Commission. [s 32(1)]

Urban Councils Act [*Chapter 29:15*]
A President of the court is the President of the Valuation Board. [s 241(3)]. The Valuation Board sits as a court of the first instance. The decision of the Valuation Board is final and unappealable but an application can be made to the Supreme Court on points of law.

War Pensions Act [*Chapter 11:14*]
The court has jurisdiction to hear appeals brought by persons aggrieved by decisions of the
Board. [s 7]. If the Administrative Court varies a decision of the Board, the decision of the Administrative Court is deemed to be a decision of the Board and is final and without appeal. [s 8].

**Water Act [Chapter 20:24]**

In 1979 all the functions of the old Water Court were taken over by the Administrative Court.

The Administrative Court deals with various disputes relating to the use of public water, the granting of servitudes and amounts of compensation.

The Administrative Court has jurisdiction to hear appeals brought by persons aggrieved by decisions, directions, orders or actions of any authority in terms of the Water Act. [s 114(1)]. On appeal, the Court may confirm, vary or set aside the decision, direction, order or action appealed against or give such other decision as in its opinion the authority concerned ought to have given, and make such order as to costs as it thinks fit. [s 114(3)]

It can make various orders such as that under section 62(1)(c).

**Court Procedure**

The procedures will vary in accordance with whether the court is exercising original jurisdiction, review jurisdiction or appellate jurisdiction. Legal practitioners must therefore ascertain from the relevant provisions of the particular enactment in question what type of jurisdiction the court is exercising in the particular case in question.

The procedure in appeal cases is laid down in the Administrative Court (Miscellaneous Appeals) Rules, 1980 (SI 122/1980).

The provisions of the rules apply to any appeal to the Court or President that is provided for in any enactment. The rules, however, do not apply to any appeal in relation to which the enactment concerned or rules published under such enactment expressly prescribe the whole procedure to be followed. See, for instance, rule 2(1) & (2) of the Town Planning Court Rules, 1971 (RGN 621 of 1972).

In an appeal to which the Administrative Court Appeals Rules apply, it is important to ensure that the rules are read subject to those provisions of the enactment concerned which prescribe aspects of the procedure for the appeal, but the Appeals Rules will be applied to the fullest extent that is consistent with the provisions of the enactment.

A notice of appeal should be directed and delivered to the presiding officer of the tribunal or body whose decision is being appealed against and all other parties affected by the decision. The notice of the appeal should also be filed with the Registrar of the Administrative Court.

The notice of appeal should be delivered and filed within thirty days of the making of the
An application for condonation of the late noting of an appeal should be accompanied by an affidavit verifying the facts on which the application is based. These should be served on all affected parties at the time of the service of the notice of appeal.

The affected parties may, within fourteen days of the service on them of such application, file a reply supported by an affidavit verifying the facts on which such reply is based. (See rule 6.)

In terms of rule 7, a notice of appeal must give all the following information—

- the tribunal whose decision is appealed against;
- the date on which the decision was given;
- the grounds of appeal;
- the exact nature of the relief sought; and
- the address of the appellant or his legal representative.

Often, legal practitioners fail to provide all the required information, such as the exact nature of the relief sought.

Not later than thirty days after the receipt of the notice of appeal, the tribunal whose decision is being appealed must—

- lodge the formal record of the proceedings with the Registrar if such a formal record was kept; or
- if no formal record was kept, lodge with the Registrar reasons for the decision, together with all the papers relating to the issue. See rule 8.

**Heads of argument**

Each party who is legally represented must prepare heads of argument together with a list of authorities to be cited in support of each head. The appellant must, not later than four days before the date of the hearing of an appeal or application deliver four copies of his heads of argument to the Registrar and one copy to the respondent. The respondent must then as soon as possible after receiving the heads of argument and in any event not later than twenty-four hours before the hearing, prepare and deliver his heads of argument. See rule 10.

**Departure from Rules**

In any case not contemplated by the rules, the court, or a President if the court is not sitting, must act in such manner and on such principles as it or he deems best fitted to do substantial justice and to carry out objects and provisions of the enactment concerned, and may for this purpose give instructions on the course to be pursued, which will be binding on the parties to the proceedings. See rule 11.
Cannot order execution of judgment despite appeal

The case of ANZ (Pvt) Ltd v Minister for Information & Anor 2005 (1) ZLR 222 (S) 252 decided that the Administrative Court does not have jurisdiction to order the execution of its judgment when an appeal has been noted against its judgment. Only a court of inherent jurisdiction has the discretion to order that its judgment be executed even though an appeal against its judgment is underway. The Administrative Court does not have inherent jurisdiction. Section 19 of the Administrative Court Act does not confer upon the Administrative Court the power to order the execution of its judgment when an appeal against its judgment has been noted.

Possible restructuring of Court

It would appear that when this court was established it was simply given a miscellany of tasks to perform and little attention was paid to the role this court could play in developing the field of administrative law on a more systematic basis.

Consideration should be given as to whether the Administrative Court should be restructured so as to allow it to play a more important and coherent role in the regulation of administrative decision-making.

The court could be made responsible for dealing with all cases in which the decisions of administrative authorities are being taken on review. In other words, it could be given exclusive jurisdiction to review such cases and the High Court would no longer exercise such jurisdiction. This would allow the court that specialises in administrative matters to deal with these matters.

Another way in which the court could be take on a more systematic role is, rather than giving it appeal jurisdiction in respect of decisions made by certain selected statutory bodies, it could be given jurisdiction to deal with all appeals against administrative decisions made under any legislation. It would thus become the specialist court to deal with all appeals against decisions taken by administrative authorities. See Baxter p 272.

List of Regulations passed under Administrative Court Act

Administration assigned to Minister of Justice, Legal and Parliamentary Affairs 60/2003
Administrative Court (Land Acquisition) (Amendment) Rules, 2004 (No. 1) 143A/2004
Administrative Court (Land Acquisition) (Amendment) Rules, 2004 (No. 2) 172/2004
Administrative Court (Miscellaneous Appeals) Rules, 1980 122/1980
Administration assigned to Minister of Justice, Legal and Parliamentary Affairs 86/2001
Administrative Court (Miscellaneous Appeals) Rules, 1980 122/1980
<table>
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<tr>
<th>Rule Description</th>
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<td>Atmospheric Pollution Prevention (Appeal Board) Regulations, 1975</td>
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<td>Town Planning Court Rules, 1971</td>
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<td>Estate Agents (Appeal) Rules, 1971</td>
<td>36/1971</td>
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The Administrative Justice Act

By setting standards for good administration, the Administrative Justice Act [Chapter 10:28] encourages efficient administration and good governance and creates a culture of accountability on the part of administrators. The positive features of this Act are, however, undermined by the provisions allowing administrative authorities, in certain circumstances, to depart from the obligations set out in the Act.

Administrative authority and administrative action [s 1]

For the purposes of this Act an administrative authority means any person who is—

- an officer, employee, member, committee, council or board of the State or a local authority or parastatal; or
- a committee, or board appointed by or in terms of any enactment; or
- a Minister or Deputy Minister of the State; or
- any other person or body authorised by any enactment to exercise or perform any administrative power or duty;

and who has the lawful authority to carry out the administrative action concerned.

Administrative action means any action taken or decision made by an administrative authority. In the case of *U-Tow Trailers (Pvt) Ltd v City of Harare & Anor* 2009 (2) ZLR 259 (H) the Harare City Council had cancelled the applicant’s lease to certain premises. The main issue for determination was whether the Harare City Council was justified in summarily cancelling the lease agreement without first affording the applicant a chance to respond to the allegations that it was subletting the premises.

The court held that the Harare City Council acted strictly in terms of the lease agreement between the parties and did not afford the applicant a chance to be heard before it summarily cancelled the lease agreement. The rule at common law is that tenets of natural justice have no application in the law of contract unless the aggrieved party can prove that the contract impliedly imported and incorporated such into the contract. However, even before to the enactment the Administrative Justice Act, courts in this jurisdiction were generally alive to the need to import fairness into administrative decisions, even those that were founded primarily on contract, especially the employment contract. Section 2 of the Act defines administrative authority as including any person, committee or council of a local authority and an administrative action as including any action or decision taken by an administrative authority. The definition is immensely wide. Accordingly, any decision made by an administrative authority under the empowering provisions of any enactment, in pursuance of any rule of common law, or in terms of an agreement between itself and another party or in terms of any legal instrument, must be made fairly and in accordance with the provisions of the Act. The decision by the Harare City Council to summarily terminate the lease agreement between itself and the applicant was an administrative one carried out by an administrative authority, empowered to do so by the lease agreement between the parties. The Act applied fully to this decision. The Harare City Council was bound to act fairly in terminating the lease agreement between itself and the applicant. It failed to do so and so breached the obligations placed upon it by the law. Its consequent decision, arrived at in circumstances where it had failed to act
fairly, could not therefore stand.

The court held further that section 4 of the Act provides that any person who is aggrieved by the failure of an administrative authority to comply with s 3 may apply to the High Court for relief. Generally, it is not necessary for an applicant to specifically plead the law that it seeks to rely on as long as the necessary averments are made therein to sustain a cause of action under the applicable law, unless the law under which he is proceeding requires that certain averments be specifically pleaded.

In *Gula-Ndebele v Bhunu NO* 2010 (1) ZLR 78 (H) the President in terms of s 110(5) of the Constitution appointed a tribunal to enquire into allegations of misconduct by the former Attorney-General. The tribunal heard the matter and recommended to the President that the applicant should be removed from office. Acting in terms of s 110(3), the President removed the applicant from office.

The applicant did not seek reinstatement, nor did he cite the President as a party. He sought a review of the tribunal’s decision, on the grounds that it was grossly unreasonable and utterly perverse in its defiance of logic and reason and no tribunal, properly addressing its mind to the facts before it and to the law, and having regard to the evidence before it, could have arrived at such a decision; that the tribunal was biased against him; and that the tribunal’s recommendation to the President arose not only out of bias against him but also as a result of the consideration of improper motives.

The court found that like the proceedings of any other quasi-judicial body, the proceedings of the tribunal, if tainted by procedural irregularities recognizable at law as vitiating such proceedings, could be set aside before they are concluded and before any recommendation was made. Even after the inquiry was complete but before its recommendation was acted upon, the proceedings and the consequent recommendation of the tribunal could have been set aside on review. In both instances, there would be no need to cite the President in review proceedings to set aside the decision of the tribunal. However, where the recommendation of the tribunal has been implemented as required by the Constitution, then the decision of the tribunal ceases to have any independent status and becomes imbedded in and forms an integral and inseparable part of the action of the President.

In terms of s 110, the Attorney-General can only be removed from office by the President if the President is so advised by the recommendation of the tribunal. The President does not take any decision in the matter but is bound simply to implement the recommendation and advice of the tribunal to that effect. The removal of the Attorney-General from office is thus not a decision that the President can reach *mero motu* or against the recommendation of the tribunal. He cannot act without a recommendation and advice from a tribunal. While the recommendation and advice can exist on its own before implementation, once they are implemented, the two become one. The implementation cannot exist on its own without the recommendation and once the recommendation is lawfully set aside, the implementation fails to have a basis in law and becomes unconstitutional. The non-citation of the President was fatal to the application. It was untenable for the applicant to suggest that he could attack the recommendation of the tribunal only without affecting the act of the President to remove him from office. The act of removing him from office cannot lawfully exist without the requisite recommendation and thus to attack
one is necessarily to attack the other. Consequently, to be procedurally correct, the President must be made a party to the proceedings as the court could not make an order adversely affecting the action of the President without affording him the right to be heard.

Obligations of administrative authorities [s 3]

All administrative authorities that have the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person must—

- act lawfully, reasonably and in a fair manner; and
- act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
- where it has taken the action, to supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.

(For a detailed discussion on the importance of requiring administrative authorities to give reasons for their decisions and actions see later under the sub-heading “Reasons for decisions” which is to be found in the section dealing with Natural Justice.)

To satisfy the requirement of acting in a fair manner the authority must give the person concerned—

- adequate notice of the nature and purpose of the proposed action; and
- reasonable opportunity to make adequate representations; and
- adequate notice of any right of review or appeal, where applicable.

The use of word “adequate” in all three of these provisions is important. The notice must obviously contain enough information about the proposed action and the reasons why it is contemplated to allow the person concerned to make meaningful representations. The reasonable opportunity to make adequate representations will sometimes require a full oral hearing and sometimes only the chance to respond in writing where this will suffice for a fair hearing.

As regards acting within a reasonable period of time, see *N & B Ventures (Pvt) Ltd v Minister of Home Affairs & Anor* 2005 (1) ZLR 27 (H). In this case the applicant ran a hotel for which it held the appropriate liquor licence. It applied timeously for the renewal of the licence but the Liquor Licensing Board did not issue a new licence promptly, in spite of reminders. The licence was finally renewed some 18 months after the application for renewal was made. In the meantime, the applicant paid two admission of guilt fines and the police thereafter obtained a court order to seize the applicant’s stock of liquor. The licence was renewed a few days later.

The applicant applied for an order for the return of its liquor. The court held that while technically the applicant had committed an offence by selling liquor without a licence, the conduct of the Board should be considered. The Board was charged with handling matters relating to liquor licences. It was duty bound to either refuse an application or to issue a liquor licence within a reasonable time. Its failure to do so was a clear dereliction of duty. Administrative authorities are required to act reasonably and the failure to issue a liquor license under such unexplained circumstances was unreasonable. Where in the absence of an adverse
reason an administrative authority fails to act, the courts have a duty to interfere in order to safeguard the financial and social interests of the applicant and the public respectively. Where an administrative authority is seized with a duty to perform a certain act, which act is a condition for another party to act, it cannot be allowed to penalise the other party on the basis of non-performance when it has not itself performed its own part. It must first perform its part before it penalises the other party for non-performance. The forfeiture was set aside.

**Factors for deciding whether breach of administrative justice [s 5]**

High Court may have regard to whether or not–

- the administrative authority has jurisdiction in the matter;
- the enactment under which the action has been taken authorises the action;
- a power has been exercised for a purpose other than that for which the power was conferred;
- a power has been exercised in a manner which constitutes an abuse of that power;
- an irrelevant matter has been taken into account;
- a relevant matter has not been taken into account;
- a material error of law or fact has occurred;
- fraud, corruption or favour or disfavour was shown to any person on irrational grounds has occurred;
- bad faith has been exercised;
- a discretionary power has been improperly exercised at the direction, behest or request of another person;
- a discretionary power has been exercised in accordance with a direction as to policy without regard to the merits of the case in question;
- the action taken is so unreasonable that no reasonable person would have taken it;
- there is any evidence or other material which provides a reasonable or rational foundation to justify the action taken;
- a breach of the rules of natural justice, where applicable, has occurred;
- the procedures specified by law have been followed;
- any departure from the requirements of administrative justice is in the circumstances, reasonable and justifiable.

**Remedies [s 4]**

In an application complaining of breach of the obligations to comply with administrative justice the High Court may, as may be appropriate–

- set aside the decision concerned;
- refer the matter back to the administrative authority concerned for consideration or reconsideration;
- direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;

- give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with its obligation to render administrative justice.

Directions may include directions as to the manner or procedure that the administrative authority should adopt in arriving at its decision, and directions to ensure compliance by the administrative authority with the relevant law or empowering provision.

The case of Associated Newspapers of Zimbabwe v Media & Information Commission & Anor 2007 (1) ZLR 272 (H) the court considered the scope of the remedy provided for in section 4 of the Administrative Justice Act. This case involved a long standing dispute relating to the registration of newspaper in terms of the Access to Information and Protection of Privacy Act (AIPPA). AIPPA requires newspapers to be registered with the Media and Information Commission before they can operate. The applicant applied for registration, which was refused. The Administrative Court set aside the Commission decision and ordered that the applicant was deemed to have been registered. The Supreme Court held the Administrative Court had misdirected itself in so ordering when it had not determined the allegations by the Commission that the applicant had not complied with the Act. It set aside the Administrative Court’s order.

Before the application for the registration was made to the Commission, the Chairman of the Commission had written articles describing the applicant as an outlaw and saying that its application would not be considered. Although the Supreme Court found that actual bias had not been established on the part of the Chairman, it concluded that the proceedings of the Commission were voidable on the grounds of reasonable suspicion of bias and ordered that the matter be remitted to the Commission for consideration de novo. The applicant’s subsequent application was again refused by a panel of which the Chairman was a member. The High Court set aside this decision and ordered the matter to be heard again de novo. It found that not only was the Chairman biased, but that the entire Commission had exhibited bias against the application. The applicant asked the respondent Minister to appoint new commissioners as the existing ones were disabled from hearing the matter due to their bias. The Minister did not reply or take any action before the applicant applied the court for relief, seeking an order that it be deemed to be registered in terms of the Act. In response to the application, the Minister took the stance that despite the finding of he retained confidence in the Commissioners and did not wish to replace them.

The applicant argued that there was nothing in the Administrative Justice Act (AJA) which prevented the court from declaring that the applicant was deemed to have been duly registered in terms of AIPPA. It contended further that a mandatory interdict would be appropriate as the legislation envisages registration except in limited circumstances. From the date that the Supreme Court judgment was handed down both respondents were aware that the Commission could not entertain the application for its registration by the applicant. In so far as the applicant was concerned it was clear that there was no administrative body to deal with the application.

The court held that the Minister’s statement that he retained confidence in the members of the Commission and found no reason to displace them would be indicative of a disinclination on his part to allow the applicant to exercise its right to apply for registration in terms of the Act. The Supreme Court’s and High Court’s findings of bias meant that the Minister should have put
in place measures for the speedy determination of the application for registration by the applicant. Whilst the AJA does provide for relief against an administrative authority which has not acted in accordance with its statutory duty, it does not exclude an applicant from seeking other appropriate relief from such administrative authority. It is clear that, amongst other rights, the intention of the AJA is to provide for the right to administrative actions and decisions that are lawful and procedurally fair and to provide for relief by a competent court against administrative actions and decisions that are contrary to the provisions of the AJA. The AJA provided the best possible form of relief to a litigant aggrieved by a recalcitrant administrative authority. There was no reason why the relief provided for in terms of s 4 of the AJA could not be availed to the applicant. Indeed, it would be most appropriate for an order in terms of s 4(2)(c) for the Minister to be directed to take such administrative action as would put in place conditions and a legal framework for the application for registration by the applicant to be considered and determined. Although the Commission did exist, all the Commissioners were effectively disabled by the judgments which found them to be biased against the applicant. However, to contend that there in fact was no administrative body in existence was to go too far. The membership of the Commission has the lawful authority envisaged in AIPPA to carry out the administrative acts for which it has been appointed. None of the Commissioners suffered from a legal impediment as envisaged in s 40(3) of AIPPA. Their disability, being specifically to do with the applicant, did not denude the Commission of its lawful authority to do its tasks and perform the functions it was meant to perform in terms of AIPPA except as it relates to the applicant. The court was being asked to place itself in the shoes of the Commission and make the decision whether or not the applicant should be granted a licence to operate a mass media service. While there was substance in the argument that AIPPA allows no discretion to the Commission to deny a licence save in certain limited circumstances, in order to be granted such licence, an applicant needs to satisfy the Commission that there has been compliance with AIPPA That issue that had not been determined by the Commission in casu. The question was not considered. In order to grant the relief being sought, the court would then have to consider whether the applicant had complied with AIPPA and hence itself become the licensing authority. A court will not interfere in the sphere of administrative actions or decisions except in very exceptional situations, but it will normally interfere in the administrative sphere in the following circumstances: (a) where the end result is a foregone conclusion and a referral back would be a waste of time; (b) where further delay would cause unjustifiable prejudice to the applicant; (c) where the statutory tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and (d) where the court is in as good a position to make the decision itself. In casu, no evidence had been placed before the court, and thus there was no way the court could know, that there had been due compliance by the applicant with the provisions of AIPPA in order to qualify for the grant of a certificate of registration. That knowledge would peculiarly be in the ambit of the Commission as the administrative authority for purposes of issuing a certificate of registration.

**Court with jurisdiction to grant remedies**

Only the High Court can grant these remedies. There are compelling arguments in favour of allowing the Magistrates Courts and the Administrative Court jurisdiction to deal with these matters.
Whether Court has power to substitute own decision

This section does not give the High Court the power to substitute its own decision for that of the administrative authority where the authority has failed to comply with the requirements set out in clause 3. On the other hand, the South African Promotion of Administrative Justice Act allows the court in exceptional cases to substitute its own decision or to vary the administrative action or correct a defect resulting from the administrative action.

It is well established in a series of decisions of our Supreme Court, such as Director of Civil Aviation v Hall 1990 (2) ZLR 354 (S); Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S) and Associated Newspapers of Zimbabwe v Media & Information Commission & Anor 2007 (1) ZLR 272 (H) that, when a court sets aside a decision on the grounds of procedural irregularity it will normally refer the matter back to the administrative authority for a re-hearing, a court on review may, however, in exceptional circumstances, substitute its own decision for that of the administrative authority. The exceptional circumstances are these—

- where the end result is a foregone conclusion and a referral back to the tribunal or official would be a waste of time; or
- where further delay would cause unjustifiable prejudice to the applicant; or
- where the tribunal or official has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; or

where the court is in as good a position as the tribunal or official to make the decision itself.

See also Administrator, Transvaal & Ors v Traub 1989 (4) SA 713 (A)

It is recommended that the Act be amended so that the Court is expressly given these powers.

Recommended further forms of relief

The South African Act in s 8 also contains the following additional forms of relief that can be granted by a court—

- prohibiting the administrator from acting in a particular manner;
- declaring the rights of the parties in respect of any matter to which the administrative action relates;
- granting a temporary interdict.
- in exceptional cases, directing the administrator or any other party to the proceedings to pay compensation.

It would be useful to incorporate all of these forms of relief into the Zimbabwean Administrative Justice Act.

Permissible departure from obligations [s 3(3)]
An administrative authority may depart from requirements to act lawfully, reasonably and fairly, act within the specified or a reasonable time and supply written reasons within the specified or reasonable period (as laid down in s 3) if

- the enactment under which decision made expressly provides for any of the matters referred to in s 3(1) and (2) so as to vary or exclude any of their requirements; or
- the departure is, under the circumstances, reasonable and justifiable, in which case administrative authority must take into account all relevant matters, including—
  - the objects of applicable enactment or common law rule;
  - the likely effect of its action;
  - the urgency of the matter or the urgency of acting thereon;
  - the need to promote efficient administration and good governance;
  - the need to promote the public interest.

No administrative authority can or should be given the discretion to depart from the requirement to act in a lawful manner. Such departure can never be reasonable and justifiable in any circumstances. Even the legislature should not be empowered to pass legislation exempting an administrative authority from the obligation to act lawfully or even varying this obligation. All administrative authorities, no matter how high-ranking, are obliged to obey the law. If an authority acts unlawfully, any person affected must surely have the right to approach a court of law for a ruling that the action is illegal and of no force and effect. This is the essence of the rule of law and the protection of the law. In terms of s 18 of the Constitution everyone has the fundamental right to protection of the law.

It is strongly arguable that no administrative authority can or should be given the discretion to depart from the requirement to act in a reasonable manner and that no Act of Parliament should exempt an administrative authority from this obligation. The public surely has the right to expect all administrative authorities to act reasonably. The South African legislation does not allow these authorities to be exempted from the obligation to act reasonably.

These provisions are dangerous as they are wide open to abuse. An administrative authority that has acted in a palpably unlawful or blatantly unreasonable manner might still claim that it was reasonable and justifiable for it to have departed from the obligation to act lawfully and reasonably. Many administrative authorities will be tempted to invoke this provision even where they have acted in a completely unacceptable manner. As regards the various factors that are to be taken into account when considering departure, urgency, for instance, cannot be an excuse for acting unlawfully or unreasonably. This applies also to the wide and vague factor of public interest. The public interest is prejudiced not promoted by unlawful and unreasonable administrative action. The same applies to the factor of the need to promote efficient administration and good governance. Unlawful and unreasonable action amounts to bad governance and inefficient administration.

It is submitted the only departures that should be allowed are justifiable departures from the procedural fairness requirement and the obligation to give reasons. This would be in line with the provisions of the South African legislation. Even these departures should be resorted to extremely rarely.
See Feltoe “Giving with one hand and taking back with the other: the exemptions and exclusions in the Administrative Justice Act” 2004 Issue No 11 Zimbabwe Human Rights Bulletin 106.

**Exempted bodies [s 11 read with Schedule]**

A number of decision-makers are exempted from
- the duty to act in a fair manner by giving the person affected adequate notice of the nature and purpose of the proposed action, a reasonable opportunity to make adequate representations and adequate notice of any right of appeal or review;
- the duty to supply reasons.

The exempted decision-makers bodies are
- the President or Cabinet in the exercise or performance of executive powers or functions;
- prosecution authorities in respect of decisions regarding the prosecution of offenders; and
- decision-makers in respect of decisions relating to the appointment of judicial officers. [S 11(1) read with Part 1 of the Schedule.]

The decision-makers in disciplinary proceedings against police, army and prison officers are exempt from the requirement to supply reasons for their decisions.

The Minister may by statutory instrument exempt other administrative authorities than the specified ones from complying with these requirements if “he or she deems it necessary or desirable in the public interest.” The Minister must lay such a statutory instrument before Parliament, which may annul it. [s 11(6) & (7)]

**When High Court will decline to order giving of reasons or limit reasons [s 8]**

The High Court may—
- decline to order that reasons be given; or
- direct that any reasons be limited or restricted.

It can do these things where—
- it would be contrary to the public interest for such reasons to be disclosed; or
- the administrative authority’s refusal to supply reasons was reasonable and justifiable in circumstances.

The public interest for this purpose includes matters that relate to—
- the security or defence of State; or
- the proper functioning of the government; or
- the maintenance of international relations; or
- the protection of confidential sources of information pertaining to law enforcement or administration; or
the prevention or detection of offences.

In order to determine this matter the court may direct that the reasons be disclosed privately to
the court for its consideration. After examining the reasons it may—

- refuse to order disclosure of reasons;
- edit reasons in manner or to extent best suited to preserve public interest and serve
  applicant’s interests;
- consider whether disclosure of reasons should be limited or restricted in terms of the
  Courts and Adjudicating Authorities (Publicity Restrictions) Act.

In the Human Rights Bill, 2011 there are some far-reaching provisions allowing the Minister of
Justice and Legal Affairs to prevent the disclosure of certain evidence by the complainant to the
Commission or by the Commission to the public or to the complainant. These provisions are as
follows—

12 Manner of conducting investigations

(6) Subject to subsection (7)(b), the Minister of Justice and Legal Affairs may give notice to the
Commission and the complainant prohibiting the disclosure—

a) by or to the Commission; or
b) to the complainant;

as the case may be, of any evidence or documentation or class of evidence or documentation
specified in the notice whose disclosure would, in the opinion of the Minister, be contrary to the
public interest on the grounds that it may prejudice the defence, external relations, internal security
or economic interests of the State.

(7) Upon receipt of a notice in terms of subsection (6)—

a) the Commission or any member of staff of the Commission shall not communicate any
   such evidence or documentation to any other person for any purpose, unless the Minister
   allows the Commission to do so, subject to such conditions as he or she may fix; and
b) the aggrieved person may, in accordance with the Administrative Justice Act [Chapter
   10:28], appeal against such notice and the court hearing the appeal shall treat any
   evidence or documentation subject to the notice in the manner specified in section 8
   (“Discretion to refuse or restrict supply of reasons”) of the Administrative Justice Act
   [Chapter 10:28].
Appeals Against Administrative Decisions

Appeals

Often when statutory authorities are given the power to make administrative decisions, the statute giving this power also provides for a right of appeal against that decision to a statutory body or to the administrative court.

See, for instance, Lowenthal v Liquor Licensing Board 1956 (1) SA 227 (SR) and Divaris v Liquor Licensing Board 1956 (3) SA 462 (SR)

Types of appeal

Where there is such a right of appeal the question arises as to what type of appeal is envisaged. In the case of Watchtower Bible and Tract Society of Pennsylvania & Anor v Drum Investments (Pvt) Ltd 1993 (2) ZLR 67 (S) the Supreme Court had this to say—

Traditionally the courts in Southern Africa have divided administrative appeals into three categories, as follows—

1. An appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information;
2. An appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;
3. A review, that is, a limited re-hearing with or without additional evidence or information, to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly.

This is the list set out by Trollip J . . . in Tickle & Ors v Johannes & Ors 1963 (2) SA 588 (T) at 590, adopted by the Appellate Division in S v Mohamed 1977 (2) SA 531 (A) at 538D-G, and applied in National Union of Textile Workers v Textile Workers’ Industrial Union (SA) & Ors 1988 (1) SA 925 (A) at 937.

In the Watchtower case a religious organisation applied for special consent from the Rural Council on land that was zoned for agricultural usage. Two persons living in the vicinity of the site objected to the application. The Rural Council granted special consent for a change of use. The objectors then appealed in terms of s 63 of the Administrative Court Act, 1979 to the Administrative Court against the granting of special consent. The court upheld the appeal and refused the permit for change of use. The religious organisation and the Rural Council then appealed to the Supreme Court. The court held that on appeal in such a matter the Administrative Court is authorised under s 39(1) of the Rural, Town and Country Planning Act, 1976 “to make such order as it deems fit”. It thus completely re-hears the matter and makes a fresh determination on the merits.

In the case of Associated Newspapers of Zimbabwe v The Media and Information Commission AIPP 1/03 ANZ had appealed in terms of the Access to Information and Protection of
Information Act against the decision of the Media and Information Commission to reject its application for registration. The Administrative Court decided that the type of appeal it was dealing with was an appeal in the wide sense, that is, a complete re-hearing of the evidence and a fresh determination of the matter.

**Whether judgment suspended on noting of appeal**

The general common law rule of practice in private law relating to superior courts of inherent jurisdiction is that the operation of a judgment is suspended on the noting of an appeal, except that the court that granted the judgment can, on application, order that the judgment will not be suspended but will come into effect despite the pending appeal. The question arises as to whether this rule also applies to the decisions of administrative tribunals and officials. In other words does the noting of an appeal against the decision of a statutory body or administrative official suspend the decision pending the appeal? There are conflicting decisions on this point.

In the case of *Phiri & Ors v Industrial Steel and Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S) employees appealed to the Labour Relations Tribunal against the approval by the Minister of their retrenchment by their employer. The Supreme Court held that as the retrenchment regulations are silent on the effect of an appeal, the common law rule applied, that is that the noting of an appeal suspends the execution of the judgment.

In the case of *PTC v Mahachi* 1997 (2) ZLR 71 (H) an employee had noted an appeal to the Supreme Court against the decision by the Labour Relations Tribunal authorizing the dismissal of the employee. The court held that the common law presumption applied and the decision of the tribunal was therefore suspended by the noting of the appeal.

On the other hand, in the case of *Vengesai & Ors v Zimbabwe Glass Industries* 1998 (2) ZLR 593 (H) a High Court judge came to a different conclusion. This case again involved the question of whether the decision of the Minister to approve the retrenchment of employees was suspended by the noting of an appeal to the Labour Relations Tribunal. The judge ruled that the appeal did not suspend the decision. His reasoning was as follows. The common law rule of practice that an appeal automatically suspends the execution of a judgment only applies to a superior court of inherent jurisdiction. It does not apply to any other court, tribunal or authority. Such other courts, tribunals or authorities are creatures of statutes and are bound by the terms of the statutes that establish them. The noting of an appeal only suspends the decision if the enabling statute in question so provides. If it does not so provide, the person appealing is not left without a remedy as he or she may apply to the High Court for a stay or interdict.

The approach adopted in the *Vengesai* case was also adopted by the judge in the case of *PTC v Mahachi* (2) HH-183-98. Commenting on the divergence of opinion on this issue, the judge pointed out that the common law rule had the important corollary that the court giving judgment has the inherent discretion to permit execution pending appeal. Only courts of inherent jurisdiction have this discretion. Thus other courts and tribunals judgments of such courts and tribunals should not automatically be suspended. See also *Chatizembwa v Circle Cement Ltd* HH121-94 1994 and *Founders Building Society v Mazuka* 2000 (1) ZLR 528 (H).

Commenting *obiter* on this conflict in the case law in the case of *UTC v Chiwedere* at p 149E
Gubbay CJ seemed to favour the approach in adopted in the *Vengesai, Mahachi* (2) and *Chatizembwa* cases, saying that the *ratio decidendi* of the judges in these cases was “highly persuasive.”

In the case of *UTC (Zimbabwe) Pvt Ltd v Chigwedere* 2001(1) ZLR 147 (S) the Supreme Court ruled that the noting of an appeal to the Labour Relations Tribunal in terms of s 101(7) of the Labour Relations Act against an employer’s decision to dismiss an employee in accordance with a registered code of conduct, does not have the effect of suspending the decision pending the outcome of the appeal. The court pointed out that this case did not concern an appeal against the decision of an administrative body or official; it was an appeal against the determination of an individual employer acting through an internal management committee. This is a matter of private law.

In the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd v The Minister of State for Information and Publicity & Ors ANZ (Pvt) Ltd v Minister for Information & Anor* 2005 (1) ZLR 222 (S) 252 the Supreme Court ruled that the Administrative Court had no power to order the execution of its judgment even though an appeal had been noted against that judgment.

As regards appeals in labour matters to the Labour Court s 97(3) of the Labour Act [*Chapter 28:01*] specifically provides that an appeal to the Labour Court in terms of s 97(1) “shall not have the effect of suspending the determination or decision appealed against.”

**Judicial Review**

**Grounds for review**

In Zimbabwean law, the High Court is vested with the power to review the proceedings of all administrative tribunals, both statutory and domestic. The two main grounds upon which the High Court can interfere on review with an administrative tribunal’s proceedings are, firstly, that the administrative tribunal has acted beyond the powers allocated to it (*ultra vires*) and, secondly, that it did not comply with the principles of natural justice. The power of the High Court to review the proceedings of all administrative tribunals was recognized under common law. This power of review is now also laid down in statutory form in s 26 of the High Court of Zimbabwe Act [*Chapter 7:06*]. The grounds upon which the proceedings can be reviewed are contained in s 27. This section reads–

27.(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be -

(a) absence of jurisdiction on the part of the court, tribunal or authority concerned;

(b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;

(c) gross irregularity in the proceedings or the decision.

(2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities.
The High Court’s powers of review are discussed in Fikilini v Attorney-General 1990 (1) ZLR 105 (S).

In the case of Secretary for Transport & Anor v Makwavarara 1991 (1) ZLR 18 (S), the court said that administrative action is subject to control by judicial review under three heads–

- Illegality, that is where the decision-making authority has been guilty of an error in law;
- Irrationality, where the decision-making authority has arrived at a decision “so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it”;
- The duty to act fairly.

In the case of Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S), the Supreme Court spelled out in more detail the review powers of courts of law. The court said that the role of the court in reviewing administrative decisions is to act as an umpire to ensure fairness and transparency. The court’s duty is not to usurp the administrative authority’s functions. If the administrative authority has acted fairly and transparently, the court will not interfere with its decision simply because it does not approve of the conclusion reached. Transparency connotes openness, frankness, honesty and absence of bias, collusion, favouritism, bribery, corruption or underhand dealings and considerations of any sort.

The courts will expect an administrative body to make a decision that is–

- Legal, that is the decision must be within the framework of the empowering law and after applying the criteria laid down in the empowering law;
- Rational, that is the decision must not so wrong that it must have been reached, deliberately or inadvertently, by failing to apply the right criteria or by applying the wrong criteria;
- Procedurally proper, that is in making the decision the appropriate procedures required by statute must have been followed and the principles of natural justice must have been observed;
- Justifiable, that is the decision will be given with reasons, at least when challenged, so that the court can determine the propriety and reviewability of its decision.

In Tsvangirai & Anor v Registrar-General & Ors 2002 (1) ZLR 251 (H) the High Court stated that a court has no general jurisdiction to intervene in administrative decisions or to direct administrative authorities on how they should act. The discretion bestowed on an administrative authority cannot be interfered with in the absence of illegality, irrationality or procedural impropriety. That the discretion of the Registrar-General should not be lightly interfered with is also clear from the provisions of the Electoral Act itself, the intention of which was to create some degree of independence on the part of the Registrar-General except where given instructions by the Election Directorate. Voting in the Presidential, council and mayoral elections in Harare and Chitungwiza had been extended for a third day. The applicants were dissatisfied with the way in which the voting had been conducted on the third day and sought an order compelling the Registrar-General to extend the voting in the Presidential election to a fourth day. The application was dismissed with costs.
In Mugugu v Police Service Commission & Anor HH-157-10 a police officer had been convicted of a disciplinary offence and had been punished. The court stated that judicial review is a process which is concerned with the examination and supervision by the courts of the manner in which administrative bodies have observed their obligations when related to the legislative requirements. The power to review is inherent in courts of superior jurisdiction, but such power is limited to the legality of the administrative action or decision. The Commissioner’s power to convene the board was undisputed and the board itself was, in terms of s 50 of the Police Act [Chapter 11:10], granted the discretion to either find that a member is no longer fit to remain in the force or to reduce his rank. For the court to venture into the merits of the punishment imposed or the wisdom of the decision, without being empowered by the Act, would be tantamount to the court usurping the authority that has been entrusted to the administrative body by the Act. The purpose of the review process is to ensure that an individual receives fair treatment at the hands of the authority to which he has been subjected. It is not within the ambit of the reviewing court’s power to substitute its own opinion for that of the administrative body. The function of the court is to ensure that the administrative body does not abuse the lawful authority entrusted to it, by treating the individual subjected to it under that lawful authority unfairly. If the circumstances show that the decision was reached fairly and in a reasonable manner, then the court would not have the power to intervene.

**Powers of High Court**

The High Court may either set aside or correct the proceedings. See s 28 of the High Court Act. See also Fikilini v Attorney-General 1990 (1) ZLR 105 (S); Secretary for Transport & Anor v Makwavarara 1991 (1) ZLR 18 (S) and Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S)

**Differences between review and appeal**

The remedy of review must not be confused with that of appeal. The main difference between these two remedies is that in an appeal what is in question is the substantive correctness of the original decision whereas on review the High Court is not delving into the substantive correctness of the decision, but is only determining whether there were any reviewable procedural irregularities or any action which was reviewable because it was *ultra vires* the powers allocated to the tribunal, see Tselentis v Salisbury City Council 1965 (4) SA 61 (SRA). Further differences between the two remedies are–

- For a review no written record of the original case is required whereas an appeal is based on the record of the original case.
- *Locus standi* for review is on fairly wide grounds whereas *locus standi* for an appeal is confined to the parties to the original case. (*Locus standi* is the right to bring an action or to challenge some decision.)
- A review can be brought even before the proceedings have been completed whereas an appeal can only be brought after the original case has been finalised, but see Manduna & Ors v Banditi & Ors (1985).
- The time period within which a review case must be initiated is longer than that laid
down for the noting of an appeal, see Nyamukapa v Minister of Local Government & Town Planning HH-363-85.

- A review is brought by application procedure whereas the procedure for bringing an appeal is set out in the rules of court. As regards appeals against the decisions of administrative tribunals the statute or contract may provide for a right of appeal to a higher administrative tribunal. Occasionally, a right of appeal to a court of law may be provided for, see Lowenthal v Liquor Licensing Board 1956 (1) SA 227 (SR) and Divaris v Liquor Licensing Board 1956 (3) SA 462 (SR).

**Procedure for bringing review**

Order 33 of the High Court Rules (1971) sets out the procedures for bringing cases on review to the High Court.

Except where a law otherwise provides, the procedure for bringing under review the decision or proceedings of any tribunal, board or officer performing quasi-judicial or administrative functions is by way of court application.

Rule 257 lays down that the application for review must state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief being sought. In Chataira v ZESA 2001(1) ZLR30 (H) at p 34G the High Court pointed out that in a number of cases the court clearly stated that the failure to comply with this Rule constituted a fatal flaw. It referred to Minister of Labour v PEN Transport S-45-89, Musaishi v Lifeline Syndicate & Anor 1990(1) ZLR 284 (H) and Chairman, PSC & Anor v Marumahoko 1992 (1) ZLR 304 (S) It went on to say that despite these warnings, legal practitioners continue to fail to comply with the Rule. The court said that the time had come to dismiss defective applications without considering the merits.

The applicant must establish his or her cause of action in his or her founding affidavit.

The application must be directed and delivered to the presiding officer or chairman of the tribunal or board or the administrative official.

Review proceedings must be instituted within eight weeks of the termination of the proceedings in which the irregularity or illegality complained of is alleged to have occurred. See Nyamukapa v Minister of Local Govt & Town Planning HH-363-85. In Gula Ndebele v Bhunu NO 2010 (1) ZLR 78 (H) at 82B the judge reiterated that the application must be filed within eight weeks of the decision being impugned. Under the rules this period includes the last day when the event occurred and excludes the last day. Thus the eight week period is reckoned from the date when the applicant was notified of the fact that the proceedings against him or her had been terminated.

However, the court may extend the time if good cause is shown for so doing. For the factors that the court will take into account in deciding whether to allow a late application for review, see Bishi v Secretary for Education 1989 (2) ZLR 240 (H).

Within twelve court days of service of the application for review the tribunal, board or officer
must lodge with the registrar of the High Court the original record of the proceedings, together with two typed copies of this record. (The charges incurred in obtaining copies of the record form part of the costs of review.)

In the case of *Chiura v Public Service Commission & Anor* 2002 (2) ZLR 562 (H) the court indicated that the rules of court require that a record of proceedings must be prepared by the officer responsible for those proceedings and must be lodged with the registrar. What was tendered as the record of proceedings could not be described as a record of proceedings. Failure to supply the record of proceedings amounts to an irregularity.

In the case of *Olivine Industries (Pvt) Ltd v Gwekwerere* 2005 (2) ZLR 421 (H) the Supreme Court held that in a case involving the review of a decision to sack an employee, the Supreme Court held that the employer had failed to comply with rule 260 of the High Court Rules, requiring the lodging with the Registrar of the original record, and had submitted only a partial record, it was open to the judge to direct that the full record be made available, in the meantime postponing the hearing of the matter. The respondent would have been within his rights to demand the full record before the matter could be heard. Neither chose to exercise these options, and the court was accordingly not in a position to properly review the decision of the head of department.

There are, of course, some situations where there is no record or where the review relates to matters not arising from record e.g. financial bias that was not revealed during the hearing but was only discovered after the hearing. This does not stop the case from being taken on review. See Order 33.

**Late application for review**

For the factors that are considered in deciding whether to allow a late application for review see *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H).

**Can a review be brought before the proceedings are concluded?**

In *Gula-Ndebele v Bhunu NO* 2010 (1) ZLR 78 (H) at 83G the judge said–

> It appears to me … like the proceedings of any other quasi-judicial body, the proceedings of the tribunal, if tainted by procedural irregularities recognizable at law as vitiating such proceedings, may be set aside before they are concluded and before any recommendation is made.

**Exhausting internal remedies**

Often persons aggrieved by administrative decisions are given the right to take an administrative decision on appeal or review to some higher administrative official or body. Where these internal remedies have been established, the question arises as to whether the aggrieved person must first pursue these internal administrative remedies before proceeding to take the matter before a court of law.
Section 7 of the Administrative Justice Act gives the High Court a discretion to decline to hear applications made under s 4 of the Act if the applicant has some other remedy available to him or her. Section 7 reads—

Without limitation to its discretion, the High Court may decline to entertain an application made under section four, if the applicant is entitled to seek relief under any other law, whether by way of appeal or review or otherwise, and the High Court considers that any such remedy should first be exhausted.

Presumably in deciding how to exercise this discretion the High Court will have reference to the case law on this subject prior to the passing of the Administrative Justice Act.

It can be argued that if the administrative machinery is working well and effective internal remedies are provided for, the administration is in the best position to rectify its own mistakes and should be given the opportunity to do so. To allow premature access to the courts before the administration has been given the opportunity to rectify the mistakes will undermine the functioning of the administration. Aggrieved persons should only be allowed to approach the courts after exhausting these internal remedies. Additionally requiring that internal remedies be pursued first will avoid inundating the courts with administrative matters which could easily be remedied by the administration itself. (See Yvonne Burns Administrative Law under the 1996 Constitution (2nd ed) pp 290-292) From the standpoint of the aggrieved person, it may well be in his or her best interests that the matter be expeditiously settled by using his domestic remedies rather than referring the matter to court, particularly where the court is simply likely to refer the matter back to the original tribunal for a re-hearing.

On the other hand, as Burns points out, where the administrative machinery is not working well the public may mistrust or have little confidence in the administrative structures. Members of the public may believe that the internal remedies will be ineffective as the higher administrative body is likely to rubber stamp the original decision. It can also be argued that a person is entitled to a fair hearing from the first administrative authority dealing with his case. Where he or she did not receive a fair hearing because of glaring procedural irregularities or illegalities he or she should be entitled to have these proceedings set aside on review and he or she has a right to a fresh hearing which is fair. If, for instance, the original decision was arrived at on a fraudulent or corrupt basis or the decision-maker had no legal power to make that decision, it is strongly arguable that the person affected should be able to approach the court to have the original set aside and should not have to pursue his or her internal remedies first.

In a number of Zimbabwean cases decided prior to the Administrative Justice Act coming into effect, it was held that a court has a discretion as to whether to review the matter before the remedies provided for in the statute have been exhausted. The aggrieved party should, however, normally exhaust those remedies unless there are good reasons or special circumstances for not doing so. If aggrieved persons have available to them effective internal remedies, they should pursue these remedies and not clutter the courts with unnecessary litigation. Additionally the internal remedy may well be more expeditious and more efficacious than the limited remedy provided by judicial review. This same approach is also to be found in cases decided after the coming into effect of the Administrative Justice Act. One such case is that of Olivine Industries (Pvt) Ltd v Gwekwerere 2005 (2) ZLR 421 (H). In this case an employee of the appellant company was the subject of a disciplinary hearing. He refused to attend the hearing on the
grounds that he was not allowed to be legally represented and because he considered representation by a member of the workers’ committee was inappropriate. He was found guilty and discharged. After a discouraging letter from his head of department, he did not appeal to the disciplinary committee as provided by the code of conduct. Instead an application for review was brought in the High Court, in which the respondent sought reinstatement. The High Court granted the respondent’s application and the company appealed. The Supreme Court held that the appeal procedure in the appellant’s code of conduct would have allowed both a review and rehearing of the matter at the disciplinary committee stage, an appeal to the head of business and thereafter to the Labour Court. It would thus have afforded the respondent effective redress against what he perceived as an unlawful termination of his employment. The respondent had abandoned his domestic remedies for no valid reason. The High Court should have declined to hear the application.

Djordjevic v Chairman, Practice Control Committee, Medical & Dental Practitioners Council of Zimbabwe 2009 (2) ZLR 221 (H) after some years of provisional registration as a medical practitioner, the applicant applied for an unrestricted practising certificate permitting her to practice as a specialist obstetrician and gynaecologist. The Medical and Dental Practitioners Council refused her application. The applicant sought a declaratory order to the effect that she was entitled to the issue of an unrestricted practising certificate. She also sought consequential relief that the respondents issue her with such a certificate. The first respondent raised the point in limine that the applicant had not exhausted the domestic remedies available to her before approaching the court. In terms of s 22 of the Health Professions Act [Chapter 27:19], any person who is aggrieved by any decision taken in regard to him by a council may appeal against the decision to the Health Professions Authority within thirty days after being informed of the decision. Section 123 provides for an appeal from the Authority to the High Court.

The court held that where domestic remedies are capable of providing effective redress in respect of the complaint, a litigant should exhaust those remedies unless there are good reasons for not doing so. No good reasons were advanced for not pursuing the domestic remedies available to her. While a declaratory order may be granted even if some other form of relief is available, the merits of each case constitute one of the circumstances of the matter to which regard must be paid before a declaratory order is issued. The nature of the relief being sought by the applicant was such that she was asking the court to substitute its own decision for that of the first respondent. A court will not interfere in the sphere of practical administration. There were disputes of fact which the court could not resolve, as they would require the expertise provided for in the Act.

What happens when the applicant files an application for review before the High Court and an appeal under the relevant legislation? In the case African Consol Resources plc & Ors v Minister of Mines & Ors HH-57-10 the court ruled that this places the court in competition with the determiner of the domestic remedy. When that happens, the High Court must defer to domestic proceedings, and allow them to be exhausted before it can hear the dispute between the parties. In terms of s 7 of the Administrative Justice Act [Chapter 10:28], the court can decline to hear an application, based on an alleged failure to comply with the provisions of the Act, if it is of the view that the applicant has other legal remedies through which he can obtain the remedy sought before it and it considers that such remedy should first be exhausted. The
court can exercise its discretion to hear the matter, but it should not do so in a manner that terminates pending domestic remedies unless there are compelling reasons for it to do so. The intention of the legislature in providing domestic remedies must be respected by the courts, and the officials charged with the authority to determine domestic appeals or reviews must be allowed to do their work before the court intervenes. The court should only intervene in cases where it is obvious that domestic remedies will not do justice in the case before it. This approach is consistent with the principle of judicial deference.

There are a number of exceptional situations where an aggrieved person would not be obliged to exhaust his or her internal remedies before approaching the High Court for relief. These are–

- Where the unlawfulness alleged has undermined or tainted internal remedy e.g. where higher body has already prejudged or prejudiced the hearing or decision. Baxter argues at p 590 that a person is only obliged to appeal first if the appeal body will expunge completely the illegality by thoroughly re-investigating the matter on an impartial basis. The internal remedy may also have been undermined by the way in which the original tribunal had conducted itself.

  - In *Mathale v Secretary for Education, Gazankulu* 1986 (4) SA 427 (T) the appellate authority, a Minister, had already condoned the action taken by the first official and thus the appeal to that Minister would be fruitless.

  - In *Lenz Township Co Ltd v Lorenz & Ors* 1961 (2) SA 450 (A) the internal appeal body had already prejudged the case.

  - In *Welkom Village Board v Leteno* 1958 (1) SA 490 (A) the council engaged in a fraudulent conspiracy to deprive the respondent of his rights and the local authority had associated itself with its actions.

- The internal remedy must be capable of providing effective redress and must not be not illusory or completely inadequate.

  - In *Moyo v Forestry Commission* 1996 (1) ZLR 173 (H) the internal remedies had been undermined by the failure by the first body to hold an inquiry as required and to keep a record of the inquiry proceedings. The appeal panel was not empowered to hear the matter *de novo* and to hear evidence afresh. It was confined to a consideration of record of the proceedings. As there had been no initial inquiry and no record, the internal appeal was completely ineffective.

  - In *Mahlaela v De Beer NO* 1986 (4) SA 782 (T) a township superintendent decided not allocate the applicant a house in a township. The court decided that an appeal to the board would be futile as it had a fixed policy that houses were not to be allocated.

  - In *Lawson v Cape Town Municipality* 1982 (4) SA 1 (C) the court held that the internal remedy was ineffectual as the administrator was unable to do internal remedy justice because of his other duties.

  - In *Msomi NO & Ors v Abrahams* 1981 (2) SA 256 (N) the court held that if the internal remedy cannot provide the same satisfaction as judicial review, this strongly indicates that the internal remedy does not have to be exhausted first.

- Matter relates to legal capacity, jurisdiction and legality of the action

  - Here the review court will be inclined to hear the case without obliging the litigant first to exhaust his or her internal remedies. The reason for this is that it will be felt that the court itself is better able to deal with such legal issues.

  - In *Archipelago (Pvt) Ltd & Anor v Liquor Licensing Board* 1986 (1) ZLR 146 (H); 1986 (4) SA 397 (ZH) the court set aside a decision of a licensing board where it purported to
exercise a jurisdiction where none existed. It did so even though the litigant had not first exhausted its internal remedies.

In the cases of Musandu v Chairperson of Cresta Lodge Disciplinary & Grievance Committee HH-115-94; Zikiti v United Bottlers 1998 (1) ZLR 389 (H) the approach adopted was that the mere fact that the legislature or the contract has provided for a extra-judicial right of review or appeal does not ipso facto preclude the aggrieved party from bringing a case to court on review. In Mabuza v Tjolotjo District Council HB-52-92, the court decided that unless the jurisdiction of the courts is excluded, a suspended employee is entitled to seek redress from the courts and is not obliged to exhaust his internal remedies first.

In the case of Ramani v National Social Security Authority S-38-03 the Supreme Court ruled that the High Court has a discretion, to be exercised judicially, whether to exercise its review powers in matters that can be remedied through an appeal or application under the Labour Act. (Since this decision, however, the Labour Act has been amended and s 89(6) of the Labour Act now states that: “No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application or matter referred to in subsection 1” (i.e. matters which are within the jurisdiction of the Labour Court.)

See also ZBC v Sones S-63-82 at 15; Tutani v Minister of Labour & Ors 1987 (2) ZLR 88 (H); Art Printers Ltd v Regional Hearing Officer & Anor HH-168-87; Fisher & Ors v Air Zimbabwe Corporation 1988 HH-306-88; Cargo Carriers (Pvt) Ltd v Zambezi & Ors 1996 (1) ZLR 613 (S); Nyangani v Forestry Commission 1996 HH-169-96; MMCZ v Mazvimavi 1995 (2) ZLR 353 (S); Manyonda & Ors v PTC 1999 (2) ZLR 81 (H)

If the enabling statute or the terms of the contract lays down that the parties must exhaust their internal remedies first before taking the matter to a court of law, then the internal remedies would have to be pursued before taking the matter to court. However, even here if the original administrative authority acted ultra vires its powers, the High Court could still entertain the matter even though internal remedies have not been exhausted.

**Exclusion of review jurisdiction (ouster clauses)**

As Parliament is the supreme lawmaker, it is competent for it to eliminate the capacity of the courts to review certain administrative actions. However, the courts have guarded jealously their review capacity and have only been prepared to accept that their jurisdiction to review has been removed by legislation if this is laid down in the clearest and most explicit terms, see Masenda v Estate Agents Council HH-20-84 and R v Padsha 1923 AD 281.

Even where the Legislature has apparently excluded the review jurisdiction of the courts, the courts have still interpreted this legislation restrictively so as to enable the court still to review in circumstances where jurisdiction was assumed where there was none, or the action taken resulted from fraud, see Union Government v Fakir 1923 AD 466.

It is clear that the provision in a statute of an appeal mechanism does not oust the court’s review power, and neither does the express exclusion of a right of appeal cut out the power of review, see Archipelago (Pvt) Ltd v Liquor Licensing Board 1986 (1) ZLR 146 (H); Rent
There are a number of South African cases dealing with ouster clauses. In the case of Natal Newspapers (Pty) v State President of the Republic of South Africa 1986 (4) SA 830 (A) the court rules that an ouster clause did not preclude the court from deciding whether the State President had acted beyond his powers. In De Lille v Speaker of the National Assembly 1998 (3) SA 430 (C) the Constitutional Court decided that the scope for ouster clauses has been drastically reduced if not entirely eliminated as a result of the inclusion in the Bill of Rights of guarantees of the right to administrative justice and the right of access to the courts.

**Whether proceedings of domestic tribunals reviewable**

A domestic tribunal is a tribunal established by contractual agreement between the parties and is not established by statute. It is now clearly established in South Africa that the proceedings of domestic tribunals are subject to review by the High Court. See Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) and Blacker v University of Cape Town & Anor 1993 (4) SA 402 (C). In the Blacker case the court ruled that a domestic tribunal established under a contract must observe the rules of natural justice where the express or implied terms of the contract oblige it to do so.

In Zimbabwe there is no specific ruling on this point, but it is very likely that our courts will adopt the same approach as in South Africa. The Vice-Chancellor, University of Zimbabwe & Ors v Mutasah & Ors 1993 (1) ZLR 162 (S)

**Locus Standi for Bringing Review**

**Direct and Personal Interest**

For a person to have standing to challenge the administrative action, he must have a sufficient personal interest in the matter concerned. Normally only a person who has a direct, personal interest in the remedy being sought has *locus standi* to seek that remedy in court. The personal interest that a person may have that will provide the basis for legal standing can be that the action will affect interests such as personal liberty, money or property or benefits or legitimate expectation of benefits, see Patz v Greene & Co 1907 TS 427; Adler v Salisbury City Council 1947 (2) SA 220 (SR); Stevenson v Minister of Local Government and National Housing & Ors 2001 (1) ZLR 321 (H) – the High Court judgment) and Stevenson v Minister of Local Government and National Housing & Ors 2002 (1) ZLR 498 (S) – the Supreme Court judgment). For a critical commentary on the High Court decision in the Stevenson case see Feltoe “Legal standing in Public Law” 2002 Issue No 7 Zimbabwe Human Rights Bulletin 187.

If a person has a personal interest in this sense, the fact that there are others with the same interest will not affect the standing to sue; the person suing does not have to prove that his interest is greater than that of others, see Bamford v Minister of Community Development 1981 (3) SA 1054 (C). In Bamford the applicant applied for an interdict to prevent Government from
building illegally in a park area. His continued access to the park for recreation was held to be a personal interest sufficient to give him *locus standi* even though this right of access was a right that others had as well. In *Director of Education, Tranvaal v McCagie* 1918 AD 616 properly qualified applicants for a post had *local standi* to take on review the decision to appoint an unqualified person.

See also *Jacobs v Waks* 1992 (1) SA 521 (A); *Dalrymple v Colonial Treasurer* 1910 TS 372; *Attorney-General v van der Merwe & Anor* 1946 OPD 196 and *Salisbury Bottling Co v Central African Bottling Co* 1958 (1) SA 750 (FS)

**Unlawful eviction from property**

In *Kweremu & Ors v Minister of Lands and Water Development & Ors* HH-230-93 the CCJPZ and two others applied for a temporary interdict restraining the respondents from evicting the two applicants from Churu farm. The court ruled that the CCJP had no *locus standi* to be a party to this suit because the CCJPZ did not have any real and substantial interest in the subject matter of the application. Although the CCJPZ has the aim of protecting the human rights of all persons in Zimbabwe, this does not mean that it had the right to appear on behalf of any persons or groups of persons whose human rights it believes are being prejudiced. It may only assist them to obtain legal representation or to form an association to represent their interests; but it cannot be a party to any application to protect people from eviction from a farm that the Government had taken over. The criteria laid down in the constitutional case for *locus standi* applied in the delay in carrying out the death penalty case did not apply here.

**Ratepayers**

Ratepayers are presumed to have a legitimate interest in the legality of action taken by their local authorities. A ratepayer would thus have automatic standing to bring an action against a local authority without proof of injury to himself or herself. See *Binza v Acting Director of Works & Anor* 1998 (2) ZLR 364 (H) and *Stevenson v Minister of Local Government and National Housing & Ors* 2001 (1) ZLR 321 (H). In the *Stevenson* case, the applicant, a ratepayer, had applied for an order obliging the holding of mayoral and council elections in Harare to elect councillors to replace the Commissioners appointed by the Minister to run the council since he sacked the previous elected council. The High Court held that the application was not directed to the local authority but was instead seeking to challenge a policy decision of central government and therefore the special rule relating to standing by ratepayers in respect of local authorities did not apply. On appeal the Supreme Court held that as a resident and registered voter in the local area, the appellant had a sufficient interest in the way in which the local area would be run.

**Rule in *Patz v Greene***

The rule in *Patz v Greene* 1907 TS 427 applies in Zimbabwe. See *Stevenson v Minister of Local Government and National Housing & Ors* 2001 (1) ZLR 321 (H). This rule states that where legislation is enacted in the special interest of a particular individual or class of persons, the court will presume that a violation of the legislation will automatically entitle the affected
individual or member of the class of persons to standing without proof of injury. (In the Stevenson case, the court decided that the Urban Councils Act was not enacted in the special interest of voters eligible to elect a local authority in their area and thus the rule in Patz v Greene did not apply.) This is in effect only a partial exception to the general rule as it merely presumes that the litigant who falls into this category was personally affected, although that person will not have personal injury.

**Actions by associations and political parties**

A citizen’s or a group’s concern about the legality of the action or harm that it will cause is not enough as the law does not recognise the right to bring an action on behalf of others or in order to protect the general public interest. However, an organisation that was formed to represent the interests of its members may bring an action on behalf of its members. See Zimbabwe Teachers Association & Ors v Minister of Education and Culture 1990 (2) ZLR 48 (H). In that case a number of teachers had been sacked after they had gone on strike. A teachers association brought a court action to have these teachers reinstated. It was argued by the respondent that the association has no locus standi in this matter. The court reviewed the relevant case law on locus standi. It pointed out the functions of the association included the safeguarding of the interests of its members and that it had a membership of about 42% of all the teachers in Zimbabwe. The court held that it had a real and substantial interest in the matter and therefore that it had locus standi.

However in the case of Nyamandhlovu Farmers’ Association v Minister of Lands & Anor 2003 (1) ZLR 185 (H) the High Court decided that an association did not have locus standi in the circumstances to bring the action on behalf of its members. Members of the applicant association, all farmers, had received notices under the Land Acquisition Act to leave their farms by a certain date. The association brought an application before the High Court, seeking an order that various sections of the Act were invalid by reason of being in conflict with several sections of the Declaration of Rights. The court pointed out that the affected farmers did not file affidavits or provide other proof that the association was authorised to act on their behalf, nor did the association aver such authorisation. Not all members of the association were affected by the receipt of notices. The association itself was not affected by the receipt of notices of acquisition, and the matter was not a class action. Consequently, the association had no locus standi to bring the application. Only the affected members themselves could do so.

In the case of United Parties v Minister of Justice 1997 (2) ZLR 254 (S), the Supreme Court ruled that the applicant political party had no locus standi to challenge the constitutionality of certain provisions in the Electoral Act as the application of these provisions might affect the rights of voters but it would not infringe the rights of the applicant political party. (For a commentary on this and other related cases see 1998 Vol. 10 No. 1 Legal Forum 48.) See also Stevenson v Minister of Local Government and National Housing & Ors (2001) (1) ZLR 321 (H).

By contrast in the South African case of African National Congress v Chairman, Council of State of Ciskei 2003 (3) BCLR 288 (C) the court held that a political party did have locus standi to bring an action on behalf of its members.
In the case of *Law Society v Minister of Justice & Anor* 2006 (2) ZLR 19 (S) the Law Society brought an application under s 24 of the Constitution, challenging the constitutionality of certain amendments to the Criminal Procedure and Evidence Act [*Chapter 9:07*], relating to arrest and detention for certain offences. In its founding affidavit, the Law Society averred that it was the largest organisation representing the interests of all legal practitioners in Zimbabwe. It represented the views of the legal profession in Zimbabwe and maintains the integrity and the status of the legal profession. As such, it had a duty to consider and deal with all matters affecting the professional interests of the legal profession. Its *locus standi* was based on its status as the public defender or protector of the rule of law and human rights. There was no averment that the impugned provision violated the right of the applicant, or of a member of the applicant. However, the Society contended that the impugned provisions violated the public’s right of liberty and entitlement to a presumption of innocence as guaranteed by ss 13 and 18 of the Constitution, respectively. The applicant contended that, as an organisation representing the legal profession, it had the duty to protect the public from unconstitutional provisions of any law, and thus had *locus standi* to bring the application. The Supreme Court held that a litigant in an application under s 24 has no *locus standi* to seek redress for a contravention of the Declaration of Rights other than for himself or itself, the exception being where the person involved is in custody. *Locus standi* to make a direct application to the Supreme Court in terms of s 24 is much narrower than the common law. It is not sufficient to simply establish that the applicant has an interest in the matter. The applicant has to go further and establish that the Declaration of Rights has been or is likely to be contravened in respect to itself. However, in the High Court the common law test, namely having an interest in the matter under adjudication, is sufficient to establish *locus standi*.

### Class actions

The Law Development Commission recommended that the law on group actions be changed to facilitate group actions so as to provide an expeditious and inexpensive method for large numbers of persons to exercise and enforce their legal rights. It recommended that non-governmental organisations should be allowed to bring such actions. See Report No. 50: Proposed Class Action (1996).

Acting on this recommendation in 1999 the Government passed the Class Actions Act [*Chapter 8:17*]. The important features of this legislation are these.

A class action can now be brought in a far wider range of circumstances than previously. For example, it could be brought even though there are different issues of fact or law relating to the claims or the relief sought which may require individual determination.

A person or organisation wishing to bring a class action on behalf of others will be required to obtain the leave of the court to mount such action. The court will grant leave if it considers that a class action is the appropriate way of proceeding. The court will exercise a supervisory role over the ongoing action to ensure that this procedure is used genuinely for the purpose for which it was designed, namely to facilitate access to justice for those who would not receive it because of their poverty, their ignorance or their disinclination to manoeuvre their way through complex legal procedures (s 8). The court can also appoint a commissioner to perform such
duties as determining particular issues or assessing individual monetary claims of individuals in the class (s 9).

To make the proceedings benefit as many potential beneficiaries as possible, the judgment in a class action is binding on all members of the class concerned other than those who after notice has been given of the action have advised that they wish to be excluded from the class action concerned (s 11). In a class action the court can, where appropriate, award judgment in the form of an aggregate amount to be distributed amongst the members of the class concerned (s 12).

In order to assist representatives embarking upon such actions on behalf of others, there will be a Class Actions Fund (s 14). This fund will be constituted of monies made available by Parliament, donations and re-inbursements of costs made by members of the class in a successful class action.

Usually, Zimbabwe legal practitioners are not permitted to take on actions on a contingency fee basis. However, in respect of class actions, subject to certain limitations, a legal practitioner will be permitted to make an arrangement with any person who is to be a representative in a class action for the payment of fees and disbursements in respect of the class action dependent on the success of the class action.

A class action is an important mechanism for a group of persons who are being denied their rights by an administrative authority or who have been adversely affected by illegal or arbitrary action on the part of an administrative authority. There is scope for extensive use of this device and legal practitioners and human rights organizations should make proper use of this action on behalf of local communities and other groups. Sometimes however where the group will have an ongoing relationship with an administrative authority, the members of the group affected by the administrative action may be reluctant for litigation to be brought on their behalf because they may fear victimization from the powerful administrative authority if they agree to the matter being litigated.

Parastatals suing for defamation

There are special rules relating to the *locus standi* of parastatals to sue for defamation. In the case of *PTC v Modus Publications 1997 (2) ZLR 492 (S)*, the PTC had sought to sue a newspaper for defamation. It was held that for policy reasons corporations that are part of the governance of the country are not entitled to sue for defamation. The main policy reasons for denying to State organs the right to sue for defamation are these. State bodies should be open to public criticism. As part of the general right of freedom of expression, the public should have the right freely to criticize the activities of these State bodies. The State should not be able to stifle or silence criticism by mounting defamation actions against the critics using State funds, derived from its subjects, to finance such actions. The State’s normal remedy in such a case is a political one and not by way of litigation. Such State bodies are not, however, wholly deprived of a remedy in the event of scurrilous attacks upon their reputations. They have the right to bring actions for economic loss resulting from injurious falsehood, in our law referred to as malicious making of false statements.
Human rights and constitutional cases

The normal rules as to standing have been relaxed in relation to cases involving important fundamental rights such as life and liberty. In such cases, the courts may allow persons or organisations that do not have themselves any direct, personal interest to seek a remedy on behalf of those who have been affected.

However, where the affected person is able to bring litigation, a human rights organisation will not have standing to join in this action. If a human rights organisation wishes to assist in such cases they can only do so by donating finance to enable the action to be brought to court or by helping to organise the people affected in an association that can represent their interests, see *Kweremu & Ors v Minister of Lands and Water Development & Ors* (1993).

In the case of *Law Society of Zimbabwe & Ors v Minister of Finance (Attorney-General Intervening*) 1999 (2) ZLR 231 (S) the *locus standi* of the Law Society was questioned. A withholding tax on the sale of immovable property was introduced in terms of ss 35 and 36 of the Finance Act 29 of 1998. The effect of these provisions was to require legal practitioners, estate agents and others who hold on behalf of others the purchase price of immovable property to withhold a percentage of the price. The applicants brought an application in which they claimed that this withholding tax amounted to compulsory acquisition of property, contrary to s 16 of the Constitution. It argued that the provisions of s 16(7)(a) of the Constitution did not save these measures of taxation as these particular measures were not reasonably justifiable in a democratic society. As a preliminary point, the respondent argued that one of the applicants, the Law Society, did not have *locus standi* to bring an application to determine the constitutionality of this system of taxation.

It was held that the Law Society had *locus standi* to bring this application. In matters of this nature the court will take a broad view of *locus standi*. The Law Society was empowered by the Legal Practitioners Act [Chapter 27:07] to assist and join in a case of this nature. In additional to its statutory interest, it had a real and substantial interest in the matter.

In the South African Constitutional Court Chaskalson P had this to say in the case of *Ferreira v Levin NO & Ors: Vryenhoek & Ors v Powell NO & Ors* 1996 (1) SA 984 (CC) at 1082 G-H (paragraph 165):

I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.

This should be contrasted with the approach adopted by the Zimbabwean Supreme Court in the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity in the President’s Office & Ors* 2004 (1) ZLR 538 (S). The owners and publishers of a daily newspaper had approached the court for a ruling on the constitutionality of legislation imposing various controls over the operation of newspapers in Zimbabwe. The court refused to give a ruling on the merits, finding that the applicant could not be heard on the merits because it
was openly defying the law. The court said it would be denied legal relief until it complied with this law.

**Violations of fundamental rights of persons in detention**

Where the person whose fundamental rights are being violated is under detention the Constitution specifically recognises the right of persons other than the person detained to approach the Supreme Court. Section 24(1) provides that any person may apply to the Supreme Court for redress where his fundamental rights as set out in the Constitution have been, are being or are likely to be violated or if the person is detained, any other person may make the application for redress.

Broken down this provision entails the following–

- A person can approach the court for redress for the detained person where any of the constitutionally protected rights of a detained person have been, are being or will be violated.
- Any person can seek redress on behalf of the detained person; the person thus does not have to be a spouse, relative or friend. The person could be a complete stranger to the person detained.
- The provision does not lay down that the other person may only approach the court when the detainee is unable to do so himself or the detained person lacks the financial means to employ a lawyer to take the matter to court for him. Thus it seems that the person seeking redress on behalf of the detained person does not have to establish that the detainee is himself unable to approach the court.
- The phrase “if the person is detained” must encompass both cases where the person is lawfully detained in custody and cases where the person is unlawfully detained. It is also not confined to cases where persons are held in preventive detention during times when there is a state of emergency. (The words “detention” and “detained” are not defined in the interpretation section of the Constitution, namely s 113.)

**Right to life**

In the case of *Deary v Acting President of Rhodesia & Ors* 1979 RLR 200 (G), certain emergency emergency powers provisions were passed authorising the execution outside areas subject to martial law of persons condemned to death by special courts martial within those areas. Deary on behalf of the Catholic Commission for Justice and Peace of Zimbabwe (CCJPZ) applied for an interdict prohibiting such executions on the grounds, *inter alia*, that the provisions violated the Constitution as such persons were denied the right to petition the President for clemency. The court held that the applicant had sufficient *locus standi* to bring the application, in view of the seriousness of the abuse alleged by him, the financial circumstances of the condemned persons and their relatives, and the fact that some of these persons were probably Roman Catholics.

In *CCJPZ v AG & Ors* 1993 (1) ZLR 242 (S) at 250 the CCJPZ brought an application to prevent the execution of certain condemned prisoners on the ground that their execution after prolonged delay would violate s 15(1) of the Constitution. In deciding that this organisation had
Locus standi to seek redress for the condemned prisoners the court pointed out that the CCJPZ is a human rights organisation whose objects are to uphold basic human rights including the most fundamental of all, the right to life. The organisation was intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the Constitution. Its application was not a frivolous one. The court went on to say that it would be “wrong, therefore, for this court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves; especially as they are not only indigent but, by reason of their confinement, would have experienced practical difficulty in timeously obtaining interim relief from this court”. Catholic Commission for Justice and Peace in Zimbabwe had locus standi to seek redress for the condemned prisoners who had been awaiting the carrying out of the death penalty upon them for protracted periods of time.

Both the above cases involved alleged violation of fundamental rights of person in detention. In such cases, the court can simply invoke s 24(1) of the Constitution that allows any other person to bring the application for redress on behalf of the detained person.

Unlawful detention

The interdict de libero homine exhibendo, more commonly referred to as habeas corpus, is a remedy designed to place under review the lawfulness of a deprivation of personal liberty, aiming ultimately at the release of an individual from unlawful detention: see Baxter p 660.

The courts have tended to apply a much more liberal locus standi requirement in respect of this remedy because the persons unlawfully detained may often be completely unable to approach the courts themselves. Where the person unlawfully detained has been unable to seek the remedy himself, the courts have allowed others to pursue the remedy on his behalf, see Borzolli v Station Commander John Vorster Square 1972 (3) ZLR 934 (W) Here a University Principal was held to have locus standi to apply for an interdict in respect of detained students.) See also Wood v Ondangwa Tribal Authority 1975 (2) SA 294 (A). This case concerned an application for a prohibitory interdict to prevent the illegal detention of certain people. The applicants were not the people threatened, but were two church leaders and the secretary of SWAPO. The applicants were thus applying for the interdict on behalf of the persons under threat. The persons threatened with detention were members of the church congregations and members of the political party. The applicants averred that because of the distances involved, the limited means of those threatened and their lack of sophistication, the persons were unable to approach the court themselves. The court accepted their locus standi. The basis of this case is that of necessity; only when the persons with direct, personal interests in the remedy are unable to approach the court, will someone else be allowed to approach the court on their behalf.

In Zimbabwe, unlawful detention is a clear violation of the constitutionally protected right to liberty. As the person is under detention s 24(1) of the Constitution can be invoked and any person would be able to approach the court to seek redress on behalf of the person unlawfully detained without the need for that person to establish that the detained person himself is unable himself to seek redress.

In Minister of Home Affairs & Anor v Bangajena 2000 (1) ZLR 306 (S) the Supreme Court
stated that the deprivation of personal liberty is an odious interference and has always been regarded as a serious injury. The courts have properly taken the stance that deprivation of liberty through unlawful arrest and imprisonment is a very serious infraction of fundamental rights. Damages for this delict should therefore be exemplary and punitive to deter would-be offenders.

In *Chituku v Minister of Home Affairs & Ors* 2004 (1) ZLR 36 (H) the court stated that treatment of an arrested, detained or convicted person that affronts the dignity of that person or exceeds the limits of civilised standards of decency and involves the unnecessary infliction of suffering or pain is inhuman and degrading. If the High Court is satisfied that the actions complained of violate the rights of the plaintiff as granted under the Constitution, it could grant suitable relief to redress the injury. This is part of the inherent jurisdiction that the court enjoys. The plaintiff is not restricted to bringing an application under s 24 of the Constitution. The right to dignity is recognised in the Roman-Dutch law as an independent right that can be protected by the *actio injuriarum*, the *actio injuriarum* being wide enough to encompass any action that violates the *corpus* or *dignitas* of the plaintiff. Inhuman and degrading treatment affronts the dignity or self-respect of an individual and could found a claim. It seems that that in an application under s 24 of the Constitution, the Supreme Court has the power to award damages.

**Unlawful eviction from property**

The case of *Kweremu & Ors v Minister of Lands and Water Development & Ors* HH-230-93 concerned an application by some squatters for an interdict to prevent their eviction. A human rights organisation wished to be a party to this suit. The court held that it had no *locus standi* because the parties directly affected were able to bring the action themselves.

**Other fundamental rights**

In the case of *Tsvangirai v Registrar-General of Elections & Ors* 2002 (1) ZLR 268 (S), the majority of the Supreme Court adopted a narrow approach to legal standing. The applicant, a presidential candidate in the presidential election, challenged the constitutionality of the use of s 158 of the Electoral Act by President Mugabe to effect last minute drastic changes to the conditions under which the presidential elections were to be held. The applicant argued that this had violated the fundamental rights of protection of law (which includes due process of law) and freedom of expression. The majority of the court found that the applicant had not shown that the declaration of rights provisions had been contravened in relation to him as required by s 24(1) of the Constitution. The minority of the court decided that the applicant had *locus standi* as he had a real and substantial interest in the matter, namely he had a right under the constitutional provision on protection of law to challenge a law passed by a process that was inconsistent with the Constitution. (The applicant was arguing that under the Constitution, only Parliament could pass electoral laws and Parliament could not delegate this power to the President.) For a critical commentary on this case see: Feltoe “Legal standing in public law” 2002 Issue No 7 Zimbabwe Human Rights Bulletin 187.

**Whether the courts should adopt a wider approach to *locus***
It has been strongly argued that in administrative cases the courts should adopt a more expansive approach instead of the rather narrow and restrictive approach to *locus standi* that they currently adopt. Thus Wade and Schwartz in *Legal Control of Government: Administrative Law in Britain and the United States* at p 291

Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good cause of action is turned away merely because he is not sufficiently affected personally, that means that some government agency is left to violate the law, and that is contrary to the public interest. Litigants are unlikely to expend their time and money unless they have some real interest at stake. In the rare cases where they wish to sue merely out of public spirit, why should they be discouraged.

For the arguments for and against a wider approach to locus standi in administrative matters see Feltoe “Legal standing in public law” 2002 Issue No 7 *Zimbabwe Human Rights Bulletin* 187.

### Natural Justice

#### General

The principles of natural justice embody fundamental notions of procedural fairness and justice. As applied to administrative decisions, these principles seek to ensure that such decisions are only taken after fair and equitable procedures have been followed. In essence, natural justice tries to guarantee that the parties who will be affected by the decisions receive a fair and unbiased hearing. By required adherence to standards of procedural fairness, not only is justice seen to be done, but also these principles assist administrative decision-makers to reach substantively correct decisions. If the principles are observed, decisions are reached only after the tribunals have been informed of facts relevant to their determinations and decisions are reached on an objective evaluation of the evidence and not on any grounds of personal interest or hostility or favouritism to particular parties.

There are two principles of natural justice. These are—

- The principle that the party or parties involved in the matter should be given the proper opportunity to present their cases before the administrative decision-maker decides the case. (This is referred to as the *audi alteram partem* principle, which means, literally, hear the other side i.e. hear both sides.)
- The principle that all the administrative decision-makers should be impartial and unbiased in their deliberations. (This is referred to as the *nemo judex in sua causa* principle which means, literally, that no person may be a judge in his own cause.)
Variable content

The principles of natural justice are not a set of rigid, fixed and invariable rules. Natural justice principles seek to ensure that there is fundamental fairness, but what particular procedures are needed to achieve fundamental fairness will vary from case to case. As already pointed out, the procedures of administrative tribunals are supposed to be more informal and flexible than those of courts of law. Under the principles of natural justice it is thus not required that administrative tribunals must follow the procedures which appertain to court cases. Instead of specifying a series of fixed and immutable procedural rules, the principles of natural justice establish only a number of broad procedural safeguards which will apply in a varying fashion to the very wide variety of different types of cases handled by administrative authorities.

For example, an oral hearing is not always required in order to achieve fairness, see Crow v Detained Mental Patients Special Board 1985 (1) ZLR 202 (H); 1985 (4) SA 175 (ZH) and Metsola v Chairman, PSC & Anor 1989 (3) ZLR 147 (S) at p 154 See also Makwavarara v Secretary for Transport HH-154-89 and Chairman, PSC & Anor v Marumahoko 1992 (1) ZLR 304 (S). Another example is that there is no fixed period of notice under the audi alteram partem principle. All that is required is that a person must be given reasonable notice of an impending hearing. The reasonableness of the amount of notice given in any particular case will depend upon factors such as the seriousness and complexity of the case. See Ford v Law Society of Rhodesia 1977 (2) ZLR 40 (A) at 55-56; 1977 (4) SA 175 (RAD) and Rwodizi v Chegutu Municipality 2003 (1) ZLR 601 (H).

In the Crow case the court held that the spirit encapsulated in the precepts of “natural justice” is applied neither rigidly nor blindly, but fluidly and flexibly, taking into account not only the considerations of the individual but those of government as well; with a mature outlook and recognition that in some cases the public interests may legitimately supersede those of the individual.

When principles apply

General

In Zimbabwean law, the legitimate expectation test is now used to decide whether natural justice principles apply to a particular administrative decision. In the past in Zimbabwe, the courts decided this issue by seeking to determine whether the decisions were quasi-judicial as opposed to purely administrative decisions. However, even when this distinction was applied, the courts sometimes took the view that though the decision concerned was of a purely administrative nature, the official or tribunal was nonetheless obliged to deal with the matter in a fair manner. The problem with this approach was that the cases did not properly explain how the obligation to behave fairly differs from the obligation to adhere to principles of natural justice that, after all, embody notions of basic fairness. See Crow v Detained Mental Patients Special Board 1985 (1) ZLR 202 (H).
Old approach

Under the old approach, the principles of natural justice would be held not to apply to decisions which were classified as of a so-called purely administrative character; they only applied if it was quasi-judicial in nature. (However, relatively few types of decisions have been classified as being purely administrative rather than quasi-judicial.) The tests that the Zimbabwean courts previously used were those enunciated in the case of *Hack v Ventserspost Municipality* 1950 (1) SA 172 (W). The decision-making capacity was deemed to be quasi-judicial if both of the following were present–

- The tribunal or official had an obligation to inquire into matters of fact, or matters of fact and law, before making the decision rather than making the decision at its absolute discretion. This obligation may be clearly indicated by a statutory provision requiring an enquiry, or it may be implied if there is a dispute between two or more parties. On the other hand, if the ground upon which a decision is to be taken and the means that need to be taken to extract information before acting are left to absolute discretion, then the decision may be held to be of a purely administrative nature.
- The decision will affect a person’s rights or liberties or involve him in civil consequences. This is really the critical criterion because if the court finds that the decision seriously affects rights or has drastic consequences for someone, it is very likely that the court will imply that there was an obligation to mount an enquiry before reaching that sort of decision.

See *Tabakian v DC, Salisbury* 1973 (2) RLR 348; 1974 (1) SA 604 (R); *de Wet v Patch* 1976 (1) RLR 65 (G); 1976 (2) SA 316; *Hussey v Rhodesia Conscientious Objectors Exemption Board* 1976 (2) RLR 73 (G) at 84; *Macara v Minister of Information and Tourism* 1977 (1) RLR 67 (G); 1977 (2) SA 264 (R); *Crow v Detained Mental Patients Special Board* 1985 (1) ZLR 202 (H); 1985 (4) SA 175 (ZH); *Nguruve v Secretary, Commission of Inquiry HH-158-86* (definition of quasi-judicial tribunal) and *Law Society of Zimbabwe v Lake* 1988 (1) ZLR 168 (S) (disciplinary body of Law Society.)

These criteria were vague and imprecise and were difficult to apply. However, the most important thing was that under this approach the decision would have been treated as quasi-judicial only if it prejudicially affected a person’s liberty or rights which he had already acquired.

New approach - legitimate expectation doctrine

As Baxter points out at pp 573-577, in the home of its birth (the United Kingdom) and in almost every other country where it was formerly applied, this distinction has been discredited and natural justice now governs all types of administrative decisions. The watershed case in the United Kingdom was that of *Ridge v Baldwin* [1964] AC 40. The legitimate expectation test was first adopted in South Africa in the case of *Langeni & Ors v Minister of Health & Welfare* 1988 (4) SA 93 (W). South Africa then emphatically abandoned the approach of resting the applicability of natural justice principles on whether the decision is quasi-judicial or purely administrative. The deathblow to this distinction was delivered in the South African Appellate decision of *Administrator, Transvaal & Ors v Traub* 1989 (4) SA 731 (A). The new approach
enunciated in that case is to apply the legitimate expectation principle. The court said-

The legitimate expectation principle, instead of insisting that an individual be affected in his liberty, property or existing rights before he may be heard in his own interest, lays down that an individual who can reasonably expect to acquire or retain some substantive benefit, advantage or privilege must be permitted a hearing before a decision affecting him is taken. The proper question to ask in any given case is therefore whether the person complaining is entitled to expect, in accordance with ordinary standards of fairness, that the rules of natural justice will be applied. [Thus] the doctrine may be applied even in the absence of a pre-existing right. (Emphasis added).

The court also said in that case that it did not think that the quasi-judicial/purely administrative classification was of any material assistance in deciding whether natural justice principles apply.

The present position in South Africa is thus that natural justice principles will not only apply if the decision will prejudicially affect the liberty, property and existing rights of the individual but also where he has a reasonable expectation that he would acquire or retain some substantive benefit, advantage or privilege. Where he does have such an expectation the benefit, advantage or privilege should not be withheld or withdrawn without first hearing from that person.

For a full listing of the other important South African cases and the relevant English cases on legitimate expectation see the later cases section under the heading Natural Justice - legitimate expectation.

The Zimbabwean Supreme Court has adopted the approach in the South African case of Traub into Zimbabwean law, thereby abandoning the classification into quasi-judicial and purely administrative in favour of the legitimate expectation test. This new approach was first referred to in cases such as PF-ZAPU v Minister of Justice (2) 1985 (1) ZLR 305 (S) and Public Service Commission v Tsomondo 1988 (1) ZLR 427 (S). In Logan v Morris NO & Anor 1990 (2) ZLR 65 (S) at p 68, the Supreme Court had this to say-  

These are indications of a developing approach to the validity of administrative acts in which the old distinction between quasi-judicial acts on the one hand and purely administrative acts on the other, has been swept away. Quite apart from the cases referred to by counsel, the whole matter has now been re-stated in clear and simple terms, as far as the Roman-Dutch law is concerned, by CORBETT CJ in Administrator, Transvaal v Traub 1989 (4) SA 731 (A). In considering an earlier dictum in which the distinction had been made, he said (at p 763H):

This dictum appears to define ‘quasi-judicial’ in terms of the effect which the decision has upon the individual concerned. On this basis, a classification as quasi-judicial adds nothing to the process of reasoning: the court could just as well eliminate this step and proceed straight to the question as to whether the decision does prejudicially affect the individual’s concerned. As I have shown, traditionally the enquiry has been limited to the prejudicial effect upon the individual liberty, property and existing rights, but under modern circumstances it is appropriate to include legitimate expectations. In short, I do not think the quasi-judicial/purely administrative classification, relied upon by counsel, is of any material assistance in solving the problem presently before the court.

In Metsola v Chairman, Public Service Commission & Anor 1989 (3) ZLR 147 (S) at pp 155-
156, the court said that the legitimate expectation test is connected with the right to be heard and does not constitute an additional ground for the application of the *audi alteram partem* principle. The court said that in essence it means no more than that the decision-maker must act fairly and apply the principles of natural justice before reaching any decision that will adversely affect the legitimate expectations of the aggrieved party.

In *Taylor v Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S), the court observed that the maxim *audi alteram partem* expresses a flexible tenet of natural justice that has resounded through the ages. The *audi* principle applies both where a person’s existing rights are adversely affected and where a person has a legitimate expectation that he will be heard before a decision is taken that affects some substantive benefit, advantage or privilege that he expects to acquire or retain and which it would be unfair to deprive him of without first consulting with him.

### Where regular practice, established policy or undertaking

In the case of *Matake & Ors v Ministry of Local Govt & Ors* 2007 (2) ZLR 96 (H) the judge set out in detail what is required for a person to claim that he or she had a legitimate expectation based on an express promise or the existence of a regular practice. The requirements are as follows:

1. The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification.
2. The expectation must be reasonable.
3. The representation must have been induced by the decision-maker.
4. The representation must be one which it was competent and lawful for the decision-maker to make without which reliance cannot be legitimate.

In *Matake* the applicants were public servants employed at a teachers’ training college. Their main task was to provide catering and cleaning services at the college. The Ministry subcontracted private companies to provide these services, thus rendering the applicants redundant. The applicants were retrenched. They requested their Ministry to be allowed to purchase the government houses in which they had been living for many years. Nearly two years later their Ministry replied, saying that a policy was being formulated and that the sitting tenants would be advised. Eighteen months later, the Ministry Secretary told the applicants that their request to purchase the houses had been turned down. They were given three months’ notice to vacate. The applicants did not move out or seek a review of the decision, but instead, at the expiry of the three month period they obtained a provisional order which stayed their eviction. At the hearing at which they applied for confirmation of the provisional order, they sought an order compelling the respondent to sell the houses to them. They claimed that the first letter gave rise to a legitimate expectation that the houses would be sold to them.

The court decided that there could be no question of the applicants having a legitimate expectation. There was no representation to the applicants that the houses would be sold to them – let alone a clear, unambiguous and unqualified representation. Nor were the applicants’ expectations to that effect reasonable. All that the letter stated was that their request would be considered, which could mean either a favourable or an unfavourable outcome of the
In a Zimbabwean tax case [Zimbabwean Fiscal Appeal Income Tax case no 1674 (2000) 62 SATC 116] a taxpayer was registered operator dealing in motor vehicles. It did not raise sales tax on vehicles it sold where these had been paid for in a foreign currency. In not charging sales tax, it relied on two letters written by senior officials in the Department of Taxes to the effect that where vehicles are bought in foreign currency not sales tax was payable. These letters were based on mistaken view of the law. The Commissioner of Taxes later demanded payment of sales tax in respect of certain of these sales. The court held that the letters had created a legitimate expectation that the policy would be followed until the parties were advised to the contrary. Any change of policy should be made operative prospectively so as to enable the taxpayer so as to enable the taxpayer to recover sales tax from those persons paying in foreign currency. As regards the demand for unpaid sales tax the court pointed out that—

it would be unfair if the Department, having advised that the sales in question were exempt from sales tax, were to be permitted to demand the sales tax. It is not as thought the appellant has collected the extra money from the buyers of the vehicles and thereby gained greater profits. The buyers were advised that the sales tax element was not payable. The change of policy and demand for sales tax that was not collected is, in my view, equivalent to a breach of contract or a breach of representation.

The court held that the Commissioner had abused his powers by acting in the way he did. The assessments against the taxpayer were consequently set aside.

In the case of Administrator, Transvaal & Ors v Traub 1989 (4) SA 731 (A) there was a long-standing practice of appointing doctors as Senior House Officers at a provincial hospital once they had been recommended for these posts. However, the doctors in question had not been appointed in accordance with this practice apparently because they had all signed a published letter critical of the provincial administration. The court held that the past practice had given these doctors a legitimate expectation of being appointed to these posts and they thus were entitled to be heard from before a decision was made to depart from this practice.

**Where no regular practice, established policy or undertaking**

In Taylor v Minister of Higher Education & Anor 1996 (2) ZLR 772 (S) the court held that the application of the legitimate expectation doctrine is not confined to situations where the person affected can show that there is an established practice to grant a hearing; it applies in any circumstances where there is a legitimate expectation that the person will be consulted before the decision is taken. At pp 333-334, the court pointed out that doctrine of legitimate expectation simply extended the principle of natural justice beyond the prior established rule that a person was only entitled to a hearing if he could show that a prior existing right had been infringed by a quasi-judicial body.

The facts in this case were that a senior lecturer at the Bulawayo Polytechnic College had been laterally transferred from his post to a similar post at the Harare Polytechnic College. His salary conditions were to remain the same and he was to be reimbursed for reasonable relocation expenses. The lecturer was not given any opportunity to make representations about the transfer
before it was effected. He had tried unsuccessfully to obtain reasons for this transfer. The court found that in the circumstance he had a legitimate expectation that he would not be transferred without being heard from first. It was not to be assumed that in every case a person being transferred had the right to a hearing before being transferred. In a busy Ministry it would be quite unworkable to have to grant hearing to every single person wants to transfer. This would lead to substantial delays and the extra work entailed would adversely affect efficiency of operations. In deciding this issue the court should take into account the position and circumstances of the person. In general professional employees of long standing, holding senior positions, should not be transferred without taking account of personal situations and wishes. It would suffice to allow the person concerned the right to make written representations.

The court stated that in general, professional employees of long standing, holding senior posts, should not be transferred without account being taken of their personal situation and wishes. Where it is necessary to hear from the person first before transferring him, it suffices to allow him to make written representations. Relevant factors were his age, seniority, the responsibilities of his job, the fact that he would not occupy the same prestigious position in Harare as he had in Bulawayo and the fact that he would suffer economic loss as a result of the transfer. The court decided that in relation to Taylor the circumstances were such that he had a legitimate expectation that he would be consulted before being transferred.

Another case involving the transfer of an employee is Kanonhuwa v Cotton Co of Zimbabwe 1998 (1) ZLR 68 (H). In this case the applicant, who worked for the respondent as a clerk, had been stationed at the respondent’s Sanyati depot. When she got married, she requested and was granted a transfer to Harare, where her husband lived. She asked for an inter-departmental transfer; this was also granted. After she had been in Harare for some time, she was ordered, at short notice, to transfer to the company’s Manoti depot in the Gokwe area. She protested but the order was confirmed. It was argued on her behalf that the legitimate expectation rule applies to both quasi-judicial and purely administrative acts and that she was entitled to be heard before the decision was made. The court held that in the circumstances of this case the applicant had a legitimate expectation to be heard. The respondent had agreed to transfer her to Harare because of her personal circumstances, and before transferring her elsewhere she should have been heard as her circumstances remained essentially the same.

In Health Professions Council v McGown 1994 (2) ZLR 329 (S) when it renewed the practice certificate of a medical practitioner, the Health Professions Council had imposed various restrictions on how he could practice. It was found that these restrictions were highly prejudicial and damaging to his standing as a professional man. The court held that a medical practitioner had a legitimate expectation that the Council would not impose drastic restrictions on his practice without first hearing from him. He had a right to be afforded a reasonable opportunity to make representations before these restrictions were imposed. The taking of the decision without allowing him a chance to make representations was a breach of the principles of natural justice.

In Guruva v Traffic Safety Council of Zimbabwe 2009 (1) ZLR 58 (S) the appellant was notified by the respondent, his employer that he was to be transferred to another town. He wrote back, making submissions against the transfer, and giving personal reasons for objecting to being transferred. A meeting of the employer’s directorate was held to discuss the matter. The directorate notified the appellant that, after a thorough consideration of his submissions, the
decision that he be transferred would stand. The appellant referred the matter to a labour relations officer, who referred the matter for arbitration. The arbitrator held that the respondent had not observed the dictates of the *audi alteram partem* rule and declared that the transfer was unlawful and should be reversed. The respondent successfully appealed to the Labour Court. On appeal to the Supreme Court, the appellant argued that the respondent had not observed the *audi alteram partem* rule, nor had it fulfilled his legitimate expectation of being heard before being transferred.

The court held that the appellant should have been granted a hearing before the decision to transfer him was made. However, the respondent had considered the appellant’s submissions; it was not as if the respondent refused to hear him. It could not be said that once the appellant made representations, the respondent should necessarily have made a different decision. It was still open to the respondent to arrive at the same decision even after hearing the appellant. The respondent may have erred in not giving the appellant a hearing in the very first place; but, since the respondent did not compel the appellant to go on transfer before he was heard, but deliberated on the issue before re-affirming its previous decision, his legitimate expectation of being heard and the requirement of the *audi alteram partem* rule were complied with.

The court pointed out that an employee who undertakes to work for an employer whose business is carried out at different places takes the risk of being sent to perform services for the employer wherever such services are required unless the employment contract stipulates that he is to be employed and remain at a specific place only. The right to transfer an employee from one place to another is the prerogative of the employer. It is the employer who knows better where the services of an employee are required. The employer’s discretion in determining which employee should be transferred and to which point of the employer’s operations is not to be readily interfered with except for good cause shown. Good cause, while not easy to define, would include such matters as unfounded allegations, victimization of the employee and any action taken to disadvantage the employee.

The case of *Muwenga v PTC* 1997 (2) ZLR 483 (S) involved a situation where an employee did not receive a promotion he was expecting. The appellant had been the acting telephone supervisor at an exchange for a long period and had given good service during this time. When the substantive position was filled, however, the appellant was not appointed to the post and the post went to someone else. The Labour Relations Tribunal found that the failure to promote the appellant to the post of superintendent did not amount to an unfair labour practice. It was held that in the circumstances the employer had not created a situation which caused the appellant legitimately to expect that he would be promoted into the post in which he was acting. Most importantly, although the appellant had experience in the post, he lacked the required academic qualifications for the post. The decision to appoint a person with the required qualifications had not been unfairly arrived at. There is a need for the courts to avoid undue interference in the administration of public authorities. Indeed, it could be contended with some persuasion that the promotion of an employee is a privilege, left to the discretion of the employer. It is not a right an employee is entitled to claim, unless his contract of employment so provides.

In *Foreman & Anor v KLM Royal Dutch Airlines* 2001 (1) ZLR 108 (H) the contract of employment of airline employees provided that employees were entitled to apply for airline tickets at a reduced rate. Two airline employees had applied for but had been refused such reduced rate tickets. The contract explicitly provided that this reduced rate travel benefit was a
privilege and not a right. The court held that the fact that the employees had been granted this benefit when they had applied in the past, did not convert the privilege into a right. They could not therefore rely on the legitimate expectations doctrine. Whilst it may have been unfair not to give the employees an opportunity to be heard before the decision was made, it did not render the decision unlawful.

This judgment is very confused. The judge seems to have thought that the legitimate expectation doctrine only applies in respect of a right. This is not so. The whole essence of the doctrine is that it applies not where there is a right but where there is a legitimate expectation that the person will receive a benefit, privilege or advantage. Where there is such an expectation the person concerned is entitled to be heard from first before such benefit, privilege or advantage is withheld. Strangely, however, the judge concluded her judgment by saying at p 116 that if the applicants had requested it, the court may have been inclined to order that the employees be given an opportunity to be heard before in the future they were denied the benefit.

Despite the emphatic acceptance of the legitimate expectation doctrine by the Supreme Court, surprisingly in the Foreman case at 115F-H the High Court judge seems to suggest that the Zimbabwean courts have adopted an ambivalent approach in regard to the acceptance of the legitimate expectation doctrine.

In Makromed (Pvt) Ltd v Medicines Control Authority of Zimbabwe HB-36-11 The applicant had been a wholesale dealer in medicines and pharmaceutical products since 2002. Such business was conducted by virtue of a wholesale dealer’s permit issued by the respondent in terms of the Medicines and Allied Substances Control Act [Chapter15:03], which permit was valid for a period of one year. Accordingly, the applicant was enjoined to renew that permit annually before it expired. The applicant’s last permit expired at the end of March 2009 without an application for renewal being made in the prescribed manner. The following month the respondent pointed out this failure and, following representations by the applicant, stated that it would allow the permit to be renewed on payment of the required fee. In spite of this indulgence (which was not sanctioned by the relevant legislation), the applicant failed to submit an application for renewal. Instead, it forged a permit and traded using the forged permit. When this was discovered, the applicant submitted an application on the necessary form and deposited the fee. The application was rejected. The applicant sought an order declaring the respondent’s failure to renew the permit as constituting an unreasonable and unfair administrative action in breach of s 3 of the Administrative Justice Act [Chapter 10:28] and directing the respondent to forthwith renew its permit. It was submitted that the applicant had a legitimate expectation that a permit would be issued and accordingly was entitled to the relief provided for in s 4 of the Act.

The court held that in terms of both the Medicines and Allied Substances Control Act and the regulations, an application for a renewal of a permit can only be made before the expiration of the permit. Such an application may only be made on the prescribed form, accompanied by the prescribed fee. No such application was made by the applicant before its permit expired. The communication between the parties which came after that did not constitute an application for renewal which the respondent was required to consider. The law does not protect every expectation; it only protects a “legitimate” one. Legitimate or reasonable expectations may
arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. Here, the applicant had been renewing its permit for several years in accordance with the provisions of both the regulations and the Act. At no time was it allowed to renew the permit after it had expired or without submitting the prescribed form. There was thus no general promise that renewal would be made out of time.

See also **PF-Zapu v Minister of Justice (2) 1985 (1) ZLR 305 (S); Public Service Commission v Tsomondo 1988 (1) ZLR 427 (S); Metsola v Chairman, Public Service Commission & Anor 1989 (3) ZLR 147 (S) at p 155-156; Logan v Morris NO 1990 (2) ZLR 90 (S) at 4-5 and Turner v Master & Anor HH-116-92**

Although the scope of the legitimate expectation test is not always easy to determine, it is unjust to exclude the protective coverage of natural justice principles from a group of decisions which are marked off as purely administrative. Additionally, the actual tests that had in the past been invoked to maintain this distinction between quasi-judicial and purely administrative decisions were so vague and imprecise that they are exceedingly difficult to apply.

**South African cases**

In **Administrator, Transvaal & Ors v Traub 1989 (4) SA 731 (A)** the facts were that for a long time, doctors had been promoted to senior health officer post on recommendations of head of department. It was decided not to appoint these doctors although they qualified for the posts and had been recommended by head of department. Apparently, the reasons why they were turned down was that they had protested about bad conditions at the hospital at which they were employed. The court held that they had a legitimate expectation that they would be heard from first if the authorities intended to depart from the practice of appointing such doctors as a matter of course on the recommendation of the head of department.

In **Khan v Chairman, Road Transportation Board & Anor 1993 (2) SA 828 (A)** an objector had a right to be informed about meeting at which the applicant for transport permit was applying to ply same route as that for which the objector held a permit.

In **Union of Teachers’Associations of SA & Anor v Minister of Education and Culture & Anor 1993 (2) SA 828 (2)** a Minister responsible for education had decided that, due to financial constraints, no temporary teachers were to be appointed as substitutes for teachers who went on leave. The decision revoked an earlier one, reached after consultation with the teachers’ union, that cost-cutting measures would be shelved. The Minister reached the decision without consulting the teachers’ union or school principals. The court held that the union and the school principals were entitled to expect that they would be consulted about the non-appointment measures, and the Minister’s failure to consult them was clearly unfair and should be set aside on review.

The cases of **Administrator, Transvaal & Ors v Zenzile & Ors 1991 (1) SA 21 (A) and Administrator, Natal & Anor v Sibiya & Anor 1992 (4) SA 532 (A)** involved the dismissal from employment of employees.

The cases of **Ngema/Chule v Minister of Justice, Kwazulu & Anor 1992 (4) SA 349 (N) and Hlongwa v Minister of Justice, Kwazulu 1993 (2) SA 267 (D)** involved transfer of civil servants.

The case of **Omar & Ors v Minister of Law and Order & Ors 1987 (3) SA 859 (A)** involved the detention without trial of a person.
In Minister of Justice, Transkei v Gemi 1994 (3) SA 28 (TkA) an assistant administrative clerk in the office of the Attorney-General has applied to be transferred to a particular town in order to be close to his family. Instead he was transferred to a place that was 100km further away from his home. The court held that when he applied for a transfer he expected it to be granted or refused. If it was refused he expected to stay in the place that he was in presently. He was transferred to the new place without being given a hearing. There was no practice of affording a hearing and nothing in conditions of service that hearing would be granted. Nonetheless, the court ruled that the clerk had a legitimate expectation that he would be heard from first before decision taken.

In Makgoto & Ors v Sethogelo Technikon & Ors 1994 (4) SA 115 (BGD) after a year of study, students had been refused a re-admission on the grounds that they had participated in unrest. They had a legitimate expectation that they would not be refused re-admission and would not be expelled on punitive grounds without first being afforded a hearing.

In Ramburan v Minister of Housing (House of Delegates) & Ors 1995 (1) SA 353 (D) the State had cancelled a statutory tenancy. The court held that the tenant had a legitimate expectation that he would be heard from first before his lease was cancelled.

The case of Xu v Minister van Binlandse Sake 1995 (1) SA 185 (T) involved an application by an alien applied for a temporary residence permit.

The case of Ramon v Williams NO 1998 (1) SA 270 (C) involved a situation in which the prison authorities had cancelled the probation of a released prisoner.

In Yuen v Minister of Home Affairs & Anor 1998 (1) SA 958 (C) the authorities had cancelled the applicant’s residence permit.

In Omar & Ors v Minister of Law and Order & Ors 1987 (3) SA 859 (A) a person had been detained without trial.

See also Langeni & Ors v Minister of Health and Welfare 1988 (4) SA 93 (W) and Lunt v University of Cape Town & Anor 1989 (2) SA 438 (O); Laubscher v Native Commissioner, Piet Retief 1989 (3) SA 147 and Claude Neon v City Council of Germiston 1995 3 SA 710 (W)

English cases

Ridge v Baldwin [1964] AC 40; Schmidt v Secretary of State for Home Affairs [1969] 1 All ER 904 (CA); CCSU & Ors v Minister for the Civil Service 1984 (3) All ER 935 (HL); R v Home Secretary, Ex P Khan [1984] 1 WLR 1337; R v Inland Revenue Commissioners, Ex P Preston [1985] AC 835; R v Secretary for State for the Home Department, Ex P Ruddock & Ors [1987] 1 WLR 1482 (QBD); R v North and East Devon Health Authority, Ex P Coughlan [2000] 2 WLR 622.

Legitimate expectation and substantive rights

In South Africa and England the courts have moved in the direction that sometimes a legitimate expectation can lead not only to a right to a hearing before the decision is taken (a procedural right) but sometimes also to a substantive right. The Zimbabwean courts have not yet adopted this approach.

South Africa

In the case of Premier of Mpumalanga v Executive Committee of State-Aided Schools: Eastern
Transvaal 1999 (2) BCLR151 (CC) the provincial authority decided in 1995 summarily to terminate the payment of bursaries to needy students in state-aided schools. These bursaries were being paid in the main to schools that mostly educated white students. It was accepted by the parties that this scheme was one of the unfair legacies of apartheid and that scheme had to be terminated. The only dispute was about the manner and timing of the termination. The court decided that no reasonable notice was given when the authority informed schools of the termination of the bursaries. This was unconstitutional as it violated the right to procedurally fair administrative action. It would be futile to refer the matter back to the authority as it could no longer take action to cure the unconstitutionality. The period for which the bursaries were to run had already expired (i.e. the end of 1995) and it was not now possible to give reasonable notice to the parents and the school governing body. The court ordered that the bursaries be paid up to the date that the bursaries expired.

England

In England in a number of cases the courts have found that sometimes a substantive right derives from a legitimate expectation. The main situation where this has come up is the following. If an individual has relied on earlier policy that has now been changed, he or she may seek to claim the substantive benefit that would have been forthcoming had the policy not been changed. A public authority is of course permitted to change its policy. The question is what should happen in respect of persons who have relied on the previous policy before it was changed.


Craig Administrative Law (4th ed) p 628 points out that if the only remedy the court can grant is to order that the authority now give the person affected a hearing, the authority can simply go through the motions of re-hearing and still refuse to change its mind. To avoid this in the case of R v Secretary of State for the Home Department, ex p Khan [1985] 1 All ER 40 the court adopted a two-stage approach in cases where a person has been affected as a result of a change in policy. The court will firstly decide whether the policy change has been made without giving the person affected a proper opportunity to be heard first. Secondly, the court will also consider whether the public interest demanded that the policy be changed. The court can order that the substantive benefit be granted if there was no valid public interest for changing the policy.

Craig at p 613 points out that there are various types of situations that can arise. These are

- A general norm or policy choice which an individual has relied on has been replaced by a different policy choice;
- A general norm or policy choice had been departed from in the circumstances of a particular case;
- An individual representation has been made to a person which he has relied upon but then the public authority seeks to depart from this in the light of a shift in general policy;
- An individual representation has been made to a person which he has relied upon but the public authority then changes its mind and makes a decision in relation to that
person which is inconsistent with the original representation.

The last case is usually seen as being the strongest basis for claiming a legitimate expectation.

**Review of disciplinary bodies**

In the case of *Vice-Chancellor, University of Zimbabwe & Anor v Mutasah & Anor* 1993 (1) ZLR 162 (S) the Supreme Court ruled that university disciplinary proceedings against students were reviewable by the courts, both in terms of s 27 of the High Court of Zimbabwe Act 1981 and under common law.

**Whether natural justice principles apply to cases governed by contract**

In the case of *Chirasasa & Ors v Nhamo NO & Ors* S-135-03 the court held that there is a presumption in favour of the application of the *audi* rule when the decision is made in the exercise of a statutory power unless the rule is expressly excluded. There is no similar presumption when a decision is taken in the exercise of a contractual right, because the question in the area of contract is whether or not failure to hear the other party constituted a breach of contract. A party cannot be in breach of an obligation which has not been made an express or implied term of the contract. An obligation to afford a hearing was not implied in the pure contract of master and servant in respect of the latter’s dismissal.

In the case of *U-Tow Trailers (Pvt) Ltd v City of Harare & Anor* 2009 (2) ZLR 259 (H) the court pointed out that the rule at common law is that tenets of natural justice have no application in the law of contract unless the aggrieved party can prove that the contract impliedly imported and incorporated such into the contract. However, even before the enactment the Administrative Justice Act, Zimbabwean courts were generally alive to the need to import fairness into administrative decisions, even those that were founded primarily on contract, especially the employment contract. The Administrative Justice Act now requires that all administrative authorities as defined in the Act who enter into contracts with private individuals or companies comply with the requirements of the Act in relation to legality, reasonableness and procedural fairness. Thus in this case a city council was not permitted to cancel a lease until there had been a fair hearing to determine whether the terms of the lease had been breached.

Although this is not a matter for Administrative Law, it is arguable that attempts to exclude the basic principles of natural justice in a contract between two private parties are unfair terms that the court could cancel or ameliorate in terms of the Consumer Contracts Act [*Chapter 8:03*].

**Whether natural justice principles can be excluded by legislation**
With decision-making powers deriving from statute, it would seem the Legislature may expressly or by necessary implication exclude all or some of the principles of natural justice or may modify the application of certain aspects of these principles. See *de Wet v Patch* 1976 (1) RLR 65 (G) and *Austin & Anor v Chairman, Detainees’ Review Tribunal & Anor* 1986 (4) SA 281 (ZS). However, the constitutionality of the exclusion of natural justice principles may well be unconstitutional.

Can Parliament, pass legislation excluding the application of principles of natural justice without violating the Constitutional guarantee of a fair hearing (section 18)? There are various constitutional provisions which are relevant in deciding this issue. These include s 18(9) which lays down that every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations and s 16 which deals with protection from deprivation of property.

In the case of *Chairman PSC & Ors v Hall* S-49-89 at p 7, the judge said *obiter* at p 7–

> It may be that in a country with a justiciable Bill of Rights one cannot apply the *dictum* of Stratford ACJ in *Sachs v Minister of Justice* 1934 AD 11 at 38 where he said: ‘Sacred though the maxim (*audi alteram partem*) is held to be’, Parliament is free to violate it. ‘Even if Parliament were free to violate it, one might ask whether a subordinate authority such as the [Public Service] Commission is free to do so.’

In *Holland & Ors v Minister of the Public Service & Ors* 1997 (1) ZLR 186 (S) the applicant challenged the constitutionality of a provision in the Private Voluntary Organisations Act that allowed the minister to suspend executive members of a non-governmental organisation without hearing from them first. The court decided that this provision violated s 18(9) of the Constitution, namely the right to a fair hearing in the determination of a person’s civil rights.

See also *Dube v Chairman, PSC & Anor* 1990 (2) ZLR 181 (H); *Zimbabwe Teachers Association & Ors v Minister of Education & Culture* 1990 (2) ZLR 48 (H).

An administrative body to which powers by Parliament to create subsidiary legislation is certainly not permitted to exclude natural justice principles in subordinate legislation.

The detailed content of the principles of natural justice is a matter of common sense and intuitive justice.

**Hearing - *Audi alteram partem***

**General**

Literally translated *audi alteram partem* means “hear the other party”. It is an elementary notion of fairness and justice that a decision should not be made against a person without allowing the person concerned to give his side of the story. Put in the context of administrative decision making, the *audi* principle requires that a decision affecting a person’s rights or his or her legitimate expectations of receiving a benefit, advantage or privilege should only be made...
after hearing first from that person and taking into account what he or she has said. Section 3(1) of the Administrative Justice Act provides that “an administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person” must act in a fair manner (i.e. a procedurally fair manner.) Section 3(2) lays down what the administrative authority must do to comply with this. It must

- give adequate notice of the nature and purpose of the proposed action;
- give a reasonable opportunity to make adequate representations; and
- give adequate notice of any right of review or appeal, where applicable.

If the decision-maker is holding prejudicial information against the person concerned that prejudicial information must be disclosed to the person and he or she must be given a chance to refute that information.

Where a tribunal is tasked with settling disputes between parties, both parties to the dispute must be heard from before the decision is made and it is obviously unfair to hear from one party and not the other party to the dispute.

The main purpose of the *audi* rule is to ensure accurate, informed and fair decision-making that inspires public confidence in administrative action. See *M & J Morgan Investments (Pvt) Ltd v Pinetown Municipality* 1997 (4) SA 427 (SCA)

**Manner of gathering facts**

There are two possible ways in which the decision-maker can gather information in order that he or she can reach a decision. Firstly, it can ask the party or parties involved to appear personally before the tribunal and to present their evidence orally. Secondly, it can ask the party or parties to make written submissions. In the great majority of cases tribunals allow the parties to appear in person and to present their evidence orally.

Obviously, if the statutory provisions or contractual terms require the holding of an oral hearing, then the tribunal is obliged to have such a hearing. In the case of *Machiya v BP Shell Marketing Services (Pvt) Ltd* 1997 (2) ZLR 473 (H) an employee had been dismissed after disciplinary proceedings. No oral hearing had been held but the employee had only been able to submit a written report responding to the allegations against her. The review court decided that it was an irregularity not to have held an oral hearing. Under the code of conduct it was expressly provided that the rules of natural justice applied. The provisions of the code pointed unmistakeably to the requirement to hold an oral hearing.

If, however, the statutory or contractual provisions do not lay down that an oral hearing must be held, the question which arises is whether it is a breach of natural justice for the tribunal to decline to hold an oral hearing?

The Supreme Court has ruled that an oral hearing of witnesses is not always required for a fair hearing. In *Metsola v PTC & Anor* 1989 (3) ZLR 147 (S) at p 154, the court said–

The *audi* maxim is not a rule of fixed content, but varies with the circumstances. In its fullest extent,
it may include the right to be apprised of the information and reasons underlying the impending decision; to disclosure of material documents; to a public hearing and, at that hearing, to appear with legal representation and to examine and cross-examine witnesses … The criterion is one of fundamental fairness and for that reason the principles of natural justice are always flexible. Thus the ‘right to be heard’ in appropriate circumstances may be confined to the submission of written representations. It is not the equivalent of a ‘hearing’ as that term is ordinarily understood.

See also Secretary for Transport & Anor v Makwavarara 1990 (1) ZLR 18 (S) and Sibanda v Law Society of Zimbabwe S-162-911991). In the case of Chairman, PTC v Marumahoko 1992 (1) ZLR 304 (S) at p 314, the Supreme Court said that the dicta in the court below in this case regarding the need for an oral hearing should not be taken as laying down a new law conflicting with the ruling of the Supreme Court in this regard.

In terms of the Public Services (Officers) (Misconduct and Discharge) Regulations the Commission is entitled to dispense with an inquiry (i.e. an oral hearing) where there is no dispute as to the facts. If there is a real dispute of fact then an enquiry must be held. See the Chairman, PTC & Anor v Marumahoko case 1992 (1) ZLR 304 (S) at 312.

In the case of Chataira v ZESA S-83-01, the Supreme Court decided that in a disciplinary hearing against an employee, natural justice requires that the employees should know of the accusations he has to meet; that he should be given an opportunity to state his case; and that the internal tribunal acts in good faith. It is not necessary that viva voce evidence be led. The employee must be shown any statements or documentary evidence that is being produced before the disciplinary committee but he need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing; or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents.

Thus, in some cases, cases can be dealt with perfectly fairly by allowing the parties to make their submissions in writing. Indeed, in certain cases, where for example an extremely large number of persons have the right to make submissions, the only practical way to proceed may be by way of receiving written evidence. See Metsola v Chairman, PSC & Anor 1989 (3) ZLR 147 (S). In respect of applications for licences and permits usually applicants are required to fill in application forms in which they provide details of their eligibility to hold the licence or permit. If the applicant establishes that he or she is eligible for the licence or permit there will be no need to hold an oral hearing. Only where there is doubt as to whether the applicant qualifies will it be necessary to hold a hearing or at least to require the applicant to supply further information in writing.

On the other hand, in some cases it may be unfair to refuse to hold an oral hearing. For instance, in a serious disciplinary matter where a person’s entire livelihood may be at stake, in order to deal with the matter fairly it would seem to be essential that the person accused should be given a full right to give evidence orally, to call his witnesses and to cross-examine the witnesses called to testify against him. Oral evidence may be of vital importance in this sort of case, especially if the outcome is likely to turn upon credibility of witnesses. Indeed, customarily where disciplinary mechanisms are established, oral hearings are built into the procedures.
Legal representation

If the legislative or contractual provisions provide that a person must be permitted to be legally represented if he so wishes, then it would be a breach of the statutory provision or the contract to disallow him from being legally represented.

Assuming that the provisions governing the procedures of the tribunal do not state that the person must be permitted to be legally represented (in which case the tribunal is obliged to allow this), the question is whether the denial of the right to be legally represented is a breach of the principles of natural justice. In the case of *Mlambo v City of Mutare* HH-114-91, the applicant’s employer had held a “commission of enquiry” into allegations against him. The applicant had been denied the right to be legally represented at the enquiry on the basis that the enquiry was not a criminal investigation. The High Court ruled that the denial of the right to be legally represented amounted to a failure to afford the applicant a fair hearing and constituted a gross irregularity. As the appeal in this case [*City of Mutare v Mlambo* S-229-91] was decided on a different basis, this made it unnecessary for the Supreme Court to decide whether, in the particular circumstances of the case, natural justice required that the respondent be allowed to be represented by a legal practitioner. The court said it preferred to leave this matter open. It did however say *obiter* that “such factors, perhaps combining together, as inarticulacy, a lack of familiarity with the setting and procedures, a failure to grasp the critical matters in issue and to distinguish the relevant from the irrelevant, and intelligence inadequately to appreciate the issues of law or complex fact would … make legal representation before a disciplinary tribunal or board” essential for the achievement of natural justice. Although not referred to in the *Mlambo* case, presumably another factor that should be taken into account is whether the matter is of a serious nature and could have grave consequences for the person in question, such as dismissal from employment. In the case of *Chirenga v Delta Distribution* 2003 (1) ZLR 517 (H) a High Court judge ruled that if an employee who is facing a charge of misconduct which might lead to his dismissal wishes to have legal representation, and his request is refused, the requirements of the *audi alteram partem* rule would not be met. This is so even where the code of conduct makes no mention of a right to representation.

In the case of *Vice-Chancellor, University of Zimbabwe & Anor v Mutasa & Anor* 1993 (1)ZLR 162 (S) the court said *obiter* that while it remained to be decided whether a provision purporting to remove the right to legal representation before a disciplinary tribunal violates s 18(9) of the Constitution, there was much to be said for the view that where an individual’s career is at stake before a tribunal he may be entitled as of right, by reason of natural justice, to legal representation if he so wishes.

Whether there is a constitutional right to legal representation has still to be ruled on in a relevant case after argument on this matter but in the light of the various observations made in a number of judgments, the Supreme Court has advised the Public Service Commission to seek legal advice whether the prohibition of legal representation that was contained in ss 20(1) & 91(3) of the Public Service (Officers) (Misconduct and Discharge) Regulations 1986 (now repealed) was *ultra vires* the Constitution. See *Chairman, PSC & Anor v Marumahoko* 1992 (1) ZLR 304 (S) at p 314. See also *Chairman, PSC & Ors v Hall* S-49-89 at p 7; *Metsola v Chairman, PSC & Anor* 1989 (3) ZLR 147 (S) at pp 157-158 and *Chairman, PSC & Anor v
In deciding this issue the court would obviously have reference to s 18(9) of the Constitution which provides that “every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.”

The Administrative Justice Act is silent on the issue of legal representation. In other words this Act does not make legal representation a mandatory requirement. In South Africa section 3(3)(a) of the South African Promotion of Administrative Justice Act provides that in order to give effect to the right to a procedurally fair administrative act the administrative authority may in its discretion give the person concerned the opportunity to obtain assistance and, in serious or complex cases, legal representation.

Under South African common law the presiding officer has a discretion whether to allow legal representation or not and the key issue is whether legal representation is required in order to allow a person a proper opportunity to present his or her case. See Baxter pp 555-556. In the South African case of *Yates v University of Boputaswana* 1994 (3) SA 815 (B), the court said at pp 846-7 that legal representation should not be lightly refused. Legal representation is engraved in the Declaration of Rights and is an essential part of the principle that a person before a tribunal should be afforded a fair hearing. (This case concerned disciplinary proceedings against a staff member at a University. His employment was terminated following a Committee of Enquiry investigation.) Where the case involves complex legal issues or complicated facts, the court will be inclined to rule that legal representation was required for there to be a fair hearing. See *Moeca v Addisionele Kommissaris Bloemfontein* 1981 (2) SA 357 (O). In *Dladla v Administrator Natal* (1995) there was a disciplinary inquiry into alleged misconduct. The enabling statute neither allowed nor prohibited legal representation. The court held that the official had a discretion whether or not to allow legal representation. The officials should have allowed legal representation in the circumstances. The court found that the need for legal representation was strong because there was no independent tribunal that would decide the matter, jobs and livelihoods were at stake and the persons concerned were at a disadvantage because of their differences in race, culture, language and background to the officials who would deliberate on the matter. In the case *Hamata & Ors v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Ors* 2002 (5) SA 449 (SCA) the court decided that in determining whether legal representation should be allowed in a disciplinary case the factors to be taken into account included the nature of the charges brought, the degree of factual and legal complexity attendant upon considering them and the potential seriousness of the consequences of an adverse finding.

See also *Dabner v SA Railways & Harbours* 1920 AD 583 and *Bell v van Rensberg NO* 1971 (3) SA 693 (C)

In a number of cases in England the courts have ruled that in serious and complex disciplinary matters it would be unfair to disallow legal representation. Thus in Britain, the courts have accepted that a person is entitled to be legally represented in grave disciplinary cases: *Pett v Greyhound Racing Association* [1969] 1 QB 125; *Enderby Town FC v Football Association* [1971] 1 All ER 215, see also Baxter pp 555-556.
Reasons for decision

There are compelling arguments in favour of obliging administrative authorities to provide reasons when they make decisions. These are:

**Improves quality of decision-making**
If a decision-maker has to articulate proper reasons to back up its conclusion, it is forced to think carefully about its decision. It will be obliged to consider the facts, make findings about the facts where they are in dispute, decide what considerations are relevant to its decision and what are not, apply the relevant considerations to the facts, and reach a reasoned conclusion. Requiring reasons to be given will thus be likely to lead to a more rational and systematic decision-making process and it will make it less likely that decisions will be reached on an arbitrary, capricious and unreasonable basis. Where a decision-maker has reached its decision on an unreasonable basis this is more likely to emerge if reasons have to be given.

**Creates impression of fairness**
Citizens will have more faith and confidence in a system where administrators are seen to be respecting the rights of people affected by their decisions by providing them with reasons. Persons adversely affected by decisions unsupported by reasons are likely to suspect that the decision has been reached on an arbitrary basis without proper consideration of the case. Where a decision maker refuses to give reasons, a person affected by that decision will strongly suspect that the decision-maker reached the decision on a faulty basis and is not now able to advance any convincing reasons to support its decision.

Baxter at p 569 argues that there is the strongest case for arguing that natural justice implies a right to reasons, as an unreasoned decision is arbitrary and unfair. In the United Kingdom both the Donoughmore and the Franks Reports regarded the giving of reasons as an important aspect of natural justice. Even if the giving of reasons is not at present part of natural justice, there is no doubt that the failure to give reasons can be used as part of the evidence upon which to build a case of bad faith or bias.

**Assists the review court**
Unless reasons are given, a review court will have difficulty in deciding whether to uphold the decision.

*Problems that could arise from imposing general duty to give reasons*
It is argued that if all administrators were required to give reasons for all their decisions, even in respect of trivial matters, this will increase bureaucracy. There is a danger that administrators, fearing that their decisions will be open to legal challenge on the basis of their reasons, will spend lengthy periods trying to justify their decisions and this will slow down the entire administrative process thereby prejudicing the public as a whole. In fact the giving of reasons will often avoid court challenges because if the decision is a sound one, the reasons given will clearly demonstrate this and this will mean that there will not be any basis for the decision to be challenged in a court of law. The giving of reasons requires a reasoned decision which will be less likely to be challengeable than an unreasoned one.
One way of overcoming this danger is to make it clear that in a routine matter brief reasons will suffice, whereas in a more complex matters fuller reasons will be needed but certainly not the detailed judgment that a court of law will be expected to produce.

The Administrative Justice Act now provides in s 3(1)(c) that administrative authorities which have the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person must give written reasons for their decisions within the period specified by law or, if there is no specified period, within a reasonable period of time. If the authority fails or refuses to give reasons for its decision, a person affected by the decision will be entitled to apply to the High Court for relief. However, the High Court may decline to order the supply of reasons if it considers that it would be contrary to the public interest for such reasons to be disclosed or it may direct that the disclosure of reasons should be limited and restricted.

Previously under the common law the position was as follows. The statutory provisions under which a decision-maker is empowered to reach a decision may lay down that reasons must be provided, in which case the decision-maker must give reasons for his decision. Also if a right of appeal has been established in the provisions or terms, the court will conclude that this means impliedly that reasons must be given because it is not possible to bring an appeal without knowing the reasons for the original decision.

A domestic contract may also provide that a party to a contract has a right to be given reasons when a decision is made affecting that person. Where there is an explicit provision in a contract making it mandatory for reasons to be given for a decision, a court will give effect to such a provision. A recent case touches indirectly upon this matter. The case in question is that of Foreman & Anor v KLM Dutch Airlines 2001 (1) ZLR 108 (H). In that case in terms of their contract airline employees could apply for reductions on airline tickets. However, the contract explicitly stated that this benefit was a privilege and not a right. The contract also provided that if the employer decided not to grant this benefit the applicant had to be informed of the reason for this decision. The employees had applied for but had been refused the benefit. The decision in this case revolved primarily around the question of whether the employer should have allowed the applicants a right to be heard before refusing them the benefit. In the court application the applicants did not apply for an order obliging the employer to furnish reasons for the refusal. The court held that the failure by the employer to allow the employees an opportunity to be heard and to furnish them with reasons may have been unfair but it did not render the decision unlawful.

Where there is no statutory provision or term of the contract obliging the giving of reasons for a decision the question is whether the principles of natural justice require that all decision-makers give reasons for their decisions.

In the case of Chairman, PSC & Anor v Marumahoko at 1992 (1) ZLR 304 at 314E the Supreme Court approved the decisions on this question in Public Services Board of New South Wales v Osmond [1987] LRC (Const) 681 and Berlin Motors v Kotze NO (1992). In these two cases, it was ruled that under the common law an administrative tribunal is not required to give reasons for its decision. On the other hand, in the case of Affretair (Pvt) Ltd & Anor v MK
Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S) at p 22 the Supreme Court stated that the court will expect various things from an administrative body when it makes decisions. One of these is that the decisions be justifiable, that is that the administrative body “will give its decision, at least when ... challenged, with reasons” (emphasis added). It went on to say that the “purpose of requiring reasons is that the court can then more readily determine the propriety and reviewability of the decision.” In certain circumstances the failure to give reasons may lead to an inference that an irregularity has occurred, see also Palley v Knight NO 1961(4) SA 633 (SR) and Mutare City Council v Mafuya 1984 (2) SA 124 (ZH).

Mention should here be made of the case of Hambly v The Chief Immigration Officer 1995 (2) ZLR 264 (H). The wife of a man who had been declared a prohibited immigrant by the immigration authorities sought to challenge this declaration in the High Court. She had requested the immigration authorities to supply reasons for the decision to declare her husband a prohibited immigrant but the responsible Minister had issued a certificate in terms of s 22(2) of the Immigration Act to prevent the disclosure of the reasons.

The court held that the Ministerial certificate does not bar the disclosure of the reasons to the court. In terms of s 18(12) of the Constitution where a Ministerial certificate has been issued that it is not in the public interest for any matter to be publicly disclosed, the court must make arrangements for the evidence relating to that matter to be held in camera and it must also take necessary measures to prevent the disclosure of that matter.

In the case of Bhatti v Chief Immigration Officer & Anor 2001 (2) ZLR 114 (H) the Minister had issued a certificate in terms of s 22(3) of the Immigration Act that it would not be in the public interest to disclose the reasons for declaring the husbands of the applicants to be prohibited persons. In this case, the court declined to take a “judicial peek” at the Minister’s reasons for declaring the applicants’ spouses to be prohibited person because the applicants had not specifically alleged in the pleadings that they knew of no reasons justifying the proposed action and neither had they challenged the Minister to produce reasons so that these could be answered. The court held that any prejudice to the parties or interests of justice caused by non-disclosure of the reasons was thus either self-inflicted or minimal. In these circumstances the court is justified in preferring to believe the Minister as “the voice of the supreme power of the State.”

In Ngaru v Chief Immigration Officer & Anor 2004 (1) ZLR 501 (S) the applicant, a Zimbabwean citizen, married a citizen of another country while he was working in Zimbabwe in terms of a work permit. When his work permit expired, the respondent Minister eventually declared the husband to be a prohibited immigrant. He refused to disclose the reasons why he did so, claiming that s 22(2) of the Immigration Act [Chapter 4:02] entitled him to decline to disclose the reasons, on the grounds that it was not in the public interest for him to do so. There was no averment that the marriage was one of convenience. It was argued for the applicant that it was impossible for her to discharge the onus of showing the interference with her rights was not reasonably justifiable in a democratic society and that the Minister could and should disclose the reasons in court. The court held that unless the court was made privy to the Minister’s reasons and had the opportunity to hear the applicant’s submissions in light of those reasons, it would not be able to determine whether the interference with the applicant’s right to freedom of movement was reasonably justifiable in a democratic society. It held further that
because of the provisions of s 18(12) of the Constitution, the Minister’s certificate could not lawfully bar the disclosure of the reasons to the court.

See also Palley v Knight NO 1961 (4) SA 633 (SR); Edwards & Sons Ltd v Stumbles & Anor 1963 (2) SA 140 (SR); Minister of Home Affairs v Austin 1986 (1) ZLR 240 (S); R v Gaming Board [1970] 2 All ER 528 and Breen v Amalgamated Workers Union [1971] 2 QB 175.

**Oral hearings**

In dealing with the *audi* principle it is convenient to deal first with oral hearings and then with cases in which written submissions will suffice. Oral hearings will be sub-divided into disciplinary and non-disciplinary hearings.

With statutory bodies, where the statute requires that an oral hearing must be held, it would obviously be illegal to deal with the matter without holding an oral hearing.

In disciplinary cases governed by statute, the statute will often explicitly lay down that there must be an oral hearing in which case an oral hearing must be held. But even where the statute is silent on this issue the court may still find that the only way in which the particular disciplinary case could be dealt with fairly is by the holding of an oral hearing. For instance, if the facts are in dispute, it will usually be necessary for the witnesses to give oral testimony so that they can be questioned and impressions can be formed as to their credibility. With disciplinary processes that are governed by private contract and not by statute, an oral hearing would again be obligatory if the terms of the contract make it so. If the contractual terms are silent on this matter, then again the courts will have to decide whether it was possible in the particular circumstances of the case to deal with the matter fairly without an oral hearing.

In *Mugugu v Police Service Commission & Anor* HH-157-10 the applicant was a police officer. He was convicted of a disciplinary offence and his appeal to the Commissioner was rejected. After his conviction, a board of inquiry was convened to determine his suitability to remain in the police force and recommended a reduction in rank and transfer from his existing posting. The Commissioner accepted the recommendation. The applicant unsuccessfully appealed to the first respondent. He then sought to bring the first respondent’s decision on review. One of the grounds was that the appeal had taken place without affording the applicant or his legal practitioners a hearing on the appeal lodged. The court held that that the Act did not specify the manner in which the first respondent ought to determine appeals brought before it and thus it was safe to assume that the appeal would be on the record, as in a normal appeal. The underlying principle in the right to heard is that of fairness and natural justice, in that each person appearing before the administrative body is given an opportunity to put his position to that body. An oral hearing is not an absolute necessity but may be where the person has been given inadequate notice, is not allowed to present his case or has not been furnished with all the information alleged against him. When the initial board of inquiry was held, the applicant was heard. Dissatisfied with the result, he then launched an appeal. There is no suggestion that such an appeal should have been a re-hearing of the initial inquiry.
As disciplinary hearings have certain special characteristics, these will be dealt with separately.

Disciplinary cases

In broad terms, what is required is that the person charged be given a fair hearing. What this means is that he be given an adequate opportunity to state his case fully and to reply to the allegations against him. This broad formulation can be broken down into a number of component aspects.

Standard of proof

In cases involving allegations of professional misconduct against legal practitioners, the Zimbabwean courts have held that the burden of proof at disciplinary proceedings before the Disciplinary Tribunal varies with the gravity of the offence charged. Where the offence has strong criminal connotations, such as misappropriation of trust money, the burden is on the Law Society to prove its case beyond reasonable doubt. On the other hand, where the offence bears no criminal implication, the burden is the ordinary civil one of a balance of probabilities. Mugabe & Anor v Law Society of Zimbabwe 1994 (2) ZLR 356 (S).

The fact that the legal practitioner concerned has already been convicted of a criminal offence would be regarded in the Tribunal as _prima facie_ proof that he has in fact committed the offence. Mugabe & Anor v Law Society of Zimbabwe 1994 (2) ZLR 356 (S).

In South Africa, the position is different: in all civil cases, including disciplinary proceedings, proof on a balance of probabilities is the acceptable measure of proof. Law Society, Cape v Koch 1985 (4) SA 379 (C).

Charge

In misconduct proceedings, care must be taken in formulating the charge so that the person concerned is properly informed as to the nature and extent of the offence with which he is being charged. The charge must be sufficiently clear to enable the person being charged to know the charge against him and to make a meaningful reply thereto. The charge must not mislead him as to what is considered the misconduct. On the other hand, the charge does not have to contain as much detail as would be found in a criminal indictment for a criminal case in court. If the charge has not been clearly formulated the review court will remit the matter for the charge to be reworded and put afresh and for the disciplinary tribunal to proceed to determine the issue in the light of the reply to the charge. See the Chairman, PTC & Anor v Marumahoko case 1992 (1) ZLR 304 (S). See also Adjunk-Minister van Landbou v Heatherdale Farms (Pty) Ltd 1970 (4) SA 184 (T).

Notice

Fairness demands that a person accused of a disciplinary offence be placed in such a position that he is able to prepare his defence in advance of the hearing. Thus, it is established that he must be given adequate forewarning of the impending hearing. What is a reasonable period of notice depends on the individual case. The time required for a serious and complex charge will obviously be greater than that required for a petty, simple, straightforward charge. The period of time, however, must be adequate for preparation of a defence and contact to be made with
witnesses, if any. See *Rwodzi v Chegutu Municipality* 2003 (1) ZLR 601 (H) and *Adjunk-
Minister van Landbou v Heatherdale Farms (Pty) Ltd* 1970 (4) SA 184 (T).

See also *de Wet v Patch NO* 1976 (1) RLR 65 (G); 1976 (2) SA 316 (R) Disciplinary hearing
for prisoner; *Ford v Law Society* 1977 (2) RLR 40 at 55-56; 1977 (4) SA 175 (RAD)
Disciplinary hearing for a lawyer; *Crow v Detained Mental Patients Special Board* 1985 (1)
ZLR 202 (H); 1985 (4) SA 83 (ZH); *Lake v Law Society of Zimbabwe HH-392-86; Wessels v
General Court Martial* 1954 (1) SA 220 (EDL); *De Vos v Die Ringkommissie* 1952 (2) SA 83
(O) (disciplinary hearing for a clergyman); *Turner v Jockey Club of SA* 1974 (3) SA 633 (A)
(Disciplinary hearing for a jockey); *Holman v Salisbury Defence Exemption Board* 1977 (1)
RLR 148 (G); *van Wyk v Director of Education* 1974 (1) SA 396 (N); *Wessels v General Court
Martial* 1954 (1) SA 250 (EDL); *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA
113 (C); *Cooper v Wandsworth Board of Works* 143 ER 414; *Urban Housing Co Ltd v Oxford
City Council* [1940] Ch 70; *Russell v Duke of Norfolk* [1949] 1 All ER 109

Often the provisions constituting disciplinary committees will specify the period of notice that
must be given. Where this is done, the prescribed notice period must be given.

**Timeous hearing**

In the case of *Rwodzi v Chegutu Municipality* 2003 (1) ZLR 601 (H) the High Court held in a
case involving disciplinary charges against an employee that the hearing must be timeous, to
ensure that the hearing takes place when the facts are still fresh in the minds of the parties and
their witnesses. However, where the person concerned requires time in order to prepare for the
hearing or to arrange for representation, he or she should be given a reasonable opportunity to
do so.

**Presence of person charged**

As it is an oral hearing, it follows that the hearing must take place with the person charged
being present to hear all the evidence against him so that he can, if he wishes, seek to controvert
it. It would thus be an irregularity if evidence was heard from a witness testifying against the
person charged in the absence of the latter. In *Mawuta v Secretary for Finance* 2003 (2) ZLR
323 (H) a public servant was charged with a disciplinary offence. He was denied the right to be
legally represented at the hearing. When the witnesses gave evidence, he was excluded.
Although he was told that the witnesses would be recalled for cross-examination, only two out
of the six witnesses were recalled. The court held that where an oral hearing takes place, it is
must do so with the person charged being present to hear all the evidence against him so that he
can, if he wishes, seek to controvert it. It was an irregularity for the disciplinary committee to
have excluded the applicant from the hearing at the time when six witnesses’ evidence was
being led. The procedure adopted flew in the face of the spirit of an oral hearing which was the
intent and purpose of the regulations. It went against the grain of what constituted a fair
hearing. It offended one’s sense of fairness and justice. It could not be cured by recalling each
witness to afford the applicant an opportunity to cross-examine that witness. Any cross-
examination that followed upon this procedure would be a sham and a travesty of justice. The
proceedings were flawed by this irregularity and would be set aside.

Where the party, due to his own fault, fails to attend an inquiry hearing after being properly
notified to attend, the inquiry can proceed in his absence. In *Chitzanga v Chairman PSC &
Anor 2000 (1) ZLR 201 (H) a public servant was accused of misconduct. He was notified of the charges and the date when he was to appear before an inquiry board. The court held that the inquiry board was entitled to proceed with the inquiry in his absence because the public servant’s failure to attend was his own fault. See also Rwodizi v Chegutu Municipality 2003 (1) ZLR 601 (H); Silver Trucks (Pvt) Ltd & Anor v Director of Customs and Excise (2) 1999 (2) ZLR 88 (H); Mukarati v Director of Housing & Community Services HH-281-90; S v Sibanda (1) 1980 ZLR 413 (G) and Pillay v Hyde 1950 (2) SA 739 (N).

If a party conducts himself at the hearing in such a manner as to make the continuation of the proceedings in his presence impossible, the tribunal has a discretion to exclude him from the proceedings.

Adequate opportunity to present case
The person appearing before the tribunal must be given an adequate opportunity to put forward his or her case.

The case of Tabakian v DC, Salisbury 1973 (2) RLR 348 (G); 1974 (1) SA 604 (R) involved a licence application.
The case of Mafuya & Ors v City of Mutare 1984 (2) SA 124 (ZH) involved an application for renewal of hawkers licence.
In the case of Nyandinu v Municipality of Chegutu HH-181-84 the court ruled that an authority entering into a lease is not under duty to hear representations from other applicants before entering into the lease.
The case of Carter v Director of Civil Aviation & Anor 1986 (1) ZLR 219 (H) involved an application for a pilot’s licence.
The case of Mhora & Anor v Minister of Home Affairs 1986 (1) ZLR 88 (H) involved the dismissal of a senior policeman.
The case of Mutambara v Minister of Home Affairs 1989 (3) ZLR 96 (H) involved a Ministerial certificate refusing bail. The court ruled that the Minister must allow person affected the right to be heard before certifying that bail is to be refused.
The case of Mukarati v Director of Housing & Community Services HH-281-90 Involved the cancellation of right of occupancy of house in high-density area. The court ruled that there had to be a full inquiry and a full opportunity afforded to the person to be affected to present his case.
In the case of Zimbabwe Teachers’ Association & Ors v Minister of Education & Culture 1990 (2) ZLR 48 (H) teachers who had gone on strike were sacked. Under the regulations in terms of which this action was taken, the teachers were entitled to be heard first because the regulations provided that an employee could be summarily dismissed if he went on strike without lawful excuse.

See also R.A.N. Mines (Pvt) Ltd v Minister of Labour and Social Services HH-521-86; Abbey Estates v Property Renting Corporation 1981 ZLR 39 (G); District Commandant of SAP v Murray 1924 AD 13; Helderberg Butcheries v Municipal Valuation Court 1977 (4) SA 99 (C) and Heatherdale Farms (Pty) v Deputy Minister of Agriculture 1980 (3) SA 476 (T).

Cross-examination of witnesses
It would seem that our courts have not recognised that a person charged with a disciplinary
offence has an automatic right to cross-examine witnesses called against him at an oral hearing. On the basis of fairness, however, it would seem that such a right should be afforded because this is surely the best way, apart from questions from tribunal members themselves, to test the evidence given by such witnesses. In the case of *Chataira v ZESA* 2001 (1) ZLR 30 (H) a person facing disciplinary charges was only allowed to make written representations to the disciplinary tribunal. He had a right to be shown any statements or documentary evidence that is produced at the hearing, but he could insist that the persons who made the statements be called so that they can be cross-examined. The court did, however, say that if the employee wishes to cross-examine these persons he should point out to the disciplinary committee why these persons should be called so that he can cross-examine them. What this suggests is that the disciplinary body may decide to summon the persons concerned and allow them to be cross-examined in appropriate circumstances. In some cases in the interests of fairness this should be done, particularly in serious cases where the entire case rests upon the evidence from the persons who made the statements and the credibility of these persons is put in issue by the employee.

In the United Kingdom, cross-examination is a recognised aspect of natural justice in appropriate circumstances, *R v Aston University Senate* [1969] 2 QB 538. See Baxter pp 554-555 and *Bushell v Secretary of State for Environment* [1981] AC 75, 97.

**Giving of testimony and calling of witnesses**

Clearly in the interests of a fair hearing the person charged must be allowed to state his case fully and to call witnesses to testify on his behalf. Where a party has already called a whole succession of witnesses who have not given any relevant testimony and he wishes to call further witnesses, the tribunal will have a discretion to at least point out to the party that his previous witnesses have not given relevant testimony and to seek some assurance from the party that the remaining witnesses will testify about relevant matters.

**Legal representation**

See earlier under heading legal representation.

**Disclosure of prejudicial allegations and information**

Not only is the person charged entitled to notice of the charge before the hearing, but he is also entitled to have disclosed to him before the decision is made all information which may influence the tribunal against him in the making of its decision. It is obviously unfair if the tribunal acquires from an outside source some evidence against the person charged and proceeds to rely upon this information without informing the person charged about it and giving him a chance to refute it. To do this constitutes a breach of natural justice.

See *Taylor v Prime Minister* 1954 (3) SA 956 (SR); *Road Services Board & Anor v John Bishop Ltd* 1956 (2) SA 504 (FS) at 512-513; *Swift Transport Services & Anor v Road Service Board & Anor* 1956 (2) SA 514 (SR) at 520; *Tabakian v DC, Salisbury* 1973 (2) RLR 348; 1974 (1) SA 604 (R); *de Wet v Patch* 1976 (1) RLR 65 (G); 1976 (2) SA 316 (R); *Matambanadzo Bus Services Ltd v Blackie & Anor* 1979 RLR 501 (G). (Whether this extends to opinions and conclusions reached); *S v Beswick* 1980 ZLR 199 (A); *Abbey Estates v Property Renting* 1981 ZLR 39 (G); *Crow v Detained Mental Patients Special Board* 1985 (1) ZLR 202 (H); 1985 (4) SA 175 (ZH); *Austin & Harper v Minister of State (Security) & Ors*
Discovery of documents

Tribunals and other authorities deciding cases are obliged to disclose prejudicial information and this applies equally to prejudicial information contained in documents. Thus there is an obligation to disclose at least the substance of the allegations or of the prejudicial information contained in such documents. The question arises, however, as to whether persons charged have a right to demand sight of the actual documents themselves. Provided they are told the substance of the prejudicial information, it would seem that at present our courts do not consider that a refusal to produce for perusal the actual documents constitutes a breach of natural justice principles. See also Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another 1980 (3) SA 476 (T) at 486D-F.

Baxter, however, argues at pp 550-551 that under certain circumstances discovery of documents may be required as a matter of fairness. For example, if a person is asserting that the document must be a forgery, he could not seek to establish this unless he had access to the document itself.

In the case of Chataira v ZESA 2001 (1) ZLR 30 (H) the High Court ruled that in disciplinary proceedings against an employee, the employee must be shown any statements or documentary evidence that is produced at the hearing, but he cannot insist that the persons who made the statements be called so that they can be cross-examined.

See also Austin & Anor v Minister of State (Security) & Anor 1986 (2) ZLR 28 (S); Ex p Zelter 1951 (2) SA 54 (SR); Huyser v Louw NO 1955 (2) SA 321 (T) and Jooste Lithium Mines v Fricke 1957 (1) SA 133 (S).

Inquisitorial process

In the case of ZFC v Geza 1998 (1) ZLR 137 (S) the court said that, unlike a court of law where accusatorial procedures are used, it is permissible for a disciplinary tribunal to conduct its proceedings along more inquisitorial lines and for the tribunal to play an active part in the gathering of evidence. This case involved disciplinary proceedings that had led to the dismissal of an employee.

Right to address and summing up

Allowing a person to sum up his case after all the evidence has been led may be useful to the tribunal in that it may focus its attention on key points, especially if there has been a large volume of evidence. Thus in an oral disciplinary hearing, to allow such summation would seem to be the fair course of action. There are apparently no cases that specify that, where the provisions governing the procedures of the tribunal do not require this, such a right is recognized as part of the principles of natural justice. Therefore, it would seem that presently, provided that a person has been afforded a proper opportunity to put forward his case, the denial of the right to sum up may not be treated as a breach of natural justice.
In *de Wet v Patch NO* 1976 (1) RLR 65 (G); 1976 (2) SA 316 (R) the court found that the right to address was mandated by regulation.

**Address in mitigation**

A 1988 amendment to s 19(3) of the Public Services (Officers) (Misconduct and Discharge) Regulations, 1986 (since repealed) purported to abolish the making of representations in mitigation.

In the *Chairman, PTC v Marumahoko* case 1992 (1) ZLR 304 (S), the court observed that the abolition of an officer’s right to make representations in mitigation ruled out further evidence and made it difficult for the disciplinary tribunal to be fair in sentencing an officer. This is what the court said–

> The difficulty created is this. The Commission may correctly decide that the guilt of the officer is clearly established without the need for an inquiry. In many cases, however, of which *Chairman, Public Service Commission & Anor v Gwisai* S-188-91 is an example, the extent of that guilt may be impossible to determine without further evidence or an inquiry. Therefore it will be impossible to determine what penalty is appropriate, without further information. Since the amended s 19(3)(a) seems to be intended to rule out further evidence or representations, the Commission may be forced to hold an inquiry, even when the guilt of the officer is established, in order to determine the extent of that guilt and thus to assess the appropriate penalty. Otherwise it runs the risk of imposing an irrational penalty.

> For the avoidance of confusion I should add that I am aware that *Gwisai supra*, was a case in which the guilt of the officer was not established. But the point was made that even if guilt had been established, the seriousness of the offence would have been impossible to establish without inquiry.

Thus, although the regulations allowed a penalty to be imposed without holding an enquiry, in certain circumstances the sentence imposed might be open to attack on the basis of irrationality because of its failure to hear evidence in mitigation.

In the *Chairman, PTC v Marumahoko* case 1992 (1) ZLR 304 (S), the court also pointed out that a person’s state of mind is a question of fact and where his state of mind is material to the question of punishment, any real dispute on it requires an enquiry. The Commission may however properly decline to hold such an enquiry where any dispute is illusory, as for example where the evidence is so clear that nothing the officer can say will change its view.

See also *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H)

**Delegation of disciplinary powers**

Normally the body to whom the power to decide a disciplinary case is given must exercise this power itself. However, in the case of *Dube v Chairman, PSC* 1990 (2) ZLR 181 (H) the court held that the PSC may delegate its disciplinary functions to other officers.

**Non-disciplinary cases**
The same basic requirements that apply in respect of oral hearings of a disciplinary character apply to oral hearings of a non-disciplinary nature. Such non-disciplinary matters cover a very wide range of different subject matters. They range from applications for licences and renewal of licences to cases involving action against persons who have erected buildings in contravention of building regulations.

In the case of Associated Newspapers of Zimbabwe (Pvt) Ltd v The Minister of State for Information and Publicity 2005 (1) ZLR 222 (S) 251 a newspaper had applied to be registered. The Commission that decided whether newspapers should be registered denied a newspaper an opportunity to be heard before the Commission refused it registration on the grounds that it had contravened various sections of the Access to Information and Protection of Privacy Act. This was a serious violation of the audi alteram partem principle and a gross irregularity justifying the setting aside of that determination.

Frequently, non-disciplinary cases involve two or more persons who are in dispute. If there are two or more parties, all parties must be given reasonable notice of the impending hearing and it would obviously be a breach of the audi principle for one but not another party to be allowed to give evidence or to hear from one party without the other being present. Again, whenever an administrative authority is contemplating taking action which will affect a person’s existing rights or his legitimate expectations, notice of intention to so act must be given to the person concerned so that he may advance arguments as to why such action should not be taken.

**Proceeding by way of allowing only written representations**

The same basic requirement of allowing the party or parties affected to present their case properly must be observed. Thus, it is not just a matter of permitting the parties to submit their arguments in writing. The parties must be properly advised as to all prejudicial evidence and information and be given the chance to reply thereto. To comply with this, it will be necessary either to allow one party to see the written submissions made by others if they contain prejudicial assertions against the first party, or for the tribunal at least to transmit to the first party the salient details of the assertions contained in the written submissions.

See Silver Trucks (Pvt) Ltd & Anor v Director of Customs and Excise (2) 1999 (2) ZLR 88 (H); Chitzanga v Chairman, PSC & Anor 2000 (1) ZLR 201 (H). Metsola v Chairman, PSC & Anor 1989 (3) ZLR 147 (S); Secretary for Transport & Anor v Makwavarara 1991 (1) ZLR 18 (S) and Sibanda v Law Society of Zimbabwe S-162-91. See also the South African case of Bam-Mugwanya v Minister of Finance and Provincial Expenditure, Eastern Cape, and Others 2001(4) SA 120 (CK).

In the case of Ministry of Labour v PEN Transport S-45-89 the court decided that it is not necessary to have a hearing where the matter involves a purely formal issue.

**Civil service misconduct cases**

See Moyo v Secretary for Justice, Legal and Parliamentary Affairs 1988 (2) ZLR 185 (H); Hlabangana v Chairman, PSC HB-76-89; Makwavarara v Secretary for Transport & Anor
Immigration cases

In Barrows & Anor v Minister of Home Affairs & Ors 1995 (2) ZLR 139 (S) the court said that it is not correct to say that aliens had no rights. Every person in Zimbabwe is entitled to the protection of the law, whether a national or not, and if an official has the power to deprive a person of his property or liberty, he should not do so without giving the person a chance of being heard and of making representations. Before a person could be declared to be prohibited under either s 14(1)(a) or 14(1)(g) of the Immigration Act, the Minister himself had to consider whether there were grounds for so declaring. The form handed to a person declared to be prohibited was deficient, in that it did not advise the person that he could make representations to the Minister under s 23.

Emergency action without hearing

In the case of Jiah v PSC 1999 (1) ZLR 17 (S) the court decided that where emergency action is authorized it may be implicit in the statute that a hearing need only be given after the decision is made. Where, on the other hand, there is no urgency, the hearing must take place before the decision is made. However, even where it is a situation requiring urgent action, the subsequent hearing must be sufficiently fair to have the effect of curing the failure to hold the hearing before the decision is made.

This case involved a situation in which striking doctors had been warned by the PSC that they would be sacked if they did not return to work. They were sacked and in their court application they argued that they had been dismissed en masse without considering the individual cases and allowing each doctor an opportunity to present his or her side of the story. In the letter informing them of their dismissal they were notified that they could make written representations within a month. The appellants all applied for reinstatement. Five received letters rejecting their applications; the others were told they would be reinstated, but not paid for the time between their dismissal and reinstatement.

The Supreme Court held that the tenor of the legislation dealing with the public service could not be said to exclude the *audi alteram partem* principle, either directly or by implication. The respondents should have given the appellants an opportunity to be heard. There was no urgency in this case. The urgency related to the situation in the hospitals, but that did not make it urgent to dismiss the striking doctors and nurses. While the fact that the regulations allowed representations to be made afterwards might have been a valid exception under the common law, the subsequent “hearings” provided for were not sufficiently fair to have the effect of curing the lack of an earlier hearing. It was clear that the appellants were not re-employed because, having represented the doctors and nurses in negotiations with the Government, they
were seen as having led the strike. The other doctors and nurses were reinstated. The treatment of the appellants was in breach of the equity principle and should be classified as an unfair labour practice. It therefore declared the dismissals of the appellants to be declared null and void. The court raised the question whether the provision for subsequent hearings would prevail against the mandatory provisions of s 18(9) of the Constitution.

In the case of Students Union, University of Zimbabwe & Ors v Vice Chancellor, University of Zimbabwe & Ors 1998 (2) ZLR 454 (H) the Vice-Chancellor had closed the University for an indefinite period, suspended all the students and ordered them to leave the campus following demonstrations, disruption of classes and violence by students. The University remained closed for a period over four and a half months before it was reopened. Some of the excluded students applied to have the decision of the Vice-Chancellor urgently reviewed by the High Court, arguing that the Vice Chancellor had breached the principle of audi alteram partem by failing to allow the students to make representations before closing the University. The court held that the Vice-Chancellor was faced with an emergency and had to act immediately to prevent further violence, injury and property damage. He was therefore not obliged to hear from the students and their leaders before closing the University. Time did not permit this. However, after closing the University, he was then obliged to observe the audi alteram partem rule. It was a breach of natural justice for him to keep the University closed for a period of over four and a half months without giving the students a hearing. If he had afforded the students an opportunity to be heard, they could have made representations through the Students Union and their student leaders who would then have had an opportunity to offer undertakings acceptable to the Vice Chancellor and the University. They were denied this opportunity. The decision to keep the University closed for this protracted period without allowing the excluded students an opportunity to make representations was thus unlawful and the purported ratification of this decision by the University Council was of no force and effect.

Arbitration cases

In an arbitration case the parties can elect to decide for themselves procedures by which to settle their dispute and the court will be reluctant to interfere in this situation. In the case of FSI Hldgs Ltd v Rio Tinto Zimbabwe Ltd & Anor HH-42-96, the arbitrator had heard each side only in the absence of the other. There was nothing specific in his terms of reference that allowed the adoption of this procedure. He apprised each of what the other had said and gave them a chance to respond thereto. The court decided that although hearings should be in the presence of both parties, applicant-

- had insisted on giving the arbitrator the widest possible discretion regarding the procedure he would use and the nature and extent of the evidence he would hear; and
- had acquiesced when it was clear that the arbitrator intended to hear each party separately and not together at any stage, and had declined a joint meeting when he later offered one.

Therefore, there was no irregularity in these proceedings.

Whether audi alteram partem applies to cases governed by
contract and not statute

In the case of Chirasasa & Ors v Nhamo NO & Ors 2003 (2) ZLR 206 (S) the Supreme Court decided that although there is a presumption in favour of the application of the audi rule when the decision is made in the exercise of a statutory power unless the rule is expressly excluded, there is no similar presumption when a decision is taken in the exercise of a contractual right, because the question in the area of contract is whether or not failure to hear the other party constituted a breach of contract. A party cannot be in breach of an obligation which has not been made an express or implied term of the contract. An obligation to afford a hearing was not implied in the pure contract of master and servant in respect of the latter’s dismissal.

For a discussion on this issue and on the difficulty of differentiating between private and public authorities see Devenish, Govender and Hulme Administrative Law and Justice in South Africa (2001) pp 23-24 and 301-304.

Bias - Nemo judex in sua causa

Test for bias

A fair hearing also demands that adjudicators who make administrative decisions must be impartial and unbiased. Thus if the matter is being decided by a tribunal, it will be a reviewable irregularity if there was bias on the part of one or more of the members of the tribunal against one of the parties involved.

The onus rests upon the person alleging bias to establish this allegation on review. He can do so either by showing–

- that bias was clearly actually displayed; or
- that, in the circumstances, there was a real possibility of bias.

In cases where a party is alleging not actual bias but instead an apprehension of bias, the courts have used one of two tests to decide this issue. The first test is the real likelihood of bias test and the second is the reasonable suspicion of bias test.

In some cases, our courts have used the test of whether there was a real possibility (likelihood) of bias on the part of the decision maker. In the case of Bailey v Health Professions Council 1993 (2) ZLR 17 (S) the court applied the real danger or real possibility of bias test. See also Mukarati v Director of Housing & Community Services HH-281-90

In other cases, our courts have applied the reasonable suspicion of bias test. In the Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Insurance Co (Pvt) Ltd HH-58-01 the court applied the test of whether there was a real apprehension of favour, affection or ill-will. This case involved an application by a party to the proceedings for the recusal of a High Court judge who was to hear a case. The respondent sought relief under the Companies Act against the applicant, a newspaper company. The applicant applied for the recusal of the judge on the grounds of his “association” with a newspaper which was not party to the proceedings but which allegedly had an interest in the outcome. The judge had worked for the newspaper for a five-month period before his appointment to the bench. The matter was initially raised with the judge in chambers, where a written
application was made. The judge held that that before making the application, the applicant should have clarified from the judge what his association was and only then if necessary have proceeded with an application for recusal. Whatever personal feelings a judge might have about an application for recusal, it is in the general interests of the judiciary for an individual judge to recuse himself where a reasonable apprehension of “favour, affection or ill-will” is perceived. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not accede too readily to suggestions of appearance of bias. The attitude of the respondent in an application for recusal should be neutral, although there may be circumstances where the application is opposed on the grounds of being far-fetched or calculated to delay the proceedings. For any interest to suffice to disqualify a judicial officer, there must be a link, direct or indirect, between the interest or conduct complained of and one or the other of the parties in litigation. Even in cases involving reasonable apprehension of bias this link, be it in a less direct form, must be proved. In determining the possibility of bias, one does so from the point of view of the court seized of the challenge or in the eyes of the reasonable litigant. In this case, there could be no reasonable apprehension of bias, and the application was dismissed.

In the case of Chiura v PSC & Anor 2002 (2) ZLR 562 (H) the court used the test of whether reasonable, right-thinking persons would regard the two persons alleged to be biased as unlikely to be impartial when they deliberated on the matter in hand. See also the SA case of BTR Industries Ltd v Metal & Allied Workers Union 1992 (3) SA 673 (A)

The danger of bias or the suspicion of bias must be a real one and must not be remote, fanciful, flimsy, far-fetched or entirely speculative. There is a need to establish a link between the conduct alleged to form the basis of the allegation of bias and one of the parties to the litigation.

Baxter at pp 558-561 has suggested that these two tests should be combined and the question should be asked as to whether there was there reasonable suspicion that there was a real likelihood of bias. This combines the reasonable suspicion test and the real likelihood of bias tests. In the case of Austin & Anor v Chairman, Detainees’ Review Tribunal 1986 (4) SA 281 (ZS), the Supreme Court seemed to use this combined test because it asked the question whether right-minded people would have entertained the likelihood of bias or the belief that the tribunal in question favoured unfairly one party and not the other.

The reason why proceedings will be interfered with not only when it is proved that an adjudicator was definitely biased, but also when there was reasonable suspicion that there was a real likelihood of bias is that emphasis is laid upon the need to ensure that justice is seen to be done. Also it is often very difficult indeed to prove that bias was actually displayed. In applying the test of reasonable suspicion of real likelihood of bias, the courts will ask the question whether the reasonable layperson would have considered that in the circumstances there was a real chance that the adjudicator would act in a biased fashion. The reasonable layperson would not analyze the facts as painstakingly as a lawyer, but on the other hand, the reasonable person would not consider that there was a real likelihood of bias if the possibility of bias was an entirely remote or fanciful one or was only a matter of vague conjecture based upon flimsy evidence.

In applying this test, the courts must take into account both particular facts suggestive of bias and the cumulative effect of factors such as the way in which the entire proceedings were handled, see R v Foya 1963(3) SA 459 (FS); Crow v Detained Mental Patients Special Board
However, “mere interest or even enthusiasm which an official may have in the discharge of his functions in pursuance of the object or purpose of his office is not bias.” Witham v Director of Civil Aviation. Even “an overly enthusiastic approach to the discharge of his functions” does not necessarily constitute bias in an official.” See Crow v Detained Mental Patients Board 1985 (1) ZLR 202 (H).

Situations when reasonable suspicion of bias

Financial interest

There was a financial interest in the matter, even a slight one unless the interest is ridiculously slight or remote. See for instance, Rose v Johannesburg Local Transport Board 1947 (4) SA 272 (W) at 287 and Dimes v Grand Junction Canal [1852] 3 HLC 759. In the Rose case the chairman of the Transportation Board was also the director of a large taxi company. The Board refused an application for an exemption certificate in respect of car-hire services. Despite his interest in the outcome of the proceedings the chairman refused to stand down. The court held that the chairman’s pecuniary interest in excluding competitors would induce an apprehension of bias in a reasonable person.

In Bam-Mugwanya v Minister of Finance and Provincial Expenditure, Eastern Cape, and Others 2001(4) SA 120 (CK) the tender board was considering the extension of contracts for the provision of bus services in the province. A member of a tender board had failed to recuse herself despite having a financial interest in a corporation which was directly interested in the extension of contracts for bus services.

The financial interest can be direct or indirect. It is direct if the person concerned has that interest himself or herself. It is indirect if persons such as the spouse, business partner or brother that person has that interest.

Frequently there are specific provisions in legislation prohibiting administrators from participating in proceedings when they have a financial interest. For example, s 48 of the Rural District Councils Act provides that a councillor may not take part in Council proceedings during which any contract, proposed contract or any other offence is being discussed if the councillor has any direct or indirect pecuniary interest in the contract.

Adjudicator friendly or hostile towards one of parties

There will be bias where one of the adjudicators is either related to or friendly with, one of the parties or is hostile to one of the parties as a result of past events or events during the hearing. See Cottle v Cottle [1939] 2 All ER 537.

In Bailey v Health Professions Council 1993 (2) ZLR 17 (S) the court found that the apprehension of bias on the part of one member of the tribunal was well founded as there was a
relationship of intense dislike between the applicant and that member but the apprehension of bias on the part of another member was fanciful. In the case of Chiura v PSC & Anor 2002 (2) ZLR 562 (H) a public servant had been found guilty of a disciplinary offence and demoted. One member of the committee had previously found the applicant guilty of misconduct. Another was the applicant’s subordinate, who was tipped to take over her position. Reasonable, right-thinking persons would regard these two persons as unlikely to be impartial. The proceedings would therefore be set aside and the applicant reinstated.

**Pre-deciding case**

This would happen if there were advance indications of support or pre-deciding the case or an expression of a definite opinion about the outcome of the case before both sides of the evidence have been heard. Giving undertakings in advance of the hearing to support one side when the matter is heard is clear evidence of bias. So too to express a definite opinion about the outcome of a case before both sides of the story have been presented will be clear evidence of bias. See Solomon & Anor v De Waal 1972 (1) SA 575 (A) at 580.

This would also apply where a member of the tribunal makes a statement showing that he is prejudiced against a party: Patel v Witbank Council 1931 TPD 284. In this case a member of licensing committee had been heard prior to hearing saying he would move heaven and earth to prevent an Indian from acquiring a licence. The applicant was an Indian.

In the case of Associated Newspapers of Zimbabwe (Pvt) Ltd v The Minister of State for Information and Publicity 2005 (1) ZLR 222 (S) 252 the chairman of the Commission responsible for deciding whether newspapers should be registered had published a series of newspaper articles expressing hostile views towards a particular newspaper. He referred to the newspaper as an outlaw and indicated that its application would not be considered at all. This person then chaired the Commission hearing dealing with the application by the newspaper about which he had expressed these views. The newspaper’s application for registration was refused by the Commission. The Supreme Court found that, although it had not been proved that the chairperson was actually biased against the applicant newspaper, there was a reasonable apprehension of bias and set aside the determination by the Commission. It did not, however, direct that the chairperson should not sit when the matter was re-heard by the Commission.

Later the Commission reconsidered the matter as ordered by the Supreme Court but the same Chairperson sat as chairperson in this re-hearing. The matter was then taken back to the High Court and this time the High Court decided that the entire Commission was biased in respect of this matter. See Associated Newspapers of Zimbabwe v Media & Information Commission & Anor 2007 (1) ZLR 272 (H)

**Adjudicator aligning with a party**

The body deciding a dispute aligns itself with one of the two parties to the dispute In the case of Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S) MK Airlines had applied for a transport carrier licence from a Board that dealt with such applications. Affretair, a solely government owned company that had a monopoly in this field, objected to the granting
of the permit to MK. The Board refused the application and when MK took the matter on review to the High Court the Board chairperson displayed bias against MK by aligning himself with Affretair. The Board chairperson and MK filed joint notice of opposition, with both these parties using the Civil Division of the Attorney-General’s office as their joint legal representative. The Board chairperson purported to speak for both the Board and Affretair. The chairperson displayed clear bias by this alignment of the Board with Affretair and seemed to regard the Board as Affretair’s ally against competition. In the case of Blue Ribbon Foods Ltd v Dube NO & Anor 1993 (2) ZLR 146 (S) the court observed that where a labour officer rules in favour of an employee and the employer takes the matter on review, the labour officer and the employee should not be represented by the same lawyer because this will create the impression that labour officer is acting in collaboration with the employee and that the labour officer is biased against the employer.

**Adjudicator also prosecutor**

The judge is also prosecutor or prosecution witness. This would be impermissible as it would be virtually impossible for the person who is presenting the prosecution case or testifying for the prosecution to then approach the case impartially in hearing defence evidence and in judging all the evidence. Whenever possible, a person who is not a member of the tribunal should be appointed to present the case against the person being charged with some disciplinary offence, so that the tribunal members can simply listen impartially to all of the evidence.

The Legislature may provide that the proceedings may take place without having a separate prosecutor, see de Wet v Patch 1976 (1) RLR 65 (G); 1976 (2) SA 316. (The judge was also the prosecutor or the prosecution witness.)

However, in the case of ZFC Ltd v Geza 1998 (1) ZLR 137 (S) the Supreme Court pointed out that that although normally it is not permissible during tribunal proceedings for a person to be both a prosecutor and a judge in the same matter, inroads can be made into this principle where authorised by statute or contract. In the present case the chairman of the disciplinary tribunal had not acted both as prosecutor and judge. He had acted more as an evidence gatherer than as an investigator. The auditor had carried out the investigation and the auditor’s report was then placed before the disciplinary tribunal. Additionally, the applicable code of conduct, which was both a statute and a contract in this case, provided for a very flexible approach and nothing that was done was contrary to the disciplinary procedures provided for in the code of conduct. The matter was fully investigated and the employee was given the opportunity to respond to the allegations.

**Prior knowledge of case**

There was prior knowledge of the case. In a disciplinary matter, it would not normally be permissible for a person to judge a case where he has some prior knowledge of the circumstances leading to the charge being brought, but the statutory provisions may sometimes permit such a person to sit. Even where the statutory provisions do allow this, however, bias would still be present if the adjudicator approached the case with a closed mind and was not prepared to modify his initial impressions in the light of the evidence which emerged. See de Wet v Patch 1976 (1) RLR 65 (G) and Turner v Jockey Club of SA 1974 (3) SA 633 (A)
See also Moch v Nediravel (Pvt) Ltd 1996 (3) SA 1 (A) and Wildlife Society of South Africa & Ors v Minister of Environment 1996 (3) SA 1095 (TK).

**Manner in which body conducts proceedings**

Reasonable suspicion of bias may be inferred from the manner in which the Chairperson conducts the proceedings. Thus if he or she conducts the proceedings in a way that clearly shows he or she is favouring the one side over the other, this may lead to an inference that the Chairperson had pre-determined the outcome of the proceedings. In Austin & Anor v Chairman Detainees’ Tribunal & Anor 1988 (2) ZLR 21 (S) the court had this to say–

The Tribunal ought . . . to forswear all manifestations of bias and by its deeds and utterances be seen to be fair. In this case, a statement made by the Chairman of the Tribunal gave the impression that the appellants were not being allowed to tell their story in full and one member of the Tribunal persistently asked questions in a manner tending to show hostility towards the appellants.

**Referral back**

Where the decision has been made by a biased person, the review court will set aside the decision and will normally refer the matter back for a re-hearing before an unbiased decision-maker.

The question arises as to what the effect is upon the proceedings of a tribunal if one member of the tribunal is biased. Rose Innes in his book Judicial Review of Administrative Tribunals in South Africa at p 186 has this to say–

The bias, or appearance of bias, of one member of a tribunal which consists of several members is sufficient to vitiate the whole proceedings. The mere presence of an interested or otherwise disqualified person as a member of a quasi-judicial tribunal at the hearing or at the decision, whether or not he influenced the other members, and even if the decision of the tribunal is reached by a vote and the vote of the biased member could not affect the result, or even if he abstained from the voting, or retired from the board when the discussion and consideration of the decision took place, is a reviewable irregularity. The reason is that an applicant before an administrative tribunal is entitled to the ear of every member of the tribunal, and to the decision of them all, and there is a likelihood or it may appear where one member is biased that he may persuade or influence the others. In addition, the process of collaborate decision, the member mutually assisting one another by their individual experience and arguments, to which an applicant is entitled, cannot properly take place where any member is biased.

The author derives these principles from cases such as Hack v Venterspost Municipality 1950 (1) SA 172 (W) and Jeffries v Komgha Divisional Council 1958 (1) SA 233 (A). This proposition of Rose Innes should apply even more strongly where the person who is biased is the Chairperson of the tribunal.

The question arises as to what course the court should adopt if it has set aside the determination of a tribunal on the basis of bias. Normally the court would order that the matter be re-heard by an entirely re-constituted tribunal consisting of unbiased members. If only a limited number of
members drawn from the complement originally sat, it may be possible to order that other members who did not sit should re-hear the matter, provided of course that the remaining members can constitute at least the required quorum if there is a provision for a quorum. However, in a situation where there are not sufficient remaining members to constitute any required quorum, additional members of the tribunal would have to be appointed before the matter could be re-heard. The appointment of new members could take a considerable amount of time as could the finding of eligible persons to sit on an entirely re-constituted tribunal. There may even be situations where it is not possible to re-constitute the tribunal because there are not sufficient eligible persons available to be appointed. In such cases the review court may have to consider the possibility of making the decision itself in appropriate circumstances.

In Associated Newspapers of Zimbabwe v Media & Information Commission & Anor 2007 (1) ZLR 272 (H) the problem arose that the entire body responsible for registering newspapers was found to be biased in relation to refusal of the application by a newspaper for registration. The Supreme Court had ordered a re-hearing by the Commission after finding that there was a reasonable suspicion of bias in respect of the Chairperson. The matter was re-heard by the Commission with the impugned Chairperson still sitting. Again the application was refused. The matter was then taken back to the High Court said that under the Administrative Justice Act the applicant could have applied for an order in terms of s 4(2)(c) for Minister to be directed to take such administrative action as would put in place conditions and legal framework for application to be considered and determined fairly.

### Correction of earlier irregularities by tribunal

The tribunal itself can correct earlier breaches of natural justice. Thus the original failure to comply with natural justice principles can be corrected by the tribunal itself setting aside entirely its original decision reached in disregard for aspects of natural justice and holding a new hearing during which the principles of natural justice are scrupulously adhered to. See Mukarati v Director of Housing & Community Services HH-281-90; Health Professions Council v McGown 1994 (2) ZLR 329 (S); De Villiers & Ors v Sports Pools Ltd & Anor 1976 (1) RLR 283 (G); Controller of Road Motor Transportation v President, Administrative Court HH-207-85 and Abbey Estates v Property Renting 1981 ZLR 39 (G)

However, it seems that if no hearing is originally held, a subsequent hearing does not necessarily rectify the original breach because there is a natural inclination to adhere to the original decision. The subsequent hearing will only correct the original breach if it is clear that the administrative authority was prepared to disregard completely its original decision and take a fresh decision based upon the information that emerged at the subsequent hearing.

### Action that review court will take where irregularities

What action will the review court take if it finds that there were breaches of the principles of natural justice? The usual remedy where there have been reviewable irregularities during the
course of a hearing is for the review court to set aside the decision reached by the tribunal and to refer the matter back for a re-hearing conducted in accordance with correct procedures. The court will specify how the tribunal should conduct the re-hearing so as to avoid repeating these procedural irregularities.

Sometimes, however, the review court will not order a re-hearing but will simply substitute its own decision in the matter.

In the case of Director of Civil Aviation v Hall 1990 (2) ZLR 354 (S), the court said that a court will not normally interfere in the sphere of practical administration by substituting its own decision for that of an administrative and specialist tribunal or official vested by the lawmaker with a discretion. It will only do so where-

- the end result is a foregone conclusion and a referral back to the tribunal or official would be a waste of time; or
- further delay would cause unjustifiable prejudice to the applicant; or
- the tribunal or official has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; or
- the court is in as good a position as the tribunal or official to make the decision itself.

See also Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S).

Similarly, in the South African case of Administrator, Transvaal & Ors v Traub 1989 (4) SA 731 (A) the court stated that the usual remedy is to refer matter back to the decision-maker unless this would be a waste of time as the outcome is a foregone conclusion or such bias was displayed that it would be unfair to refer it back or the tribunal or official had displayed such incompetence that it would be unfair to refer it back See also Controller of Road Motor Transportation v President, Administrative Court HH-207-85.

The case of Associated Newspapers of Zimbabwe v Media & Information Commission & Anor 2007 (1) ZLR 272 (H) A court will not interfere in the sphere of administrative actions or decisions except in very exceptional situations, but it will normally interfere in the administrative sphere in the following circumstances: (a) where the end result is a foregone conclusion and a referral back would be a waste of time; (b) where further delay would cause unjustifiable prejudice to the applicant; (c) where the statutory tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and (d) where the court is in as good a position to make the decision itself. In casu, no evidence had been placed before the court, and thus there was no way the court could know, that there had been due compliance by the applicant with the provisions of AIPPA in order to qualify for the grant of a certificate of registration. That knowledge would peculiarly be in the ambit of the Commission as the administrative authority for purposes of issuing a certificate of registration.
Waiver of natural justice

Clearly, if a person is offered the chance to exercise one of the rights recognized as being part of the principles of natural justice and he declines to avail himself of this right, then he has waived his right e.g. if he is offered the chance to call witnesses and he says he does not wish to call any witnesses, see Zulu v Pharmanova (Pvt) Ltd S-66-92 In this case the Labour Relations Board had rejected an application to dismiss an employee and ordered her reinstatement. The employer appealed to the Labour Relations Tribunal but a dissenting member of the Board (one who had favoured the employer) was now a member of the Tribunal. The parties were invited to object. The employee knowingly waived her right to object because she did not want a further postponement and delay. The Tribunal decided unanimously against her. The court held that a party can waive her right to natural justice, such as the right to an impartial hearing. She had done this and she could not turn around almost two years later and complain. Her right was to an opportunity of a fair and unbiased hearing, which she had been given.

A far more difficult question is whether a person should be taken to have waived his entitlement to the protection of natural justice, where the failure to exercise certain rights is the result of ignorance on the part of the person concerned that he possessed such rights. Logically, waiver would seem not to be possible unless there is awareness of rights. In the case of Chidziva & Ors v Zisco Ltd 1997 (2) ZLR 368 (S), the minority judgment stressed that a person can only abandon his rights if he has full knowledge of his rights. The minority of the court held that the workers were not aware of their rights and their legal implications. However, the majority of the court held that by accepting the benefits under the retrenchment package the workers had waived their rights arising out of any failure to follow correct procedures in retrenching the workers.

In the case of Bailey v Health Professions Council 1993 (2) ZLR 17 (S) the legal representative of the Council had argued that the applicant could not now complain about bias as he had acquiesced in the composition of the Council despite the fact that one member of the Council was biased against him. There had been no oral hearing and the court pointed out that Bailey neither knew nor was informed about the composition of the Council until he was informed in writing of the Council’s decision. He could thus not have be said to have acquiesced in the composition of the Board and thereby be said to have waived his rights.

Thus, it would seem that, for instance, in a case where a person is facing a serious disciplinary charge and is not legally represented, in the interest of fairness the tribunal should be obliged to apprise the accused person of his rights. To place the responsibility for asserting his rights upon a person who is under pressure and may be totally ignorant about his rights is unrealistic. For this reason, the ruling in the case of University of Ceylon v Fernando [1960] KB 223 has been subjected to severe criticism. This case concerned a disciplinary hearing of the case of a student. He had not asked to cross-examine witnesses against him as he had been unaware that he had a right to do so. He was held to have waived his right.

This case concerned a disciplinary hearing of the case of a student. He had not asked to cross-examine witnesses against him as he had been unaware that he had a right to do so. He was held to have waived his right. For a discussion of this point see 1960 MLR 252, 1973 Journal of Public Teachers of Law 252 and 1978 Natal University Law Review 176. In these articles, it is argued that it is unreasonable to expect an unrepresented person to take the initiative in
asserting his rights. In the context of criminal cases, there have been a number of recent judgments in which the courts have said that where accused are unrepresented and there have been undue delays in bringing the cases to trial, the accused are entitled to look to the magistrate to ensure that their rights were not infringed by the machinery of the State. This applies even where the accused, because of ignorance of their rights, have not raised the issue of undue delay. See *S v Tao* 1997 (1) ZLR 93 (H) and *S v Musindo* 1997 (1) ZLR 395 (H).

See also: *Behr & Oberholzer v Liquor Licensing Board* 1955 (2) SA577 (T) 589 at 589; *Bell v van Rensburg NO* 1971 (3) SA 693 (C) at 725; *Kemana v Mangope & Ors* 1978 (2) SA 322 (T); *Bulawayo Bottlers v Minister of Labour* 1988 (2) ZLR 129 (H) The proceedings of the hearing were void and a nullity and the party attending hearing could not be taken to have waived right to object to a nullity; *ABBM Printing & Publishing v Transnet Ltd* 1998 (2) SA 109 (W).

**Whether proof of prejudice required**

It would seem that if there was a reviewable irregularity during the hearing by a tribunal, it is not necessary for a party to the proceedings who is complaining about this irregularity on review to prove that he actually suffered prejudice as a result of the irregularity before the court will set aside the proceedings, see *Abbey Estates v Property Renting* 1981 ZLR 39 (G). But see also *De Villiers & Ors v Sports Pools Ltd & Anor* 1976 (1) RLR 283 (G).

**Whether natural justice applies to work of investigator or investigating body**

In the case of *Moyo v President, Board of Inquiry & Ors* 1996 (1) ZLR 319 (H) a police inquiry board conducted an inquiry into whether a police officer was an unsuitable person to remain in the force. It conducted an inquiry and recommended to the Commissioner that the officer be found to be unsuitable to remain in the force. The High Court held that although a police inquiry board’s task was not to make a decision but to collect evidence and make a recommendation to the police Commissioner who would make a decision as to whether the applicant was suitable to remain in the Force, this did not mean that the Board was not obliged to observe the precepts of natural justice. Bodies which collect evidence upon which the decisions affecting the rights of individuals are made have a duty to act fairly. They must observe the rules of natural justice, unless there are special circumstances to the contrary or the enactment expressly excludes them. They must inform the person involved of the complaints made against him and give him an opportunity to make relevant statements with regard to those allegations.

On the other hand in the case of *Motsi v A-G & Ors* 1995 (2) ZLR 278 (H), the High Court decided that the principles of natural justice did not apply in respect of an investigation carried out into alleged corruption by a company. Under the Prevention of Corruption Act when a Minister has declared a person to be a specified person in terms of the Act he must appoint an
investigator to carry out an investigation into that person. (s 7(2). The investigator must report the results of his or her investigation to the Minister. Clearly the Minister will be influenced in his final decision as to whether to continue with the order or to lift it. The Minister had appointed the investigator using his powers in terms of the Prevention of Corruption Act. The court decided that the principles of natural justice only applied to judicial and quasi-judicial adjudication. An investigator is not an adjudicator and the principles of natural justice therefore did not apply. The investigation could thus not be impugned on the basis that as the investigator was a director of the complainant company, he could thus have been biased.

The correctness of this decision is open to doubt. The categorisation of administrative decisions into quasi-judicial and purely administrative has largely fallen away as a result of the acceptance of the doctrine of legitimate expectation. In any event, it would seem that a person under investigation is entitled to expect that the investigation will be carried out objectively and impartially. The final decision-maker will often make the final decision based on the results of the investigation. If the investigation is not carried out fairly, a wrong final decision may be made. It is particularly unfair that a person who is clearly biased against the person being investigated or in respect of whom there is a reasonable suspicion of bias be allowed to conduct an investigation. The principles of natural justice should thus apply to investigations.

As regards the application of the *audi* principle to the proceedings of an investigatory body de Ville in *Judicial Review of Administrative Action in South Africa* at p 242 has this to say—

> It is now accepted that the advice, findings or recommendations of an investigatory body can adversely affect the rights or legitimate expectations of a person. The *audi* rule is therefore applicable to the proceedings of such an enquiry where a person or body can suffer prejudicial consequences because of the report or recommendations of the statutory body concerned.”

The South African courts have recognised that preliminary or intermediate decisions can have a significant or even devastating effect on an individual involved. See *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) and *Director: Mineral Development, Gauteng Region v Save the Vaal* 1999 (2) SA 709 (SCA)

But it should be noted that some earlier South African cases adopted the same approach as in the *Motsi* case. For example in the case of *South African Defence and Aid Fund v Minister of Justice* (1967) it was held that bodies which investigate and report, but do not take decisions themselves, do not in principle have to comply with the *audi* rule. Such compliance, the court ruled, would be required only if the Act itself expressly provides for compliance with the *audi* rule or when there is a direct causal relationship between the report and the eventual decision (affecting a person’s rights).

Under s 7 of the Commission of Inquiry Act [*Chapter 10:07*] Commissioners are obliged to make a full, faithful and impartial inquiry into the matters specified.

**Circumstances in which natural justice may not be**
In some circumstances aspects of natural justice principles may not be applicable. See *de Wet v Patch* 1976 (1) RLR 65 (G); 1976 (2) SA 316 (R) and *Austin & Anor v Chairman, Detainees’ Review Tribunal & Anor* 1986 (4) SA 281 (ZS).

**When decision of administrator final**

As to when the decision of an administrative tribunal or official is final and when it can be reconsidered, see *Cinamon v Independence Mining (Pvt) Ltd* 1980 ZLR 247 (A); *Lapham v Minister of Mines & Ors* 1989 (2) ZLR 56 (H) and *Chigwerere v Chairman, PSC HH-151-89*.

**Ultra vires decisions**

Clearly, if an administrative tribunal decides a matter upon which it has no power to decide or, having made its decision, makes an order which it does not have the power to make, it will be acting *ultra vires* and its decision or order, as the case may be, will be set aside on review.

In the case of *Laurence v Verhoef & Ors NNO* 1993 (2) SA 328 (W). Where a decision is taken by a judicial or quasi-judicial authority for reasons which are in part legitimate and in part illegitimate, the decision should be set aside on review where the authority was substantially influenced by the illegitimate reasons.

For a discussion of the *ultra vires* doctrine, see the later section on the *ultra vires* doctrine. Some relevant cases are these: *Kaplan v Salisbury Liquor Licensing Court* 1951 (4) SA 223 (SR); *Clan Transport Co v Swift Transport Services (Pty) Ltd* 1956 (3) SA 480 (FS); *Troake v Salisbury Bookmaker’ Licensing Committee* 1971 (2) RLR 118 (A) 121; *Kambasha Bros & Anor v Thompson NO & Anor* 1970 (2) RLR 97; 1971 (1) SA 155 (SR); *Tabakian v DC, Salisbury* 1973 (2) RLR 348; 1974 (1) SA 604 (R); *Caterers & Entertainers (Pvt) Ltd v City of Salisbury* 1974 (2) RLR 65 (G); 1974 (4) SA 515 (R); *Quintas v Controller of Customs & Excise* 1976 (1) RLR 208 (G); *Mwayera Bazaars v Liquor Licensing Board* 1979 RLR 9 (G); *Golden Dragon Restaurant v Liquor Licensing Board* GS-230-78; *Hayes v Director of Security Manpower GS-102-79*; *Archipelago Ltd v Liquor Licensing Board* 1986 (1) ZLR 146 (H); *Dabengwa v Minister of Home Affairs HH-244-86*; *Mutambara & Ors v Minister of Home Affairs* 1989 (3) ZLR 96 (H); *Minister of Home Affairs v Austin & Harper* 1986 (1) ZLR 240 (S); 1986 (4) SA 281 (ZS); *PF ZAPU v Minister of Justice, Legal and Parliamentary Affairs* 1985 (2) ZLR 305 (S); *Secretary of State v Management Board of Thameside* [1977] AC 1014; *CCSU v Ministry of Civil Service* [1984] 3 All ER 935 (HL) at 951; *Nyokong v Western Transvaal Bantu Administration & Anor* 1975 (1) SA 212 (T) and *Johannesburg Local Road Motor Transportation Board v David Morton Transport* 1976 (1) SA 887 (A).

**Sub-delegation of decision-making power**
Where the legislature delegates the power to make a decision to an administrative official or body the question arises whether that official or body is entitled to sub-delegate this power to some other administrative official or body. In order to discover the answer to this question, the legislation in question will need to be examined in order to discover the intention of the legislature. The question will be: did or did not the Legislature intend that the power be sub-delegated? Usually, the intention in this regard will not be expressly stated and here the implied intention of the Legislature will have to be discovered. Various criteria will be taken into account in deciding whether sub-delegation is permissible. For instance, sub-delegation would not have been envisaged where the Legislature had delegated the power to make a decision requiring special expertise to an administrative official who had that expertise. If the decision that needs to be made is complex and will have far-reaching consequences, it will probably be implied that no sub-delegation was envisaged. On the other hand, if the decision was purely mechanical or was of a petty nature and many such decisions need to be made, it may well have been envisaged that, if the delegate is a high-ranking official like a Minister, he would be permitted to sub-delegate to civil servants in his Ministry the power to make such decisions.

In *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S) the court said that while it is normal for Ministers, to whom statutory powers and duties are given, to delegate the exercise of those powers and duties to responsible officials in their departments, this does not apply where the Minister is given responsibility of exercising a discretion which the nature of the subject matter and the language of the Act show can only be properly exercised in a judicial spirit.

### Unreasonable decisions

#### Traditional view

The traditional view of the function of the review court in administrative matters is that the review court should not to delve into the substantive correctness of administrative decisions, but only to ascertain whether there have been any procedural irregularities or action of an *ultra vires* nature. From this view would follow the proposition that the review court has no power to overturn a decision simply because it considers it to be unreasonable. If it did have this power, it would in effect be substituting its own decision in place of the decision of the body empowered to make this decision.

#### Symptomatic unreasonableness

However, in the past the courts have been prepared to set aside decisions on the basis of what is known as symptomatic unreasonableness. In terms of this doctrine, the courts have the power to set aside a decision if it is so grossly unreasonable that it can only be explained on the grounds that the decision was made in bad faith or because of fraud, or that there was an ulterior motive or the decision-maker failed to apply his mind to the decision.

#### Irrationality

In Zimbabwe, the courts have in several cases adopted the *Wednesbury* test, namely, that the decision will be reviewable if the decision is so outrageous in its defiance of logic or accepted
standards that no reasonable person who has applied his mind to the question to be decided would have arrived at that decision. See PF (ZAPU) v Minister of Justice 1985 (1) ZLR 305 (S); Rushwaya v Minister of Local Government S-6-87 and Affretair v MK Airlines 1996 (2) ZLR 15 (S).

In the case of Marawa v Minister of Transport 2000 (2) ZLR 225 (S) the Board of the Civil Aviation Authority appointed to the post of General Manager a person who had no qualifications or experience in the field of aviation in preference to a person who had such qualifications and experience (the appellant). The advertisement for this job required applicants to have a professional qualification in civil aviation or a related field. This was entirely reasonable given the technical and specialist area involved. The court set aside the decision of the Board was on the basis that it was irrational. It was irrational to lay down qualifications and then choose a person for the job a person who does not meet these qualifications and to reject a person who had the required qualifications. It did not mean, however, that the appellant should now automatically be appointed. There were other applicants and it may be that one of these candidates might be more qualified and suitable than the appellant.

In the case of Dube v Chairman PSC (1990) it was observed that the power to review proceedings on the grounds of irrationality of the decision must not be confused with an appeal against the decision’s merits.

There are also many Zimbabwean decisions laying down that a decision can be set aside if it is grossly unreasonable. See, for instance, Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment & Tourism & Anor (1996) and Silver Trucks (Pvt) Ltd & Anor v Director of Customs and Excise (2) 1999 (2) ZLR 88 (H)

**Reasonable foundation**

The courts in Zimbabwe have also ruled that they can investigate whether the facts relating to the exercise of a discretion were reasonably capable of supporting the action taken (this approach is sometimes referred to as the reasonable foundation or substantial evidence rule), see Minister of Home Affairs v Austin & Anor 1986 (1) ZLR 240 (S); 1986 (4) SA 281 (ZS). In this case, the validity of the Minister’s decision to detain two persons was under challenge. The test applied to decide this issue was whether there were sufficient facts upon which that sort of decision could reasonably be based. (This test applied, said the court, even though the official is allocated a subjective discretionary capacity.) In his judgment, the Chief Justice referred to the case of Secretary of State v Management Board of Thameside [1977] AC 1014 where this sort of approach was adopted. Under this approach, the court is able to exercise meaningful control over administrative power, without arrogating to itself the capacity to make a decision that it is the responsibility of an administrative official to make. Essentially, what the court will do is to check that there was a reasonable foundation for the decision i.e. were there proper facts upon which that sort of decision could have been arrived at?

**Simple unreasonableness**

In recent times, there has been a movement towards allowing the courts to interfere with
administrative decisions on the grounds that the decisions are unreasonable (rather than grossly unreasonable or so grossly unreasonable that they point to others things such as bad faith.) In South Africa, it is now provided in s 33(1) of the SA Constitution that all persons are entitled to decisions which are reasonable. This provision has been interpreted in the case of Roman v Williams NO (1998). The court decided that this constitutional protection is wider than the common law and that under this constitutional provision, the courts are no longer confined to examining only the way in which decisions are reached; they were now entitled to look into the substance and merits of administrative decisions. Decisions can now be examined objectively to determine whether the decisions are justifiable in relation to the reasons given and are proportional.

The Law Development Commission of Zimbabwe has made recommendations regarding the issue of unreasonableness in its final report entitled Administrative Decisions (August 1997). At pp 17-19 of this report, the Commission points out the various approaches towards unreasonableness in administrative decision-making. Having looked at these the Commission concludes that an administrative decision should be reviewable if it is so unreasonable that no reasonable person would have made that decision. Under this approach, the court would not interfere with a decision simply because the court might have arrived at a different decision. The court will only interfere if the decision was so unreasonable that no reasonable person would have arrived at that decision.

In African Tribune Newspapers (Pvt) Ltd & Ors v Media & Information Commission & Anor 2004 (2) ZLR 7 (H) the High Court said that unreasonableness has an extremely limited, even an insignificant, role as a ground of review in our law. Judicial review is concerned not with the correctness of the decision but with the decision-making process. A review court can only set aside a decision if it is satisfied that the decision was so grossly unreasonable that no reasonable person applying his mind to the facts before him would have come to that conclusion. This case obviously predates the coming into operation of the Administrative Justice Act. These observations should therefore not be treated as a correct statement of the position now that the Administrative Justice Act has come into operation. In that Act one of the grounds for review is the unreasonableness of the decision. As had been stated above, the decision can be set aside if the decision is so unreasonable that no reasonable person would have made that decision. Even before the coming into operation of the Administrative Justice Act at least gross unreasonableness was a recognised ground for setting aside a decision.

**Unreasonable delays in making decisions**

Members of the public can be severely inconvenienced or prejudiced by the failure by public authorities to make decisions affecting those persons within a reasonable period of time.

In order to overcome this problem, the Law Development Commission of Zimbabwe recommended in its final report entitled Administrative Decisions (August 1997). It recommended firstly that there should be a right to have public officials arrive at decisions within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to make the decision by the person concerned. These
recommendations have been incorporated into the Administrative Justice Act. In terms of s 4(2)(c) of that Act any person who is aggrieved by an administrative authority’s undue delay in making a decision can apply to the High Court for relief and the court will have the power to direct that the administrative authority arrive at a decision within the relevant period specified by law or, if no such period is specified, within a period fixed by the court.

**Improperly constituted tribunals**

**Composition**

If a tribunal is not properly constituted decisions arrived at by it may be *ultra vires* and invalid. Thus provisions in the statute relating to the composition of the tribunal must be strictly complied with.

**Qualifications of members**

The enabling statute will usually spell out what qualifications the various members of the tribunal must possess. Frequently, it is required that the Chairman must possess certain special qualifications e.g. that he must be a judge or ex-judge or possess expertise in a particular area. Conversely, often it is stated what things disqualify a person sitting as a member of the tribunal. If a person sits as a member of the tribunal and does not possess mandatory qualifications or a person sits when, according to the listed disqualifications, he is debarred from sitting, the proceedings of the tribunal will be invalid.

In the case of *Marawa v Minister of Transport & Ors* 2000 (2) ZLR 225 (S) the court decided that the Civil Aviation Board was not properly constituted and a decision it had taken was therefore a nullity. Section 10(3) of the Civil Aviation Act [*Chapter 13:16*] required that Civil Aviation Board members be “appointed for their knowledge of and ability and experience in aviation or finance or for their suitability otherwise for appointment as members.” The court held that the functions of the Board were all specialist functions in relation to civil aviation. It was therefore entirely inappropriate to compose the Board entirely of persons without any qualifications in relation to civil aviation. There were many people with such qualifications that could have been appointed so it was not a situation where the Minister of necessity has to appoint persons without these qualifications because no such persons were available. The Board should have consisted of a preponderance of persons qualified in the field of aviation together with some persons with expertise in the field of finance and corporate management. Furthermore the Chairperson of the Board was disqualified in terms of the Civil Aviation Act as he was already a member of the board of two other statutory bodies. Finally s 10(3) the Act provided that at least one member “shall be appointed for his knowledge of law, in particular the law relating to aviation.” There was no person on the Board with any knowledge of law and the Board was therefore not properly constituted. The court rejected the argument of the respondent that the challenged decision of the Board was nonetheless still valid by virtue of s 23 of the Civil Aviation Act which provides that no decision of the Board “shall be invalid solely because” there was vacancy on the Board or a disqualified person purported to act as a
member of the Board.

**Complement and quorum**

The complement is the total number of tribunal members, whereas the quorum is the minimum number of tribunal members who must sit in order for the proceedings of the tribunal to be valid. If the enabling legislation does not specify a quorum, all members of the tribunal must sit for its proceedings to be valid.

Even if a quorum is laid down, it would seem that there must be a full complement of tribunal members from which to draw the quorum as the quorum is merely the minimum number who may sit, and if all the tribunal members are able to sit, the person whose case is before the tribunal is entitled to have his case heard by as many persons as can sit. This cannot be complied with if, say, the number of persons appointed is only enough to constitute a bare quorum. Thus, if a member is incorrectly ruled by the Chairman to be disqualified from sitting, even though there was a quorum without him, the proceedings will still be invalid, see *Botha v Cavanagh* 1953 (2) SA 418 (N).

**Absence of member during hearing**

If one of the members of a tribunal is absent for a substantial period of time during a hearing this may vitiate the proceedings, and this may apply even if a written record of the proceedings is kept which the member can peruse on his return. This would apply particularly where credibility of witnesses is important, as in a disciplinary matter.

**Vacancies occurring after commencement of hearing**

If a member of a tribunal that has started to hear a matter dies or becomes too ill to continue to sit, the proceedings will have to start again from the beginning with a new member to replace him.
Ultra vires action

Introduction

All administrative powers (other than those exercised by domestic tribunals) derive from statute and the nature and extent of those powers are to be found in the statutory provisions granting these powers. Such powers are not unlimited: the Legislature will not grant unlimited power but instead it will give powers for certain purposes only, or subject to special procedures or with some other kinds of limits. In other words, the limits upon the power are to be discovered by examining the statutory provisions in order to decide what powers the Legislature has expressly or impliedly granted. The exercise of a power by an administrative official or body will be invalid unless the official or body is authorised to exercise that power. If an administrator purports to exercise a power he or she does not have, or acts in excess of a power he or she possesses, his or her action will be invalid on the basis that it is ultra vires.

This proposition is illustrated in the case of *B-Sky Energy (Pvt) Ltd v Minister of Energy & Anor* 2009 (2) ZLR 241 (H) The second respondent, an official in the Ministry of Energy, prevented the applicant from importing a load of diesel fuel into the country. The reasons given were that the sulphur content was above the standards determined for Zimbabwe. His actions were subsequently supported by the first respondent, the responsible Minister. The applicant was one out 15 importers of fuel of the same quality, which came from the same source in South Africa, but the other importers were not prevented from importing their consignments. In justifying his actions, the Minister claimed that he was exercising his constitutional mandate to give general direction and control over his Ministry and departments in terms of s 31D of the Constitution. He also claimed cabinet authority and directives as justification of his conduct. Finally, he sought to argue that as a government Minister he placed the embargo on the diesel in the public interest because it constituted a harmful substance in terms of the Environment Management Act [Chapter 20:27].

The court held that while it was correct for the Minister to say that, as the minister, he had a constitutional duty to exercise general direction and control over his Ministry or departments, that constitutional mandate must be exercised within the strictest confines of the law. It cannot and must not be used as a vehicle to act outside those confines. All administrative powers (other than those exercised by domestic tribunals) derive from statute and the nature and extent of those powers are to be found in the statutory provisions whereby these powers have been granted. Such powers are not unlimited. The legislature gives power for specific purpose only, or subject to special procedures or with some other kinds of limits. The exercise of a power by an administrative official or body will be invalid unless the official or body is authorized to exercise that power. If an administrator purports to exercise a power he does not have or acts in excess of a power he possesses, his action will be invalid on the basis that it is ultra vires. The Minister’s resort to cabinet authority and directives as justification of his unlawful conduct was equally misplaced and without merit because the cabinet has no legislative authority. Laws are made in Parliament and not in cabinet.
The Environmental Management Act defines “Minister” as the minister of Environment and Tourism or any other minister to whom the President, may from time to time, assign the administration of the Act. As the first respondent was not the Minister of Environment and Tourism, nor had the administration of the Act been assigned to him, his conduct in assuming responsibility over the Act without presidential authority was unconstitutional and unlawful. In any event, neither the Act nor regulations made under it authorized any minister to place an embargo on any fuel on the basis that its specifications constituted a hazardous substance or was harmful to motor vehicles.

The court held further that although the second respondent was acting in the course of duty as a civil servant, he was not entitled to act unlawfully. A civil servant who acts unlawfully in the course of duty attracts personal liability for the simple reason that he is not employed to discharge his duties contrary to law. He could therefore not object to being sued in his personal capacity.

The action can be *ultra vires* if the administrative official or body acts in any of the following ways.

**Does wrong thing**

If the purported action is not within the scope of the powers granted by the enabling statute, it will be *ultra vires*. Section 5(b) of the Administrative Justice Act provides in deciding whether administrative action is lawful the High Court may have regard to whether or not “the enactment under which the action has been taken authorises the action.”

In order to determine whether the administrative authority has acted *ultra vires*, the court will obviously have to interpret the statutory powers in question to ascertain what powers have been allocated, expressly or impliedly by the empowering legislation. The courts will, for instance, imply certain ancillary powers where these are necessary in order for the express powers to be exercised. See *JCI Co v Marshalls Township Syndicate Ltd* 1917 AD 662 and *Johannesburg Municipality v Davies* 1925 AD 395

If the administrative authority assumes jurisdiction where it has none, it will also be acting *ultra vires* its powers. Section 5(a) of the Administrative Justice Act provides in deciding whether administrative action is lawful the High Court may have regard to whether or not “the administrative authority has jurisdiction has jurisdiction in the matter.”

In the case of *Witham v Director of Civil Aviation* 1983 (1) ZLR 52 (H) the civil aviation authorities were empowered to impose limitation on a pilot’s licence but it was not permitted to impose a condition that prevents the person from flying at all unless pilot meets a particular requirement.

In *Union Government & Anor v West* 1918 AD 556 the disciplinary body had no jurisdiction to deal with the matter in question.

In *Roberts & Letts v Fynn* 1920 AD 23 a poundmaster wrongly sold an ox that had not been properly impounded.

In *Durban North Estates v Durban Corporation* 1935 NPD 558 the corporation had tried to impose rates on land exempt from rates.
In Rent Control Board v SA Breweries 1943 AD 456 the rent board had set rental levels for property over which it did not have control. See also White & Collins v Minister of Health [1939] 2 KB 838.

Acts in wrong manner

If it is laid down that certain procedural steps must be taken before certain action is taken, then the taking of the action without having followed the prescribed procedures will mean that the action is ultra vires. Section 5(o) of the Administrative Justice Act provides in deciding whether administrative action is lawful the High Court may have regard to whether or not “the procedures specified by law have been followed.”

However, if an administrative authority fails to follow a procedure which is not mandatory or if it departs from laid down procedures in a minor or insignificant manner and this does not affect the outcome this should not result in the invalidation of the action taken.

In BMG Mining (Pvt) Ltd v Mining Commissioner, Bulawayo & Ors HB-11-05 the applicant had pegged and registered certain mining claims. The third respondent’s holding company complained to the first respondent, the Mining Commissioner for the Bulawayo District, alleging that claims already registered by the third respondent had been over-pegged by the applicant. The first respondent then purported to cancel the applicant’s claims. The first respondent then purported to cancel the applicant’s claims. She claimed to be acting in accordance with s 50 of the Mines and Minerals Act [Chapter 21:05], which allows cancellation where the site pegged was reserved against prospecting and pegging. The applicant sought a declaration that it was the lawfully registered owner of the claims.

The court held that if the cancellation was in breach of the Act, such cancellation was void ab initio because anything done by an official in excess of the powers conferred upon him or without following the procedure for such cancellation is null and void. Section 50(2) requires the mining commissioner, inter alia, to give at least 30 days’ notice to the affected party of the intention to cancel the registration. Even if the section applied (which was unlikely, given that the area was not reserved against prospecting and pegging under ss 31 or 35, and s 258(3) has no bearing and the pegging method has not been questioned), the first respondent had not complied with the procedure for cancellation set out in subs (2) and (3) of s 50. This therefore meant that her actions not only offended the audi alteram partem principle but also that failure to comply with the mandatory procedural requirements renders her decision ultra vires s 50. If the first respondent had reason to believe that the registration of applicant’s claims was questionable or that there might have been a case of overpegging, her duty was to investigate the matter thoroughly and act in accordance with the provisions of the Act. Overpegging complaints should be dealt with in terms of ss 353 and 354 Act, which had not been followed. She appeared to have acted simply on the basis of the complaint made on behalf of the third respondent and did not conduct any meaningful investigation, let alone commission a survey in terms of s 353. The application would therefore be granted.

See Cluff Mineral Exploration Ltd v Union Carbide Management Services (Pvt) Ltd 1989 (3) ZLR 38 (S) where an administrative authority had failed to comply with peremptory provisions of a statute. See also Hooper v Superintendent, Johannesburg Gaol (1) 1958 (2) SA 152 (W); R v Agricultural Land Tribunal [1955] 2 QB 140; Musson v Rodrigues [1953] AC 530
The South African Promotion of Administrative Justice Act makes this clear in section 6(2)(b). This provides that there can be judicial review where “a mandatory and material procedure or condition was not complied with.”

Acts on wrong grounds

Improper purpose

Section 5 (d) of the Administrative Justice Act provides that in deciding whether administrative action is lawful the High Court may have regard to whether or not “a power has been exercised for a purpose other than that for which the power was conferred.”

As Baxter points out at p 507, every grant of powers is expressly or impliedly aimed at achieving some purpose or objective and cannot be used to achieve an entirely different or unauthorised purpose or no purpose at all. The problem is that the Legislature will seldom spell out the purposes for which the power was conferred and it thus becomes a matter of statutory interpretation to discover the permissible purposes. If a public authority acts to achieve some unauthorised purpose, its action will still be ultra vires despite the fact that it was acting in good faith to try to advance the public interest.

In Minister of Justice, Law & Order v Musururwa 1964 RLR 298; 1964 (4) SA 209 (SRA) the court pointed out that it is not permissible to use statutes in combination to achieve purpose otherwise illegal.

In Minister of Information v Mackeson 1980 ZLR 76 (G); 1980 (1) SA 747 (R) a person declared prohibited immigrant sought to prevent his deportation to Britain claiming that it was an improper purpose for the immigration authorities to deport him to that country so that he could stand trial in that country on criminal charges. The court held that the authorities were entitled to deport the person to his country of origin, even if criminal proceedings were pending against him.

In van Eck v Etna Stores 1947 (2) SA 984 (A) wartime food regulations giving power to confiscate food as evidence of breaches of regulations were improperly used to take food as part of a food distribution scheme.

In University of Cape Town v Ministers of Education and Culture 1988 (3) SA 203 (C) the power to subsidise university to advance higher education was used to impose conditions on university to prevent boycotts, unlawful gatherings and other disruptive conduct on campuses. The court found that the conditions imposes on receiving subsidies were invalid as the purpose behind the conditions were not in accordance with the purpose of the Act which was simply to promote higher education.

See also Haruperi & Ors v Minister of Home Affairs HH-258-84; Ismail & Anor v Durban City Council 1973 (2) SA 362 and Municipal Council of Sydney v Campbell [1925] AC 338
It should be noted that section 5 of the Administrative Justice Act does not provide for the reviewing of action on the grounds of improper motive, whereas s 6(2)(e)(ii) of the South African Promotion of Administrative Justice Act provides that the court can review administrative action on the grounds that the administrative action was “taken for an ulterior purpose or motive.” Thus in South Africa even if the purpose for which the administrative authority is a permissible one in terms of the enabling legislation, the action in question can be impugned if the administrative authority is utilizing the power because of some bad motive.

In the case of LF Boshoff v CT Municipality 1969 (2) SA 256 (C) a municipality expropriated property for municipal purpose but the reason why it expropriated the property prematurely was a desire to acquire property at lower price, avoid certain obligations and to punish the complainant. The motive behind the expropriation was held to be irrelevant. Baxter argues that this case is wrongly decided. He maintains that the Court should intervene if power notionally within purpose but motive spite or ill-will or to take unfair advantage of power. But see contra 1994 Vol 6 No 2 Legal Forum 11 & 13.

**Relevant and irrelevant considerations**

Administrative action may be *ultra vires* if the administrator either takes into account irrelevant considerations or does not take into account relevant considerations when deciding to adopt a particular course of action. This is provided for in s 5(l) and (m) of the Administrative Justice Act.

The Legislature may have structured the discretion that an administrator is to exercise by stipulating the considerations that the decision-maker is to take into account before arriving at his or her decision. (See, for example, the considerations applicable to the registration of a bank in terms of s 8 of the Banking Act [*Chapter 24:20*].)

When relevant considerations are spelled out, it will have to be decided whether this is an exhaustive list of factors. In other words, the question will be is it permissible to take into account only these considerations and no others, or can additional matters be taken into account?

On the other hand, officials are sometimes given wide discretionary powers in terms of which they are entitled to take into account such factors as they see fit. Even here, however, the courts may conclude that the official took into account a consideration that was patently not germane to this type of decision. Thus, all relevant factors must be taken into account (although the weight to be attached to these factors is a matter for judgment by the administrator). Conversely, no manifestly irrelevant considerations may be taken into account. Where the administrator arrives at his or her decision on the basis of some relevant and some irrelevant considerations, the vital question will be: did the bad grounds substantially influence the decision arrived at? If they did, the decision will be set aside.

See *Troake v Salisbury Bookmakers’ Licensing Committee* 1971 (2) RLR 118; (A) 1972 (2) SA 40 (RA) where the licensing committee failed to take into account relevant statutory provisions. See also *Evans & Anor v Chairman, Review Tribunal & Anor* HH-485-84; *Mukarati v Director of Housing and Community Services & Anor* HH-281-90; *Wing Lee Ltd v Johannesburg City Council* 1931 AD 45 and *Vandayar v Port Elizabeth Municipality* 1957 (2) SA 67 (E)
Failing to exercise discretion or exercising discretion wrongly

If the administrator fails to apply his mind at all to the decision he has to make but simply makes the decision on the basis of whim, caprice, or complete irrationality, the decision will be set aside. Section 5 of the Administrative Justice Act provides a variety of criteria that the court may have regard to in this regard. These include

- that the action taken is so unreasonable that no reasonable person would have taken it; [s5(j)]
- that there is any evidence or other material which provides a reasonable or rational foundation to justify the action taken; [s 5(k)]
- that a power has been exercised in a manner which constitutes an abuse of that power. [s 5(i)].

If an official has to make the decision himself, he or she cannot pass the buck by leaving it to, say, a junior official to make that decision.

If it is his decision to make alone, it is wrong for him to allow a superior to dictate the decision that he makes. Section 5(g) of the Administrative Justice Act provides that in deciding whether administrative action is lawful the High Court may have regard to whether or not “a discretionary power has been improperly exercised at the direction, behest or request of another person.” See Leach v Secretary for Justice 1965 (3) SA 1 (ECD) and Simms Motor Units Ltd v Minister of Labour [1946] 2 All ER 201

It is permissible for administrative bodies to formulate certain policy guidelines to assist them in their decision-making process, providing these guidelines are consistent with the terms of the empowering legislation. These guidelines must not, however, become hard and fast rules, which the body in question applies regardless of whether the facts of the particular case demand that the guidelines be not applied in that case. Section 5(h) of the Administrative Justice Act provides that in deciding whether administrative action is lawful the High Court may have regard to whether or not “a discretionary power has been exercised in accordance with a direction as to policy without regard to the merits of the case in question.” See Chotabhai v Union Government 1910-11 AD 301; Edwards & Sons Ltd v Stumbles & Anor 1963 (2) SA 140 (SR); Hayes v Director of Security Manpower GS-102-79; Maruta & Ors v Minister of Home Affairs HH-3-84 and Struben v Minister of Agriculture 1910 TPD 903

Mistakes of law and fact

Section 5(c) of the Administrative Justice Act provides that a determining factor in deciding whether the administrative authority has breached the duty to act lawfully is whether or not a material error of law or fact has occurred.
This makes it clear that only a material error of law or fact will suffice. Thus if the decision is still supportable despite the error of law or is still supportable on a correct version of the facts, the error will not be a material one. If on the other hand, a different decision would have been reached if the error of law or of fact had not been made then the error is material.

An administrative authority makes a mistake of law where it misinterprets the enabling Act in terms of which it is purporting to exercise its powers. It makes a mistake of fact for instance certain conditions have to exist in order for an application to succeed and the facts of the case in question actually satisfy all these requisite conditions but the authority misunderstands the facts and wrongly believes that the facts do not satisfy the conditions.

Before the Administrative Justice Act there was case law in Zimbabwe and South Africa which laid down that not all mistakes of fact and law will constitute reviewable irregularities. In the case of _Kambasha Bros & Anor v Thompson NO & Anor_ 1970 (2) RLR 97 (G) the court ruled that mistakes of law will amount to reviewable irregularities if they lead the following consequences—

(i) they lead the official or body to assume jurisdiction when they do not have such jurisdiction;
(ii) they lead the official or body to decline jurisdiction where clearly they possess jurisdiction;
(iii) the mistakes badly distort the understanding of the nature of the discretion to be exercised or prevent the exercise of the discretion, e.g., by misreading the enabling legislation, the administrator completely fails to comprehend the nature of his discretion.

In the South African case of _Hira v Booyseen_ 1992 (4) SA 69 (A) the court decided that reviewability of the administrative matter depends on whether legislature intended the administrative authority to have exclusive authority to decide the question of law concerned. It set out the following guidelines—

- If the question is of a purely judicial nature (i.e. falls within defined and objectively ascertainable statutory criterion) the courts will be reluctant to conclude that the administrative authority had exclusive jurisdiction to interpret that provision;
- The materiality of error. If the decision is still supportable on the facts despite the error of law, the court will not interfere unless there is some other reviewable ground;
- Where the administrative authority is entitled to take into account considerations of policy or desirability in public interest, the position might be different.

**Fraud, corruption, nepotism, favouritism and bad faith**

Section 5 of the Administrative Justice Act provides that in deciding whether administrative action is lawful the High Court may have regard to whether or not

- fraud, corruption or favour or disfavour was shown to any person on irrational grounds [s 5(e)]
- bad faith has been exercised [s 5(f)].
These various grounds overlap with one another. Bad faith refers to a dishonest intention or corrupt motive on the part of the public authority. Bad faith would be present where the authority acted dishonestly, e.g. where he or she claims to be acting for one purpose but knows that he or she knows full well that he or she is acting to obtain private gain for himself or his relatives. This overlaps with the ground of corruption. Another manifestation of bad faith is where the administrative authority takes the action on the basis of animosity, spite or vengeance. This overlaps with the showing of disfavour to any person on irrational grounds.

See Rushwaya v Minister of Local Government and Town Planning S-6-87 and Adams Stores (Pty) Ltd v Charlestown Board 1951(2) SA 508 (N).

On irrationality see Austin & Anor v Minister of State (Security) & Anor 1986 (2) ZLR 28 (S); Rushwaya v Minister of Local Government and Town Planning 1987 (1) ZLR 15 (S) and Mutambara v Minister of Home Affairs 1989 (3) ZLR 96 (H).

Sub-delegation

Where the Legislature did not expressly or impliedly authorise sub-delegation, action taken by a sub-delegate will amount to ultra vires action.

Where the legislature delegates the power to take action to an administrative official or body the question arises whether that official or body is entitled to sub-delegate this power to some other administrative official or body. In order to discover the answer to this question, the legislation in question will need to be examined in order to discover the intention of the legislature. The question will be: did or did not the Legislature intend that the power be sub-delegated? Usually, the intention in this regard will not be expressly stated and here the implied intention of the Legislature will have to be discovered. Various criteria will be taken into account in deciding whether sub-delegation is permissible. For instance, sub-delegation would not have been envisaged where the Legislature had delegated a power requiring special expertise to an administrative official who had that expertise. If the action requires a decision to be made that is complex and will have far-reaching consequences, it will probably be implied that no sub-delegation was envisaged.

In the case of Cargo Carriers (Pvt) Ltd v Zambezi & Ors 1996 (1) ZLR 613 (S) the court said that while it is normal for Ministers, to whom statutory powers and duties are given, to delegate the exercise of those powers and duties to responsible officials in their departments, this does not apply where the Minister is given responsibility of exercising a discretion which the nature of the subject matter and the language of the Act show can only be properly exercised in a judicial spirit.

See R v Nyandoro 1959 (1) SA 639 (SR); S v Seedat 1977 (1) RLR 102; Whaley & Ors v Cone Textiles 1989 (1) ZLR 54 (S); Lenton Ranch Safaris (Pvt) Ltd v Minister of Natural Resources & Tourism S-179-89; Shidiack v Union Government 1912 AD 642; Arenstein v Durban Corporation 1952 (1) SA 279 (A) and Ellis v Dubowski [1921] 2 KB 621.
**Action that court will take when action *ultra vires***

What will the review court do if it finds that the action taken was *ultra vires*? Usually, the court will set aside any action that was *ultra vires* because the illegal action is a nullity.

In *Zvobgo v City of Harare & Anor* 2005 (2) ZLR 164 (H) the applicants challenged the legality of actions taken by a Commission set up by the Minister to replace the Harare City Council after the Minister had dismissed the Councillors. The Urban Councils Act permitted such a Commission to operate for a maximum period of six months, after which there had to be fresh elections to elect a new city council. The Commission had continued to operate after the six-month period. Legal counsel for the Council had conceded that the operations of the Commission after six months were illegal, but he argued that the vacuum had had to be filled pending the election of a new council and therefore, on the basis of necessity, the actions taken by the Commission after the six months should be validated. Makarau J rejected this argument, saying:

> A commission was allowed to remain in office past its legal mandate, thereby creating the fictional vacuum. It is my view that to legitimise the clearly illegal in the circumstances of this matter would be to offend against the clear letter of the law as contained in the Urban Councils Act and to usurp the functions of Parliament and seek to legislate from the bench by excusing that which Parliament has decreed illegal.

She pointed out that the vacuum could have easily have been filled by holding an election for a new council in accordance with the Act.

See also *Combined Harare Residents Association & Anor v Registrar General* HH-210-01; *Chideya v Makwavarara* 2007 (1) ZLR 115 (H).

However, with subordinate legislation if only a portion of it is *ultra vires* it may be possible to annul the bad portion only and leave intact the valid portion.

If the *ultra vires* action has caused damage, the person affected may not only want an annulment of the action but may very well also want to claim damages. On this matter, see later under the section “Remedies”.
Bodies given legislative powers by Constitution

In South Africa, subject to certain exceptions, the Promotion of Administrative Justice Act governs administrative action taken by an organ of the state exercising a power in terms of the Constitution.

In the case of *Chairman, PSC & Ors v ZIMTA & Ors* 1996 (1) ZLR 91 (S), the majority of the court found that as the legislative authority had been given to the Public Service Commission by the Constitution and had not been delegated by Parliament, the court had no power and authority to enquire into the reasonableness of the legislation passed by this body. This approach has been heavily criticised. See The Reviewer “A retreat of judicial review” 1996 Vol. 8 No. 3 *Legal Forum* 11. The author of this article points out, amongst other things, that the approach of the majority of the Supreme Court has “opened the door for the executive to establish executive organs under the Constitution with a view to ruling by decree in complete disregard to reasonableness, justice and fairness.”

The constitution was later amended to remove the law making power of this body.

In the case of *Movement for Democratic Change and Another v Chairperson of the Zimbabwe Electoral Commission and Others* (E/P 24/08) [2008] ZWHHC 1 (14 April 2008) the MDC had sought an order compelling the Commission to announce the long delayed results of the presidential election. The Commission maintained that it had a legally valid reason for not releasing the results timeously. This was that it had become necessary to have a recount of some of the votes.

The Electoral Court decided that the Administrative Justice Act does not apply to decisions taken by the Electoral Commission. This Commission is established in terms of the Constitution is not an administrative body for the purposes of this Act. The actions of this independent constitutional body are only open to challenge on a very limited basis. The clear intention of the Legislature in Section 61 (5) of the Constitution was to ensure the Commission’s independence provided it was operating within the law.

The Commission’s decision to recount and the extent thereof is not subject to an appeal means that it was intended to act independently and that its decision would be final. The provision barring an appeal simply means the Commission has been given a very wide discretion as to whether or not to order a recount. The provision that Commission’s decision is not be subjected to an appeal also means this court cannot inquire into that decision. The Commission’s conduct is only open to the jurisdiction of this court when it strays from the law.

The reason proffered by the Commission for their failure to timeously announce the presidential results is legally valid. It can therefore justify the delay. The Commission had not strayed from the law. This court is therefore not entitled to intervene and order the respondents to announce the results on the basis of failure to comply with the law.
Prerogative powers

In the past the courts have viewed the exercise of certain types of prerogative powers as being essentially political rather than legal matters and the courts tend to treat such matters as being non-justiciable. These include such powers as the dissolution of parliament, executive assent to legislation and making of treaties with foreign states.

In *PF ZAPU v Minister of Justice (2)* 1985 (1) ZLR 305 (S) at 315-316 the Supreme Court started off by stating that these powers were not normally subject to judicial review. However, it went on to say that the court would check to see that these powers were exercised under lawful conditions and within the law. It said that a court of law could thus review and set aside the exercise of a prerogative power of the President if its exercise had resulted in a person being deprived of his/her rights, interests or legitimate expectations without being heard from first. For example, if the President exercised the prerogative of mercy without first obtaining the advice of the Cabinet as required by the Constitution, the court would be entitled to declare the President’s action unlawful.

See also Linington *The Constitutional Law of Zimbabwe* pp 84-94.

There has been an increasing trend in a number of countries to subject prerogative to some extent of review. In South Africa there have been a number of cases in which this issue has arisen. In *Re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) the Constitutional Court decided that the exercise of a prerogative power could be reviewable if the power was exercised in a way which undermined provisions of the Constitution.

In the case of *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC), the court held that the exercise of the President’s power to pardon or reprieve offenders as set out in the constitution was subject to judicial review. The President had granted a remission of the remainder of their sentences to certain categories of prisoners. One of these was to all mothers with minor children under the age of 12. The respondent, who was a widower with a young son, had argued that this remission was discriminatory and therefore contrary to the Constitution. The Constitutional Court held that although the measure had discriminated against the respondent, the discrimination was not unfair in the circumstances. However, Court also decided that the President’s power was subject to judicial review because it was a power conferred by the Constitution. It was subject to review in the same way as other constitutional powers were subject to review. If the discrimination has been unfair the Court would have been entitled to order that remedial measures be taken so as to comply with the Constitution. (In the lower court Goldstone J referred to the view of Baxter that prerogative powers were an historical anachronism and that such powers should be subjected to review.

In England as well the courts have shown an increasing willingness to review the exercise of prerogative powers. In *CCSU v Minister of the Civil Service* [1985] 3 All ER 935 (HL) the majority of the court accepted that prerogative powers are justiciable in the courts. The Minister was exercising a prerogative power when banning trade unions at a government intelligence communication installation. The court required the Minister to adduce evidence that this ban was based on considerations of national security.
In *R v Secretary of State for the Home Office, ex p Bentley* [1993] 4 All ER 442, the prerogative of mercy was subjected to judicial review and the court stipulated the types of considerations that could be taken into account when exercising this power.
The Public Protector Office

The Ombudsman Act first established this office in 1982. The Act is now Chapter 10:18. The Act should be read together with ss 107 and 108 of the Constitution of Zimbabwe. As a result of Constitutional Amendment No 18 the obscure title of “Ombudsman” has been changed to the far more understandable term “Public Protector.”

Basic functions

The basic function of this office is to protect citizens against administrative injustices and bureaucratic oppression and to provide citizens with an inexpensive and readily accessible avenue for complaint when such injustices and oppression do occur.

The Public Protector Office investigates complaints by citizens that they have suffered injustice as a result of unjust or oppressive administrative action by various administrative officials. The Public Protector is empowered to investigate action taken by

- any Ministry or department of Government and any member of such Ministry or department;
- any local authority;
- any hospital, clinic, school or training institute controlled directly or indirectly by the State;
- any statutory body;
- any authority empowered to determine the person with whom any contract or class of contracts is to be entered into by or on behalf of the State.

[s 108 of the Constitution and First Schedule to Public Protector Act]

The Public Protector will take remedial steps where, after investigating the complaint it finds that there has been—

- action contrary to the law;
- action based wholly or partly on mistake of law or fact;
- unreasonably delayed action; or
- action otherwise unjust or manifestly unreasonable;

and it considers that—

- the matter should be given further consideration; or
- an omission should be rectified; or
- a decision should be cancelled, reversed or varied; or
- any practice on which the act, omission, decision or recommendation was based should be altered; or
- any law on which the act, omission, decision or recommendation was based should be reconsidered; or
- reasons should have been given for the decision; or
- any other steps should be taken.

[s 16(1)]

Qualifications for appointment
To be appointed as Public Protector or Deputy Public Protector the person must be—

- a judge or ex-judge in Zimbabwe or jurisdictions practicing Roman-Dutch or English Law;
- a person qualified to practice as legal practitioners for at least seven years;
- a regional magistrate;
- a Secretary of the Cabinet or of a Ministry;
- a person who in the opinion of the President is a person of ability and experience and distinguished in the public life of Zimbabwe.

### Disqualifications for and declaration of interest by Public Protector and Deputy Public Protector

The Public Protector and Deputy Public Protector may not—

- perform the functions of any other public officer except that they can chair or be members of certain tribunals specified in s 8(3);
- hold any other paid office or employment;
- be a director, consultant or adviser to any corporate body or partnership.

[§ 3(3)]

Before assuming officer the Public Protector and Deputy Public Protector must declare in writing to the President if he or she has any financial, commercial or other interests that may conflict with his or her duties and responsibilities in his or her office and must also declare any such interests if he or she acquires them after assuming office.

[§ 3(4)]

### Who appoints

The President appoints the Public Protector and Deputy Public Protector after consultation with the Judicial Service Commission. (§ 107 (2) of the Constitution.) Where the recommendation of the Judicial Service Commission for the appointment of a Public Protector or Deputy Public Protector is not adopted by the President, the President must cause the Senate to be informed of this fact, and not both Houses of Parliament.

As the Public Protector is supposed to probe maladministration within the executive it does not seem appropriate that the head of the Executive should appoint the Public Protector. It would be better, as happens in a number of countries such as South Africa, that the Public Protector be appointed by Parliament.

### Location of offices

Its main office is in Harare and it also has offices in Bulawayo, Mutare and Masvingo.

### Staff

There is a Public Protector and a Deputy Public Protector. Presently, the Public Protector has a
staff of seven legal officers, five investigating officers and six administrative personnel. These staff members have to try to cope with the work of the office throughout the country.

**Budget**

The Public Protector office does not have its own independent budget. It is financed under the budget of the Ministry of Justice. The office does not even possess a vehicle of its own to carry out its work.

This position is very unsatisfactory. The office should have its own budget allocation and should not have to seek financing through the Ministry of Justice. Parliament should be able to make a budget allocation directly to this office and it should not have to compete for finance under the Ministry of Justice budget.

**Excluded areas**

The Public Protector is not permitted to undertake investigations into any actions taken by—

- the President and members of his personal staff;
- judicial officers;
- the Attorney-General and the Secretary to the Ministry which is responsible for giving legal advice to the Government and any member of their staff in relation to the conduct of any prosecution, the conduct of any civil action or any legal advice given to the Government or any of the forces, services, institutions, authorities or bodies set out in the First Schedule.

However, the Public Protector can investigate complaints against these persons or bodies by their officers or employees relating to their conduct towards such officers or employees. [s 9 read with the Second Schedule.]

The Minister of Justice may also by notice in writing prevent any investigation where he considers that such investigation would not be in the interest of security or foreign relations of the State. [s 9(3)(a)(ii)]

**Human rights cases**

Previously, the Public Protector Act specifically barred the Public Protector from investigating complaints of human rights abuses by members of the Defence Forces, the Police Force and the Prison Service.

However, in 1997 the Public Protector Act was amended by the insertion of a new provision. This gave the President the power to make regulations providing for all or any of the powers of the Public Protector to be exercised over the Defence Forces, the Police Force and the Prison Service by the Public Protector or by any other person or authority which he may appoint or establish for that purpose. The President has apparently made no such regulation and thus the Public Protector’s office therefore does not seem to have the necessary legal mandate to carry out investigations into complaints about human rights abuses. Nonetheless it has been conducting such investigations.
Even if the President does pass such a regulation, the Public Protector could still be prevented from investigating certain cases as the Act provides that the Public Protector may not investigate such allegations if the President gives written notice that the investigation would not be in the interests of public security or foreign relations of Zimbabwe.

See “The Public Protector’s new powers to deal with human rights abuses: How effective will these powers be?” 1997 Vol. 9 No. 1 Legal Forum 37.

In 2011 the Zimbabwe Human Rights Commission was established. This body will in the future be responsible for dealing with human rights cases.

**Lodging of complaints**

No power is given to the Public Protector to initiate an investigation in the absence of a complaint. The Public Protector can thus only act if a complaint has been lodged.

Complaints must be in writing, supported by relevant documentation. Where complainants are unable to write out their complaints, staff at the Public Protector’s office assists them.

Complaints must normally be made within twelve months of the date when the complainant first had notice of the act complained of, but this period may be extended where this is considered to be proper.

**When Public Protector will decline to investigate complaint**

**Where other remedies are available**
The Public Protector will decline to investigate a complaint if the complainant has reasonably available to him or her a remedy by way of proceedings in a court or an appeal to a court. In this instance the complainant will simply be advised to take the matter to court. However the Public Protector has the discretion to conduct an investigation even where such a remedy is available if he is satisfied that in the particular circumstances it is or was not reasonable to expect such person to resort or have resorted to such remedy. When deciding whether an alternate remedy is reasonably available, the Public Protector will take into account such factors as the financial capacity of the complainant. [s 9(3)] When it declines to investigate on this basis, it should advise the complainant of any remedy that appears to be available to that person. [s 14(3)(b)]

**Where complaints frivolous**
The Public Protector will also not investigate any matter which the Public Protector considers frivolous, vexatious or trivial.

**Complainant has no sufficient interest**
Where he considers the person aggrieved has no sufficient interest in the subject matter of the complaint. [s 9(3)]
Manner of investigation

Where the case falls within the jurisdiction of the Public Protector, various methods of investigation are available. These include formal inquiry procedures.

However, because the Public Protector has adopted a policy of persuasion rather than confrontation and because in most cases co-operation has been forthcoming from the bodies concerned, the Public Protector has hitherto only very rarely made use of his power to mount a formal inquiry to which witnesses can be formally summoned. Most cases have been dealt with by correspondence or by telephone or, more occasionally, by staff members visiting the offices of the administrative agency involved.

During investigations, the Public Protector is entitled to have access to all relevant documents and information and the administrative bodies or officials concerned are not entitled to claim a privilege of secrecy in respect of such documents or information, except that the Public Protector is not entitled to have access to the proceedings of Cabinet.

However in terms of s 15(2) of the Act the Minister may give notice to the Public Protector that disclosure of documents or information would be contrary to the public interest on grounds of defence, external relations or internal security or economic interests of the state. Where he gives such notice the Public Protector or her staff must not communicate the document or information to any person outside the office of the Public Protector for any purpose otherwise than with the authority of the Minister and subject to such conditions as he may fix.

Action which can be taken when complaint well founded

In the event of the investigation establishing that the complaint has substance, the first recourse of the Public Protector is to report this finding to the relevant body and to recommend to it any necessary measures to rectify the problem. The Public Protector has no powers to enforce such recommendations. If the offending body does not act on his recommendations, all he can do is to make a personal report to the President and to lay a special report before Parliament. However, in almost all cases the offending bodies have complied with the Public Protector’s recommendations and it has only been necessary to resort to this further procedure in a few cases.

Lack of awareness of office

For ordinary people with insufficient financial means to be able to engage lawyers, this is the only available remedy. As yet relatively few people, especially in the rural areas, are aware of the existence of this remedy. (Even if they do happen to know something about the Public Protector they would often not know how to go about making complaints to the Public Protector.)

Lack of resources of office
The lack of manpower and finance has drastically curtailed the effectiveness of this office. It is not able to cope with its caseload and there is an increasing backlog of cases. It is supposed to submit annual reports to Parliament. For a number of years it has failed to produce such reports. Its last report was for 2005.

If this office is going to have any widespread impact in controlling and remedying maladministration, far greater financial and manpower resources have to be given to it so that it can then engage in a country-wide campaign to inform the public about the office and so that it can cope with the increase in case load which will certainly result from this publicity. In addition to the offices in Harare and Bulawayo, other regional Ombudsmen offices will be needed if this office is to reach aggrieved people in the different parts of the country.

Other complaints systems

Citizens aggrieved as a result of practices that amount to maladministration can obviously seek redress by complaining directly to various government or local government departments or to their members of Parliament or to party officials.

There are also other mechanisms for complaint such as making complaints to the Commissioner of Police in respect of malpractices on the part of members of the police force.

Remedies

Review

Order 33 sets out the procedure for bringing a decision of an administrative authority. This is by way of court application directed at the chairperson of the administrative body or the administrative officer and all other parties affected. The notice of motion must state shortly and clearly the grounds on which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. The applicant must establish his or her cause of action in his or her founding affidavit. The applicant must also be careful to establish his or her locus standi in the affidavit. See Stevenson v Minister of Local Government and National Housing & Ors 2001 (1) ZLR 321 (H).

Annulment

If the administrative action was ultra vires the enabling Act, the court will declare the action to be null and void and can set it aside. See cases cited by Baxter pp 678-681.

Referral back for hearing or rehearing

Where natural justice has been violated by the administrative authority the High Court will normally refer the matter back and order that the administrative authority first comply with natural justice before deciding upon what action it will take.

If no hearing has taken place in violation of the audi alteram partem principle, the court will order the administrative authority to consider the matter after holding a hearing. If a hearing has taken place but the procedures used violated principles of natural justice, the court will set aside the decision and refer the matter back for a rehearing, usually with directions as to how the administrative authority must conduct the rehearing so as to comply with the principles of natural justice.

In exceptional circumstances the High Court may substitute its own decision for the decision that should have been taken by the administrative authority. The factors that the High Court will take into account in deciding whether to substitute its own decision are–
- the end result is a foregone conclusion and a referral back to the administrative authority would be a waste of time;
- the court is in as good a position as the tribunal or official to make the decision itself;
- further delay would cause unjustifiable prejudice to the applicant;
- the tribunal or official has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.

Other remedies in the Administrative Justice Act

Delays in dealing with matter

Where an administrative authority has failed to take administrative action within the period specified by law, the High Court can direct the administrative authority to take administrative action within the relevant period specified by law.

If there is no period specified by law for taking the administrative action, the administrative authority must take the action within a reasonable period of time and if it fails to do so, the court can order it to take the action within a period fixed by the court.

Failure to give reasons

If the administrative authority fails to supply reasons for its action within the period specified by law, the High Court can direct the administrative authority to supply reasons within the period specified by law.

If the law does not specify the period within which reasons are to be supplied, but an unreasonable period of time has elapsed without reasons being given, the court can direct the administrative authority to supply reasons within a period fixed by the Court.

Giving of directions

The High Court is given the power to make such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with its obligation to render administrative justice.

Directions may include directions not only directions as to the manner or procedure that the administrative authority should adopt in arriving at its decision, but also directions to ensure compliance by the administrative authority with the relevant law or empowering provision.

Interdict

This can be used to prevent the threatened commission or continued commission of an unlawful act such as an unlawful arrest, see Bull v Minister of State (Security) & Ors 1987 (1) SA 422 (ZH) at 426-427; Gosschalk v Roussow 1966 (2) SA 466 (C) and Wood & Ors v Ondangwa Tribal Authority 1975 (2) SA 294 (A).
A final interdict will only be granted if—
- the applicant has a clear legal interest;
- the right has been infringed or there is a reasonable possibility that the rights may be infringed;
- there is no other appropriate legal remedy available; and
- the applicant will suffer irreparable harm if the interdict is refused.

Mandamus

This remedy can be used to require an administrative authority to perform a mandatory statutory duty imposed upon it that it is wrongly refusing to perform, or to require the authority to correct the effects of its unlawful administrative action.

A court will only order an administrative authority to take action where it has a clear statutory duty to take that action and has no discretion in this regard. If the authority has a discretion whether or not to take action, the court may not grant a mandamus ordering it to take action. However, the court may order the authority to exercise its discretion where it is failing to do so. See Baxter Administrative Law p 691 and Tsvangirai & Anor v Registrar-General HH-36-02 at pp. 2-3.

The essential requirements for a mandamus are—
- a clear and definite right;
- an injury actually inflicted or reasonably apprehended; and
- the absence of a similar protection by any other ordinary remedies.

See Tribac (Pvt) Ltd v Tobacco Marketing Board 1996 (2) ZLR 315 (S.)

See also Minister of Home Affairs v York & Anor 1982 (2) ZLR 48 (S); 1982 (4) SA 496 (ZS); Crow v Detained Mental Patients Special Board 1985 (1) ZLR 202 (H); 1985 (4) SA 175 (ZH); Bull v Minister of State (Security) & Ors 1987 (1) SA 422 (ZH)

Spoliation order

This private law action can also be used in the field of public law to obtain restoration of some item, such as a passport, where there has been unlawful dispossession of the item by the public authority, see Donges NO v Dadoo 1950 (2) SA 321 (A).

Interdict de libero homine exhibendo (habeas corpus)

The main purpose of this action is to bring under review the lawfulness of the detention of a person. The detaining authorities holding the person concerned are thus ordered to present the detainee in court in order that the legality of his continued detention can be examined.

Various Supreme Court cases have laid down that this remedy is only applicable in respect of
situations of detention where a pre-requisite of a valid order of detention *ab initio* has not been observed. If the initial detention was valid but some mandatory procedure following detention has not been observed, such as that the detention order must be reviewed within a specified period of time, then the correct remedy is a *mandamus* to oblige the authority to carry out the mandatory procedure.

See *Mandirwhe v Minister of State* 1981 (1) SA 759 (ZS) and *Minister of Home Affairs & Anor v Dabengwa* 1984 (2) SA 345 (ZS) This remedy will only be granted in cases of detention if a pre-requisite for a valid detention is not observed from outset: *Bull v Attorney-General* 1986 (1) ZLR 117 (S) and *Van Wyk v Chief Intelligence Officer, Matabeleland North & Ors* S-101-86.

See also *In re Willem Kok & Anor* (1879) 9 Buch 45; *Ganyile v Minister of Justice* 1962 (1) SA 647 (E).

There can be an appeal against a decision by High Court not to grant this remedy See *Minister of Home Affairs & Anor v Dabengwa* 1984 (2) SA 345 (ZS).

**Declaratory order (Declaration of Rights)**

The court can be approached in advance of potential action by an administrative authority in order for the court to rule on the legality of that action. The declaratory order can be used in order for the court to determine the scope of a statutory duty or the rights of a person in relation to a public authority. The public authority itself can bring this action.

The court will simply declare whether the right or duty exists and/or what the scope is of the duty.

Before the courts will grant such an order there must be a clear legal dispute or legal uncertainty about validity or effect of administrative action.

In *MDC v President Republic of Zimbabwe & Ors* 2007 (1) ZLR 257 (H) the court stated that The power of the High Court to issue declaratory orders is one of the inherent powers that this court has as a Superior Court and which inherent power has been put beyond doubt by provisions of section 14 of the High Court Act [*Chapter 7:06*].

For a declaratory order the applicant must show that–

1. it is an interested person;
2. there is a right or obligation which becomes the object of the inquiry;
3. it is not approaching the court for what amounts to a legal opinion upon an abstract or academic matter;
4. there must be interested parties upon which the declaration will be binding; and
5. considerations of public policy favour the issuance of the declarator.
The court reiterated that a person seeking a declaration of rights must set forth his contention as to what the alleged right is. The contention must refer to a legal right and not the factual basis upon which a right is based.

See also Bulawayo Municipality v Bulawayo Indian Sports Ground Committee 1956 (1) SA 34 (SR); Gelcon Investments (Pvt) Ltd v Adair Properties (Pvt) Ltd 1969 (2) RLR 120; 1969 (3) SA 142 (R); Ex parte Farquhar 1938 TPD 213; Ex p Nell 1963 (1) SA 754 (A)

Baxter pp 702-704 points to the strategic importance of this remedy. He says this remedy has become increasingly popular and that it is particularly useful for the following reasons—

1. It is a less confrontational remedy as it “does not require the parties to do or refrain from doing any specific act, and because it does not directly upset action already undertaken”. It is a more gentle remedy as it enables the parties to adjust their respective positions with less appearance of compulsion. Where a court authority “wishes to avoid inflicting upon the public authority indignity of an interdict, it may simply declare the unlawfulness of the action in question and leave it to the authority to correct the act in whatever manner is necessary to correct the situation.

2. It is particularly useful where the scope of the authority of the public authority is unclear and requires judicial interpretation. A declaratory order will settle the matter and avoid a potential dispute in the future. It can be settled in a more amicable or less authoritative way. This is especially important where the conduct of an individual could be construed as criminal and the person wants to ascertain his or her potential liability in advance.

3. The courts may be prepared to assume jurisdiction to grant this remedy when they would not have jurisdiction to issue a coercive order.

4. This order may be sometimes obtained more expeditiously than any other remedy.

Baxter further points out at p 701-702 that in South Africa, although the courts still refuse to permit declarations concerning purely abstract or hypothetical cases, the courts have shown a tendency to expand the scope of declaratory orders with some judges saying that the scope of this remedy must be liberally construed.

In Zimbabwe the courts have adopted a narrow approach to locus standi and the courts are likely to adopt a similarly restrictive approach to the scope of the declaratory order.

**Damages**

Where a person has suffered financial loss as a result of unlawful action by a public authority the person affected will obviously wish to claim damages for his loss.

Where there has been a breach of a statutory duty by a public authority the primary question is whether the statute was intended to create a civil right of action. The breach of statutory duty allows a person affected thereby to sue if—

- he has suffered damage as a result of such breach;
- he is one of the persons for whose benefit the duty was imposed;
- the harm caused was within the mischief contemplated by the statute;
- the statute has not expressly or impliedly excluded the ordinary civil remedy; and
- the breach of the statute was the proximate cause of the loss.

Where the defendant is a public authority carrying out a function authorised by statute it will not be liable for harm caused by carrying out this function provided that it acts **without negligence**. There may, however, be immunities contained in the empowering legislation for harm negligently inflicted. For the principles that will be applied to decide such a claim, see *Knop v Johannesburg City Council* 1995 (2) SA 1 (A).
Vicarious liability of the State

General

Under the State Liabilities Act [Chapter 8:14], the State can be sued vicariously for delictual and contractual wrongs committed by State employees in the course of their employment. Thus it is provided in s 2 that the State can be sued “where the claim arises or has arisen out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any officer or employee of the State acting in his capacity and within the scope of his authority as such officer or employee, as the case may be.”

Immunities

Section 9 of the State Liabilities Act makes it clear that if any immunity from liability of the State is contained in any statute or a statute lays down special procedures for bringing a claim or special periods within which a claim must be brought, these provisions will still apply. It is important therefore to establish whether any such immunities for the State or any pre-conditions for claiming exist before mounting the action against the State. For example, in terms of s 58 of the Postal and Telecommunications Act [Chapter 12:05] there is immunity from liability for delays in delivery of postal items.

In the case of Nyakabambo v Minister of Justice, Legal and Parliamentary Affairs & Ors 1989 (1) ZLR 96 (H) there was an action against the Attorney-General for unlawful detention and malicious prosecution. The Attorney-General claimed that he was immune from liability for such a civil suit. The court held that the immunity from liability afforded to the Attorney-General by the proviso to s 13(5) of the Constitution is a qualified one; he is immune only if he acts reasonably and without malice and without culpable ignorance or negligence. In so providing the Constitution recognised and adopted the common law’s position on the matter.

Nominal defendant

Section 3 of the State Liabilities Act provides that the Minister or Vice-President in charge of the relevant Ministry or department may be cited as the nominal defendant or respondent in any proceedings against the State.

In terms of s 4 of the Act whenever the President, a Vice-President, a Minister or other public official is sued in his official capacity he must be referred to in his official capacity (i.e. as President, Vice-President, etc.) and not by name.

Actions against President

As regards actions against the President, Order 3 Rule 18 of the High Court Rules provides that “no summons or other civil process of the court may be issued out against the President . . . without the leave of the court upon motion made for that purpose.”
Notice

In terms of s 6 of the State Liabilities Act 60 days’ notice must be given of the intention to claim against the State. This notice must set out the grounds of the claim and, where appropriate and possible, give details of the officials involved and have copies of documents relating to the claim attached to it.

The courts, however, are given the power to condone failure to give the required notice where there has been substantial compliance with the section or where there is no undue prejudice to the State or the officer being sued.

Prescription

In terms of s 70 of the Police Act [Chapter 11.10] and s 196 of the Customs and Excise Act [Chapter 23:02], there is a shortened period of prescription of eight months for bringing actions against the State in respect of the actions of police officers or customs officers. This period also applies in respect of actions against the officers themselves. Sixty days’ notice of the intended action must also be given.

Enforcement of judgment

Section 5 of the State Liabilities Act provides that where a person successfully sues the State and obtains a judgment, the court cannot order execution or attachment against State property but the nominal defendant (that is usually the Minister of State) may cause the judgment debt to be paid out of State funds. As regards the use of contempt proceedings to enforce a judgment, see *Mhora & Anor v Minister of Home Affairs & Anor* 1990 (2) ZLR 236 (H). See also 1987 Vol. 5 Zimbabwe Law Review 26 at 50 and *Chairman, PSC & Ors v ZIMTA & Ors* 1996 (1) ZLR 637 (S)

In the case of *Dingaan Hendrik Nyathi v The MEC, Department of Health, Gauteng and Others* [2008] ZACC 8 the majority of the South African Constitutional Rights ruled that the provision in the South African State Liabilities Act barring execution against of state property unjustifiably limited the right to equal protection of the law contained in section 9(1) of the Constitution and was inconsistent with the constitutional protection of dignity and the right of access to courts. The Court held too, that section 3 also violated the principles of judicial authority, and the principle that the public administration be accountable. The Court therefore upheld the declaration of constitutional invalidity, but suspended the order for 12 months in order to allow parliament to pass legislation that provides for an effective means of enforcement of money judgments against the state.

Actions arising out of contracts with State

In the course of administering the modern State the Government will enter upon a whole range of activities similar to those of ordinary commercial, trading and industrial corporations, and will enter into a wide variety of contracts with organisations outside Government in order to
carry out many of these activities. Provided that the contract was lawfully entered into by the Government official acting on behalf of the State and the official had the capacity to enter into the contract on behalf of the State, in terms of s 2 of the State Liabilities Act [Chapter 8:14] the State can be sued by the other contracting party if the State breaches the contract.

In the case of *Minister of Natural Resources v FC Hume (Pvt) Ltd* 1989 (3) ZLR 55 (S) at 59-60, it was made clear that where the State had concluded an ordinary commercial contract with a private person that contract was binding on the State and the private person could sue the State for specific performance to oblige it to carry out the obligation which it had bound itself by contract to perform. The court said that s 2 of the State Liabilities Act placed the State in the same position as any other party to a contract. The court distinguished a situation where the State enters into a binding contract from that where a Government official purports to contract on behalf of Government where he is not empowered to enter into such a contract on behalf of Government or where a Government official promises at some stage in the future that the Government will enter into a contract with the private individual. As regards a promise to enter a contract in the future see also *Murray v McLean NO* 1969 (2) RLR 541 (H).

Some difficulties are created by the case of *Chairman, PSC v ZIMTA & Ors* 1996 (1) ZLR 637 (S). This case concerned the withdrawal of a bonus from teachers. This had been done in terms of a regulation passed by the PSC that provided that bonuses could be withdrawn or withheld after consultation with the Ministry of Finance. The minority of the court found that in terms of the relevant legislation there was a contractual obligation to pay an annual bonus to the teachers. The majority held that it could not interfere with the regulation passed by the PSC as it was a body set up in terms of the Constitution and was not exercising delegated powers. The Government was the best judge of how government finances should be used and there would be no way in which an order obliging the payment of money to the teachers could be enforced.

The State, however, can raise a special defence to an action for damages for breach of contract, namely that it would no longer be bound by a contract if the public interest would be prejudiced by the continued adherence to that contract. Implicit in this is that in these circumstances the State can resile from the contract with impunity and without having to pay damages. If the enforcement of the contract is incompatible with the advancement of public welfare the contract is not binding upon the State. The contract cannot be allowed to stand if it is incompatible with the purpose for which the power was conferred upon the public official.

In both Zimbabwe and in South Africa, there have been decisions purporting to follow the approach in the English case of *Rederiactiebolaget Amphitrite v The King* [1921] 3 KB 500. What the *Amphitrite* case laid down was that a public authority cannot by contract fetter its discretion to act at a later point in time for the public good and that if a contract it has entered into turns out not to be compatible with the public good, the public good will override the contract. This view was adopted in the various Zimbabwean cases such as *Waterfalls TMB v Minister of Housing* (1957), *Murray v McLean NO* 1969 (2) RLR 541 (H; Commissioner of Police v Wilson* 1981 ZLR 451 (A) 1981 (4) SA 726 (ZAD) 737 See particularly the dissenting judgment of Baron JA and *Tanaka Power (Pvt) Ltd v Acting Minister of Industry & Technology* HH-225-89. Most of these cases, however, were concerned with undertakings from public officials and not ordinary commercial contracts. For instance in the *Waterfalls* case the court decided that a Minister was not bound by an undertaking he had given not to erect buildings in
a particular place. In any event, a public authority may not fetter its future freedom of action by stipulating how it will act in the future, although if an undertaking is given about future action, this may give rise to a legitimate expectation on the part of the person to whom it is given and a procedural right to be heard from first before the undertaking is not honoured.

This principle that contractual arrangements cannot stand in the way of advancement of the public welfare was also adopted in the South African cases of Sachs v Donges NO 1950 (2) SA 265 (A) and Fellner v Minister of the Interior 1954 (4) SA 523 (A).

Where a contract is contrary to the purposes of the statute or it purports to take away the discretion of another decision-maker it is in effect ultra vires the Act and therefore is null and void on this basis.

In the South African case of President of South Africa & Ors v SA Rugby Football Union & Ors President of South Africa & Ors v SA Rugby Football Union & Ors 2000 (1) SA 1 (A) the court adopted the test of whether the contract entered into by the public authority “is wholly incompatible with the discretion conferred upon it.” In this case a contract was entered into between the Minister and a sporting body that the Minister would appoint a task team to investigate certain complaints made against such sporting body and no Commission of Inquiry would be appointed by the President. The court held that this contract was not binding on the Minister or the President.

It would be similar with a contract between the Minister of Foreign Affairs and an individual under which the Minister undertakes to ensure that the individual is appointed as ambassador to a particular country. This contract cannot fetter the President’s constitutional discretion in regard to the appointment of ambassadors.

Where a contract has been entered into in terms of a statute and that statute is later expressly repealed (or the section in terms of which the contract was entered into is repealed), the contract is no longer binding on the State and it can resile from that contract without having to pay contractual damages.

Similarly a benefit previously available under a statute can be removed by subsequent legislation. In Hewlett v Minister of Finance 1981 ZLR 571 (S) under legislation relating to compensation for victims of terrorism, the applicant had been awarded compensation for loss of property but had not yet been paid such compensation. He had also lodged further claims for such loss. Subsequent legislation removed the right to compensation for property loss. The applicant alleged that his constitutional right to property had been violated by this subsequent removal of his right to compensation. The court held that, although debts owed by the State arising from actual awards of compensation constitute property, extinction of a right to in property did not amount to compulsory acquisition property for the purposes of the constitutional provision.

Even where the public good dictates that a contractual agreement entered into by a public official should not be binding if the public good dictates otherwise, it seems only fair that some compensation should be paid to the private party with whom the contract was made and who has suffered loss as a result of the public authority resiling from it. See Baxter pp 323-324 and

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the English case of Robertson v Minister of Pensions [1948] 2 All ER 767. This remedy should apply both where a validly concluded contract has to be varied because of change of circumstances and where a subsequent statute is enacted which invalidates the contract which was validly concluded.

Craig in Administrative Law p 547 says that although the action taken by the public authority is lawful as a public body cannot promise not to interfere with one of its contracts if this is required by the public interest, there should be a remedy that recognises the legality of the public body’s actions, but which nevertheless accepts that compensation should be payable.

**Actions in delict**

Generally, the State is only liable here if the person committing the delict is–

- State employee who is not an independent contractor; and
- the employee is acting in the scope of his employment when he committed the delict.

As regards the first requirement civil servants who are full time employees clearly fall into this category. However, there may be difficulties in deciding whether private persons temporarily employed in certain capacities or especially by parastatals are employees in this sense. Baxter argues at pp 626-629 of his book that the use of the private law model of vicarious liability in the field of public law causes problems and acts as a hindrance to the development of a proper approach to public liability. There is no difficulty where the person committing the delict is an employee in the normal sense and is subject to direct control in his work, e.g. a road worker employed by the City Council, but says Baxter, many administrative officials, especially high ranking officials, exercise personal powers under statute and where this is the case these persons are not acting as employees of the executive but rather on behalf of the executive and the normally understood employer-employee relationship is absent. In practice, however, no great difficulties now arise providing the courts continue to use an approach that plays down the need for control in any direct sense and simply require that the State employee committed the delict in connection with his official duties.

However, in the case of Nyakabambo v Minister of Justice, Legal and Parliamentary Affairs & Ors 1989 (1) ZLR 96 (H) the High Court decided that in an action against the Attorney-General for unlawful detention and malicious prosecution, the Minister had been wrongly joined as a defendant. It reasoned that for the State to be vicariously in delict for the actions of a State official under the State Liabilities Act the civil servant whose acts gave rise to the action must have been subject to the directions and control of the Executive. Where he was instead carrying out a duty entrusted to him by statute and where the Executive had no power to direct or control him in carrying out that duty, he could not be regarded as a servant of the State. In terms of s 76(4) of the Constitution, power and responsibility over all prosecutions in Zimbabwe is vested in the Attorney-General; s 76(4) provides that in exercising these functions the Attorney-General is not subject to the directions or control of any other person or authority. Consequently, the citing of the Minister was a misjoinder.
See also Minister of Police v Gamble 1979 (4) SA 759 (A) (Wrongful arrest by police); Nel & Anor v Minister of Defence 1978 RLR 455 (Liability of State for theft by soldiers); Reid-Daly v Hickman & Ors (1) 1980 ZLR 201 (Liability of Ministry when no action brought against actual perpetrators) and Badenhorst v Minister of Home Affairs 1984 (2) SA 13 (ZS) (Action against State for harm caused by negligent driving of a policeman. The shorter prescription period applied.)

**Damages for unlawful arrest or imprisonment**

If a person is unlawfully arrested or detained by the law enforcement agencies, the State can be sued for damages. This action will obviously not be available if the arrest or detention is lawful either in terms of the provisions of the Criminal Procedure and Evidence Act \[Chapter 9:07\] or some other law.

In Parliament during 1986, the then Prime Minister stated emphatically that the Government would not necessarily feel obliged to pay the damages awarded by the courts in cases of unlawful arrest and detention, and where it felt that the plaintiff did not deserve to receive such damages it would refuse to pay him out of public funds. This statement was made when there was extensive South African destabilisation of Zimbabwe and a state of emergency was in operation. A number of suspected saboteurs and spies sued the State for unlawful arrest and detention. It was in this context that this statement was made and, in a number of such cases at this time, the State refused to pay out compensation awarded by the court. Since the ending of the state of emergency in 1990, it seems that the State has abided by court rulings awarding damages in cases of unlawful arrest and detention and has paid out the damages.

See Mandirwhe v Minister of State 1986 (1) ZLR 1 (S); Granger v Minister of State 1985 (1) ZLR 153 (H); Minister of Home Affairs v Allan 1986 (1) ZLR 263 (S); Makomberedze v Minister of State Security 1986 (1) ZLR 73 (H); 1986 (4) SA 26 (ZH); Chitunga v Minister of Home Affairs HH-261-89 and Stambolie v Commissioner of Police 1989 (3) ZLR 287 (S). See also 1987 Vol. 5 Zimbabwe Law Review 26 at 30-38.

**Damages for malicious arrest or prosecution**

This delict is committed when the defendant maliciously and without reasonable cause brings about the arrest or prosecution of another. The criminal proceedings must have terminated in favour of the plaintiff and prescription only starts to run from the date the charge is withdrawn.


**Breach of statutory duty**
The primary question is whether the statute was intended to create a civil right of action.

The breach of statutory duty allows a person affected thereby to sue if

- he has suffered damage as a result of such breach;
- he is one of the persons for whose benefit the duty was imposed;
- the harm caused was within the mischief contemplated by the statute;
- the statute has not expressly or impliedly excluded the ordinary civil remedy; and
- the breach of the statute was the proximate cause of the loss.

See *Patz v Greene & Co* 1907 TS 427; *Salisbury Bottling Ltd v Central African Bottling Ltd* 1958 (1) SA 750 (FS); *Da Silva v Coutinho* 1971 (3) SA 123 (A); *Tobacco Finance Ltd v Zimnat Insurance* 1982 (1) ZLR 47 (H); 1982 (3) SA 55 (ZH); *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) and *van Buuren v Minister of Transport* 2000 (1) ZLR 292 (H).

Burchell in *Principles of Delict* at p 46 has this helpful comment–

A statute may specifically provide for a civil remedy for damages, specifically provide for a criminal penalty but remain silent on the availability of a civil remedy, remain silent on any means of enforcement or provide for a ‘special’ remedy. Obviously if a statute includes a civil remedy for the enforcement the ordinary principles of liability apply. Where the statute specifically provides for a criminal sanction this does not necessarily exclude the availability of a civil remedy and the intention of the legislature on this matter must be determined. Where the statute remains silent on the means of enforcement it may be presumed that the legislature intended it to be enforceable by ordinary private right of action. Where the statute provides for a ‘special’ remedy there is a strong indication that the legislature intended the special remedy to be the only one.

In the case of *Patz v Greene* 1907 TS 427 the court established the rule that where the legislature intends to protect the interests of a particular group of persons, then if P is part of that group, he or she does not have to prove that he or she has suffered damage, as it will be presumed that he or she has suffered damage. If, on the other hand, the legislature simply wants to protect the general public interest, P must prove that he or she suffered damage.

**Defence of statutory authority**

Even where there is no statutory immunity from liability, there may still be no liability if the public authority or official has acted under statutory authority. Thus, where a statute has authorised the body or official to carry out some function that will infringe upon certain legal rights, the public authority or official cannot be held liable for taking the authorised action; the authorised action cannot be wrongful. This, however, is subject to the proviso that authorisation is given to perform the function in a non-negligent fashion, and if harm is caused as a result of negligent execution of that task there may still be liability. For a detailed treatment of this topic, see Baxter pp 603-615.

On the subject of reform to the law so as to provide compensation for harm caused by non-negligent or lawful administrative action, see Baxter pp 636-642.
State Privilege

Nature of claim

Under common law, it is recognised that if a party to court proceedings seeks discovery of certain documentation or the giving of certain evidence by a witness the State has a right to object to the production of this evidence in the course of a court case on the grounds that the giving of such evidence would be contrary to the public interest. A State privilege claim is a claim made by the State that certain evidence should not be produced because it would prejudice the public interest if it is so produced. Using State privilege, the State may seek to prevent the production of documentary evidence or the giving of oral testimony by a witness. Such a claim can be made in any court case, whether or not the State is a party to those proceedings. If it is a party to the proceedings (as where the State is being sued or the State has brought a criminal prosecution against someone) and the other side requests the discovery of certain documents or the giving of testimony by a certain witness, the State may seek to prevent such evidence from being elicited on the grounds of State privilege. So too, the State can intercede in a civil action between two private citizens in order to try to prevent the eliciting of certain evidence which one side is wishing to have produced, if the State believes that the production of such evidence would adversely affect the public interest.

Content and class claims

A State privilege claim can either be a content claim, that is, a claim that the contents of, say, a particular document are such that it would prejudice the public interest if those contents were to be disclosed in a court case; or a class claim, this is a claim that it would prejudice the public interest if documents falling into a particular class were to be disclosed in court.

Claim in proper form

A State privilege claim must be made in proper form. By this is meant that it must be made by the head of the relevant Ministry, that is, by the Minister or by the head of the department, duly authorised by the Minister. The claim must be made in the form of a sworn affidavit that the Minister, or a person duly authorised by the Minister, has acquainted himself with the information or documents in respect of which the State privilege claim is being made and has satisfied himself that disclosure of such information or documents in a court case would be prejudicial to the public interest. Thus, where privilege is claimed in respect of a whole series of documents, the Minister must have scrutinised all of the documents concerned in order to have made a determination that each and every one of those documents fall into a class of documents in regard to which class there are valid grounds for claiming privilege. If the claim is not made in proper form, the court will order the claim to be so made before it proceeds to consider the merits of the claim itself.

Common law

Once the claim is made in proper form, the question arises as to whether the court is obliged simply to uphold such claim or whether it has the power to examine the claim and to order the
production of the evidence if it considers that the claim is not justified.

In a civil matter, evidence excluded consequent upon a State privilege claim may be vital to the proof of the claim by the litigant against another private individual or the State. In a criminal case, even more drastic consequences can ensue if evidence is withheld on the basis of a State privilege claim. The excluded evidence may be pivotal to the successful advancement of some defence and thus an accused might be convicted, whereas if the evidence had been available, he might have been acquitted.

Previously in both criminal and civil cases, it was provided that when dealing with claims for exclusion of evidence on the ground of public policy, the Zimbabwean courts were enjoined to follow English law as applied by the Supreme Court of Judicature as at 1 June 1927.

When we look at what the English law lays down on the matter of Crown privilege, we see that, at first, the position was that the courts saw themselves as obliged to uphold at face value any Crown privilege claim and they considered that they had no capacity to examine whether the claim was justified by evaluating the merits of the claim and deciding whether or not in fact the disclosure of the information would lead to harm to the public interest.

This was the position adopted by the House of Lords in the case of *Duncan v Cammel, Laird & Co* [1942] AC 624 (HL); [1942] 1 All ER 587. In that case a submarine built by the admiralty sank while on trial. P was the widow of one of the drowned sailors. She brought an action for negligence. She sought the discovery of certain plans relating to the submarine. The admiralty withheld the documents and claimed state privilege.

Later, however, in the case of *Conway v Rimmer* [1968] AC 910 (HL); [1968] 1 All ER 874., the House of Lords ruled that the decision in the *Duncan* case was incorrect insofar as it laid down that the court has always to accept without question a properly made Crown privilege claim. Instead, it said the correct position was that when faced with a Crown privilege claim the court always has a residual discretion to examine the merits of the claim and decide whether the claim is justified; it does not have to accept the claim at face value. Where it is felt to be appropriate, the court can order the production of the documentary evidence to the judge trying the case so that he can scrutinize that documentation and decide whether disclosure is necessary for a fair trial.

In *Burmah Oil v Bank of England* (1980) AC 1090 the British Government claimed privilege for certain documents which it said related to its economic policy in response to the oil crisis. It said that Government had obtained the economic information in confidence from business companies and businesspersons. If it had to disclose these it would have difficulty in obtaining such information in future. The House of Lords inspected the documents in respect of which privilege was been claimed and concluded after doing so that they did not contain material which was necessary for a fair consideration of the case. The court made it clear that it could inspect the documents in order to decide on how to balance interests and to decide whether disclosure is necessary for a fair trial.

In certain cases, it may be quite obvious from the very nature of the claim that it should be upheld without the judge needing to examine the documents himself. This would be the case
where the documentation relates to high-level matters of State such as Cabinet minutes, military secrets and delicate diplomatic negotiations.

The _Conway_ case also made it clear, however, that it would not uphold claims made in respect of low level, routine documentation passing between junior civil servants. Essentially, what the _Conway_ case lays down is that the English courts will evaluate the likely harm which would ensue if the evidence is produced in court and balance that against the harm to litigant’s case which will be caused by the exclusion of the evidence and decide whether, on balance, the claim should be upheld in the public interest.

Based upon the relevant statutory provisions and on general considerations of public policy, it would seem to be clear that the Zimbabwean courts should follow the _Conway_ case. (Even though the law to be applied was that as at 1st June, 1927, as _Conway_ ruled that the _Duncan_ case was wrong, the correct law applicable in 1927 was in fact that laid down in _Conway_.)

There was, however, a conflict in Zimbabwean law on this point. There were a number of cases, including one after the _Conway_ decision that followed the _Duncan_ case. These are ex p _Zelter_ 1951 (2) SA 54 (SR); _Taylor v Prime Minister & Minister of Internal Affairs_ 1954 (3) SA 956 (SR); _Faber v Barrow (1)_ 1963 (1) SA 422 (SR) and _ARNI v Brookes (1)_ 1972 (1) RLR 144 (G).

On the other hand, in the case of _Holman v Lardner-Burke NO_ 1968 (2) RLR 57 (G), the court followed the _Conway_ case and in the most recent case of _Austin & Anor v Minister of State & Ors_ 1986 (1) ZLR 174 (H) the judge followed _Conway_ but without any reference to Zimbabwean case law. (It should be noted, however, that on appeal the Supreme Court ruled that the trial judge was wrong in deciding that the principles of State privilege had application in this case, as there had been no application for discovery of documentation that the State wanted to be kept secret from all but the judge himself, see _Austin & Anor v Minister of State & Ors_ (1986).)

For a detailed survey of the Zimbabwean cases, apart from the _Austin and Harper_ case see Feltoe “State Privilege: A Curious Conflict” 1979 (1) _Zimbabwe Law Journal_ 31.

In the case of _S v Tsvangirai_ 2004 (2) ZLR 210 (H) the High Court dealing with a case of treason was faced with two state privilege claims. It emphatically ruled that the court does not have to accept a state privilege claim at face value but can look behind the claim, examine itself the evidence in chambers and decide whether to order that the evidence be produced.

See _Hambly v The Chief Immigration Officer_ 1995 (2) ZLR 264 (H) on the application of s 18(12) of the Constitution when the Minister issues a certificate that it is not in the public interest for the reasons for an administrative decision to be disclosed.

**Statutory provisions**

**Criminal cases**

Resort to State privilege in criminal cases could lead to far more serious consequences than in
civil cases insofar as the accused could end up being convicted, whereas had he had access to and been able to produce certain evidence excluded by a State privilege claim, he might have been acquitted. Because of this fact, the American courts have gone so far as to rule that if the State undertakes a criminal prosecution, it waives any right it might otherwise have had to claim privilege. It must therefore decide whether to prosecute and to allow disclosure of the official information or decline to prosecute because it wishes to maintain the secrecy of the information. See also US v Andolschek 142 F2d 503 (1944). U S v Grayson 166 F.2d 863, 870 (1948) and Reynolds v US 345 US 1, 12 (1953). In Andolschek at 506 Hand J said--:

While we must accept it as lawful for a department of government to suppress documents, even when they will help determine controversies between their persons, we cannot agree that this should include the suppression of in a criminal prosecution, founded upon those very dealings to which the document relates, and whose criminality they will, or may, tend to exculpate.

McCormick on Evidence (3rd ed 1972 West Publishing) sums up the position in the USA as follows--

Accordingly, in a criminal prosecution the court may give the government the choice of making disclosure of matters of significance to the defense or suffering the dismissal of the proceedings; any executive immunity is waived, and the government cannot as litigant invoke an evidential privilege e.g. for military secrets, while at the same time seeking to proceed affirmatively with respect to its subject matter.

As regards criminal cases the relevant statutory provisions are as follows--

Section 295 Criminal Procedure and Evidence Act [Chapter 9:07] which deals with exclusion of evidence on the grounds of public policy, simply says a witness is not compellable or permitted to give evidence if such witness would not have been compellable or permitted to give evidence if the case were depending in the Supreme Court of Judicature in England. (There is no longer a cut off date of 1 June 1927 in respect of Supreme Court of Judicature decisions.)

Section 296 of the Criminal Procedure and Evidence Act deals specifically with exclusion of evidence on the grounds of State security. These provisions were added in 1976 (ss 46 and 53 of Act 50 of 1976) This section provides that no oral or documentary evidence may be given if the Minister puts in an affidavit to the effect that he has personally considered the evidence and that, in his opinion, this evidence affects the security of the State and disclosure of it would, in his opinion, prejudicially affect the security of the State. This seems to lay down that the court cannot look behind such a claim but has to accept it at face value.

The only case in which State privilege has been claimed in a criminal case in Zimbabwe is during the treason trial of the leader and two other senior officials in a political opposition party. In that case, S v Tsvangirai & Ors 2004 (2) ZLR 210 (H), the Minister of State Security made two State privilege claims. The first was to try to stop the defence from questioning Mr Ben Menashe about the performance by him of the terms of a contract entered into between his
company and the Government of Zimbabwe. The judge ruled as follows–

The first issue, he said, was whether the Ministerial certificate was binding upon the court and had to be accepted at face value or whether the court had the power to look behind the certificate and examine whether the state privilege claim was justifiable in the circumstances. He found that when s 296 was incorporated into the Criminal Procedure and Evidence Act in 1976, it was clear from the Parliamentary debate that the intention of the legislature was to make the Ministerial certificate binding on the court and to preclude the court from looking behind it. However, in 1976 there the constitution was non-justiciable and there was a war situation in which various rights had been suspended. The situation presently was very different. The Bill of Rights of the Constitution is now justiciable and there is a fair trial guarantee in the Constitution. Although there are conflicting decisions on whether the court has the power to look behind a state privilege claim, in the current constitutional environment it should be taken that the court does have such power. In appropriate cases the court would therefore exercise the power to look behind a Ministerial claim of state privilege and examine whether the claim is justifiable by calling the Minister to give evidence in camera. However, in some cases the claims would be accepted at face value.

The difficulty in the present case was that the Minister had sought to claim privilege for a document that had been tendered and introduced into evidence by the State itself. The witness whom the Minister had said should not be compellable to give evidence in relation to the document had already given evidence in relation to this document in response to questions from the State. The State had even indicated that it would supply further information to the defence about payments made in terms of the agreement. Therefore there could no longer be an issue about the admissibility of the document and the compellability of the witness to give evidence in relation to the document, although the concern seemed to be not so much about the status of the document but rather about the public disclosure of what had been done under clause 4(1) of the agreement.

The judge ruled that in the present case there was no need for the court to make further inquiry into whether the state privilege claim was well founded because the matter could be dealt with in terms of s 18(12) of the Constitution and the Courts and Adjudicating Authorities Act. These allow the court to hold proceedings in camera where confidential matters were going to be dealt with. The court would therefore order that only the parties to the proceedings be present and the public be excluded when defence counsel cross examined the witness in relation to these matters and the persons present during the in camera proceedings must not publicly disclose what was said during the closed proceedings. The judge observed that the accused were facing serious charges and justice must be done. Justice would be served by hearing the evidence in camera.

The second claim was made to try to stop questioning of the head of the Department of National Security about payments made to Mr Ben Menashe from a covert account. The court upheld this claim without going behind the claim, saying that the claim related to obvious state security matters and the claim should be upheld.

From this case it is now clear that he court does not have to accept a state privilege made on the grounds of state security claim at face value but can look behind the claim, examine itself the evidence in chambers and decide whether to order that the evidence be produced. It was prepared to look behind the first claim but not the second which related to the secret operations of the intelligence service.

In S v Sithole 1996 (2) ZLR 575 (H) the court ruled that normally, as an essential component of the constitutionally protected right to a fair trial, a person facing a criminal trial is entitled to
have access to witness statements contained in the police docket. If the State seeks to rely on State privilege to prevent the disclosure of this material, it must discharge the onus of establishing that the State interest in keeping the information secret outweighs the right of the accused to a fair trial. It is for the court to decide where the balance of interest lies. In reaching that decision it may be necessary for the court to have sight of the statements of the witnesses. The court decided that in the present case the State had not advanced valid grounds of public policy to justify non-disclosure of the witnesses’ statements and it was clear that the accused had a well-founded apprehension that he would not have a fair trial unless he had access to the statements.

There are less drastic devices available to protect from revelation information of a sensitive nature than totally excluding it. For instance, there are the provisions contained in the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04], which allows proceedings to be held in camera and for restrictions to be placed on publication of certain details of cases.

The question arises whether a person being tried for a criminal offence can receive a fair trial if evidence is excluded in a criminal case because of a State privilege claim. For a detailed investigation of this point see Feltoe “Can there be a fair criminal trial when State privilege is claimed? 2004 Issue No 11 Zimbabwe Human Rights Bulletin 140.

**Civil cases**

Section 10 of the Civil Evidence Act [Chapter 8:01] no longer makes privilege dependent upon the practice before the Supreme Court of the Judicature in England. Instead in civil cases, the court is simply enjoined to decide whether to exclude evidence on the grounds of public interest if the giving of such evidence would be detrimental to the public interest and such detriment would outweigh any prejudice to the parties or to the interests of justice that might be caused by the non-disclosure of the evidence. Public interest is defined to include the security or defence of the State, the proper functioning of the Government, international relations, confidential sources of information relating to enforcement or administration of the law, and the prevention or detection of breaches of the law.

Section 10(4) sets out the considerations the court must take into account for the purpose of determining whether or not any matter should be declared privileged, and in weighing up the balance of interests. These considerations are–

- the likely effect on the public interest if the matter concerned is disclosed; and
- the importance of the matter concerned in relation to the proceedings and the need to do justice to the parties; and
- the nature of the cause of action and the subject matter of the proceedings; and
- any means available to limit the publication of the matter concerned, whether in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04] or otherwise.

Section 50 of the Civil Evidence Act specifically provides that the court may itself examine the evidence itself to determine whether that evidence may be privileged from disclosure.
LEGISLATION

Administrative Court Act [Chapter 7:02]


ARRANGEMENT OF SECTIONS

Section
1. Short title.
2. Interpretation.
3. Establishment and constitution of Administrative Court.
4. Jurisdiction, powers and authority of Court.
5. Presidents and acting Presidents of Court.
6. Assessors.
7. Appointment of Registrar and other officers of Court.
8. Record of proceedings of Court.
9. Proceedings to be in public.
10. Decision of Court.
11. Powers of President of Court sitting alone.
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18. Costs.
19. Appeal from decision of Court.

AN ACT to provide for the establishment, functions and powers of the Administrative Court and to provide for matters incidental thereto or connected therewith.

[Date of commencement: 12th July, 1979.]

1 Short title
This Act may be cited as the Administrative Court Act [Chapter 7:01]

2 Interpretation
In this Act–
“assessor” means an assessor appointed in terms of section six or in terms of any other enactment;
"Court” means the Administrative Court established in terms of section three;
“Minister” means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act;
“pension benefit” means a pension, commutation of pension, gratuity or other like allowance or refund of pension contributions, including any interest payable thereon, for a person in respect of his service as a President of the Court or in respect of any ill-health or injury arising out of and in the course of his official duties or for any spouse, child, dependant or personal representative of such a person in respect of such service, ill-health or injury;
“President of the Court” means the senior President of the Court, a President of the Court or an acting President of the Court referred to in subsection (1) of section five;
[amended by the General Laws Amendment (No.2) Act 2002 promulgated on the 24th January, 2003 - with retrospective effect, in terms of clause 47 - from the 4th February, 2002 - Editor.]
“Registrar” means the Registrar of the Court appointed in terms of section seven.

3 Establishment and constitution of Administrative Court
There is hereby established a court to be known as the Administrative Court which shall, subject to section eleven, consist of—
(a) the Senior President of the Court and such number of Presidents of the Court as the President may consider necessary; and
(b) such assessors as may be provided for in terms of this Act or any other enactment.

4 Jurisdiction, powers and authority of Court
(1) The Court shall have such jurisdiction, powers and authority as may be conferred upon it by this Act or any other enactment.
(2) The Court may, in relation to any matter referred to it in terms of this Act or any other enactment—
(a) in relation to an appeal or review, confirm, vary, reverse or set aside the decision, order or action concerned or refer the matter back to the body, person or authority concerned for further consideration; or
(b) make such determination or order or exercise such powers as may be provided for by any other enactment.

5 Presidents and acting Presidents of Court
(1) The Court shall be presided over by—
(a) a President of the Court who shall be a person appointed, subject to subsection (3), as President of the Court in terms of subsection (1) of section 92 of the Constitution; or
(b) an acting President of the Court appointed, subject to subsection (3), in terms of subsection (1) of section 92 of the Constitution.
(2) A person referred to in subsection (1) shall be appointed on such terms and conditions, including terms and conditions relating to the payment of salary, allowances and pension benefits, as the President, on the recommendation of the Judicial Service Commission, may fix.
(3) A person shall not be qualified for appointment as the President of the Court or acting President of the Court unless he—
(a) is a former judge of the Supreme Court or the High Court; or
(b) is qualified for appointment as a judge of the Supreme Court or the High Court; or
(c) has been a magistrate in Zimbabwe for not less than seven years.

6 Assessors
(1) Subject to this section and except as otherwise provided in any other enactment, the President of the Court may appoint two persons from the appropriate list of persons referred to in subsection (2) to assist him as assessors in determining any matter which is required in terms of this Act or any other enactment to be determined.
(2) The Senior President of the Court or, if there is more than one President of the Court, the most senior of them, shall, with the approval of the Chief Justice, draw up a list of the names of not less than ten persons who, by reason of their ability or experience, may appropriately be assessors and who are otherwise suitable for appointment as such in terms of subsection (1) and may draw up different lists for different classes of cases.
(3) The Senior President of the Court or, if there is more than one President of the Court, the most senior of them, may, with the approval of the Chief Justice, add to or remove from any list drawn up in terms of subsection (2) the name of any person.
(4) An assessor shall, before entering upon his duties for the first time, take an oath before the President of the Court that he will faithfully perform his duties as a member of the Court.
(5) An assessor who is not a person in the full-time employment of the State shall be paid such remuneration and allowances as the Minister, with the consent of the Minister responsible for finance, may fix.

7 Appointment of Registrar and other officers of Court
(1) There shall be a Registrar of the Court who shall be appointed by the Public Service Commission.
(2) The Registrar shall perform such functions as may be assigned to him by or under this Act or any other enactment.

8 Record of proceedings of Court
(1) Subject to rules of court made in terms of section twelve, a record of the proceedings of the Court shall be kept and filed in the office of the Registrar.
(2) Subject to subsection (12) of section 18 of the Constitution, the record kept in terms of subsection (1) shall be accessible to the public and copies thereof may be obtained upon like conditions and upon payment of the same fees as if they were civil records of a court of a magistrate.

9 Proceedings to be in public
Subject to subsection (12) of section 18 of the Constitution, the proceedings of the Court shall be conducted in public unless the parties agree otherwise.

10 Decision of Court
(1) Subject to subsection (2), all questions or matters which are required to be decided by the Court consisting of the President of the Court and assessors shall be decided by a majority of the members thereof:
Provided that, where the opinions of the President of the Court and the assessors are equally divided on any question or matter, the decision of the President of the Court shall be the decision of the Court.
(2) Any matter of law arising for decision at any sitting of the Court and any question arising at any such sitting as to whether a matter for decision is a matter of fact or a matter of law and any question arising at such sitting as to the admissibility of evidence shall be decided by the President of the Court and no assessor of the Court shall have a voice in the decision of any such matter.

11 Powers of President of Court sitting alone
Subject to section 18 of the Constitution and to this Act and except as otherwise provided in any other enactment, a President of the Court sitting without assessors may, whether in chambers or otherwise—
(a) vary, reverse or set aside the decision, order or action that is the subject of the appeal or review or refer the matter back to the body, person or authority responsible for the decision, order or action, if he is satisfied that such a course is not opposed by any of the parties to the appeal or review, including that body, person or authority;
(b) postpone or further postpone the hearing of any matter;
(c) appoint commissioners for the taking of evidence;
(d) authorize the proof of all or any of the facts in a case by affidavit;
(e) on such terms and conditions as to costs or otherwise, as he thinks fit, permit an applicant or appellant to withdraw his application or appeal;
(f) deal with such other matters as may be prescribed in rules of court made in terms of section twelve.

11A Sittings of Court
The Court shall sit at such places and at such times as may be prescribed or as the Senior President of the Court may direct.

[inserted by the General Laws Amendment (No.2) Act 2002 promulgated on the 24th January, 2003 - with retrospective effect, in terms of clause 47 - from the 4th February, 2002 - Editor.]

12 Procedure of Court

(1) Subject to this section, the Senior President of the Court or, if there is more than one President of the Court, the most senior of them, may make rules for the Court providing for–

[amended by the General Laws Amendment (No.2) Act 2002 promulgated on the 24th January, 2003 - with retrospective effect, in terms of clause 47 - from the 4th February, 2002 - Editor.]

(a) the practice, procedure and rules of evidence to be followed, including the determination of any preliminary point in any proceedings;

(b) the service of notices and other documents required for the purpose of any proceedings;

(c) the forms to be used for the purpose of any proceedings;

(d) the fees to be paid in respect of the service or examination of documents and the doing of any other thing by the Registrar or any officer of the Court in connection with any proceedings;

(e) a tariff of fees which may be charged by legal practitioners in respect of any matter relating to the Court;

(f) allowances and other payments to witnesses summoned to give evidence or to produce any book or document in any proceedings;

(g) any other matter which the Presidents consider should be provided for in rules in order to ensure or facilitate the proper dispatch and conduct of the business of the Court.

(2) Rules in terms of subsection (1) may provide for the condonation on good cause shown of any non-compliance therewith.

(3) In any proceedings not covered by rules in terms of subsection (1) or any other enactment–

(a) the rules relating to practice and procedure in the High Court shall, where appropriate, apply; and

(b) in any case not contemplated by rules made in terms of subsection (1) or referred to in paragraph (a), the Court shall act in such manner and on such principles as it deems best fitted to do substantial justice and to effect and carry out the objects and provisions of this Act, and may for that purpose give instructions on the course to be pursued which shall be binding on the parties to the proceedings.

(4) Rules in terms of subsection (1) shall not have effect until they have been approved by the Chief Justice and the Minister and published in a statutory instrument.

13 Representation of parties and consideration of written submissions

(1) Except as otherwise provided in any other enactment, at any hearing before the Court any party may–

(a) appear in person; or

(b) be represented by–

(i) a legal practitioner; or

(ii) any person appointed in writing by such party; or

(c) make written representations to the Court.

(2) For the purposes of determining any matter in terms of the Regional, Town and Country Planning Act [Chapter 29:12] the Court or the President of the Court, as the case may be, shall, whether or not any party appears or is represented, consider any objections or representations made in writing which are relevant thereto.

14 Summoning of witnesses and privileges of witnesses

(1) The Court shall have power to summon witnesses, to call for the production of, and grant inspection of, books and documents and to examine witnesses on oath.

(2) A subpoena for the attendance of witnesses or the production of books or documents shall be signed by the Registrar and served in the manner provided for in rules made in terms of section twelve.
(3) Any person subpoenaed to give evidence or to produce any book or document or giving evidence before the Court shall be entitled to the same privileges and immunities as if he were subpoenaed to attend or were giving evidence at a civil trial in the High Court.

15 Witnesses failing to attend or refusing to be sworn or to give evidence
(1) If any person who has been subpoenaed to give evidence or to produce any book or document before the Court fails to attend or to remain in attendance until duly excused by the Court from further attendance, the President of the Court may—
   (a) if he is satisfied upon oath or by the return of the person charged with the service of the subpoena that the subpoena was duly served upon such person; and
   (b) if no sufficient cause for such failure seems to him to exist;
   issue a warrant, signed by him, for the arrest of such person, and such person shall thereupon be apprehended by any police officer to whom such warrant is delivered and shall be brought before the Court to give his evidence or to produce the book or document.
(2) If any person who has been subpoenaed to give evidence or to produce any book or document before the Court refuses without sufficient cause, the onus of proof whereof shall rest upon him, to be sworn as a witness or, having been sworn, to answer fully and satisfactorily a question lawfully put to him, or to produce any such book or document, the President of the Court may order that person to be removed and detained in custody as if he were a prisoner awaiting trial until the determination of the matter before the Court or until he sooner consents to do what is required of him.
(3) Nothing in this section shall prevent the Court from giving judgment in any case or otherwise disposing of the same in the meantime according to any other sufficient evidence taken but, if such judgment be given or the case be otherwise disposed of, any person committed to prison in terms of subsection (2) shall thereupon be released.
(4) No person shall be bound to produce any document or thing not specified or otherwise sufficiently described in the subpoena unless he actually has it in the Court.
(5) Every person who refuses or fails to comply with subsection (1) or (2) shall be liable, in addition to being committed to prison in terms of subsection (2), to be sentenced summarily by the President of the Court to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.
[amended by Act 22 of 2001, with effect from the 10th September, 2002.]

16 Witness giving false evidence
Any witness who, after being duly sworn, makes a false statement of fact material to any question under investigation before the Court knowing such statement to be false or not knowing or believing it to be true shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.
[amended by Act 22 of 2001, with effect from the 10th September, 2002.]

17 Contempt of Court
If any person wilfully insults the Court or any member thereof during any sitting of the Court or wilfully interrupts the proceedings of the Court or otherwise wilfully disturbs the peace or order of such proceedings, the President of the Court may order that person to be removed and detained in custody as if he were a prisoner awaiting trial until the rising of the Court and such person shall be liable, in addition to such removal and detention, to be sentenced summarily by the President of the Court to a fine not exceeding level three or to imprisonment for a period not exceeding one month or to both such fine and such imprisonment.
[amended by Act 22 of 2001, with effect from the 10th September, 2002.]

18 Costs
(1) Except as otherwise provided in any other enactment, the President of the Court may make such
order as to costs as he may deem fit.
(2) The costs in connection with any proceedings before the Court shall be payable in accordance with the scale of costs for the time being in use in the court of a magistrate in civil cases unless the President of the Court directs that the scale of costs for the time being in use in the High Court shall apply.
(3) Any costs awarded in terms of subsection (1) shall be taxed by the Registrar in terms of subsection (2) and the taxation of such costs shall be subject to review by the President of the Court at the instance of the interested party.

19 Appeal from decision of Court
(1) Subject to subsection (2) and except as otherwise provided in any other enactment, any person who is dissatisfied with any decision of the Court may lodge an appeal with the Supreme Court within the period of twenty-one days immediately following the announcement by the Court of such decision.
(2) Except as otherwise provided in any other enactment, no appeal shall lie from—
(a) any order of the Court or the President of the Court made with the consent of the parties;
(b) an order as to costs only or an interlocutory order or an interlocutory judgment without the leave of the Court or the President of the Court or, if such leave has been refused, without the leave of a judge of the Supreme Court.
(3) Except as otherwise provided in any other enactment in any appeal in terms of subsection (1), the Supreme Court may—
(a) exercise its powers in terms of the Supreme Court of Zimbabwe Act [Chapter 7:13] or take any other course which may lead to the just, speedy and, as far as possible, inexpensive settlement of the matter;
(b) make such order as to costs as it may deem just.

Administrative Justice Act [Chapter 10:28]

Act 12/2004
ARRANGEMENT OF SECTIONS
Sections
1. Short title.
2. Interpretation and application.
3. Duty of administrative authorities.
4. Relief against administrative authorities.
5. Determining factors.
6. Application for and issue of order to supply reasons.
7. Discretion to entertain applications.
8. Discretion to refuse or to restrict supply of reasons.
10. Minister may make regulations.
11. Application of Act to certain administrative authorities or actions limited or excluded.
Schedule: Administrative Actions in Respect of which Application of Sections 3(1) (c), 3(2) and 6 Excluded or Qualified.
ACT
To provide for the right to administrative action and decisions that are lawful, reasonable and procedurally fair; to provide for the entitlement to written reasons for administrative action or decisions; to provide for relief by a competent court against administrative action or decisions contrary to the provisions of this Act; and to provide for matters connected with or incidental to the foregoing.
ENACTED by the President and the Parliament of Zimbabwe.
[Date of commencement: 3rd September, 2004]
1 Short title
This Act may be cited as the Administrative Justice Act [Chapter 10:28].

2 Interpretation and application
(1) In this Act—
“administrative action” means any action taken or decision made by an administrative authority, and the words “act”, “acting” and “actions” shall be construed and applied accordingly;
“administrative authority” means any person who is—
(a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or
(b) a committee or board appointed by or in terms of any enactment; or
(c) a Minister or Deputy Minister of the State; or
(d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty;
and who has the lawful authority to carry out the administrative action concerned;
“empowering provision” means a written law or rule of common law, or an agreement, instrument or other document in terms of which any administrative action is taken;
“Minister” means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may from time to time assign the administration of this Act;
“parastatal” means a body established under an enactment for special purposes specified in the enactment;
“uniformed force” means—
(a) the Defence Forces as defined in subsection (1) of section 2 of the Defence Act [Chapter 11:02]; or
(b) the Police Force as defined in section 2 of the Police Act [Chapter 11:10]; or
(c) the Prison Service as defined in section 2 of the Prisons Act [Chapter 7:11].
(2) The provisions of this Act shall be construed as being in addition to, and not as limiting, any other right to appeal against, bring on review or apply for any other form of relief in respect of any administrative action to which this Act applies.

3 Duty of administrative authority
(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
(a) act lawfully, reasonably and in a fair manner; and
(b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
(c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.
(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—
(a) adequate notice of the nature and purpose of the proposed action; and
(b) a reasonable opportunity to make adequate representations; and
(c) adequate notice of any right of review or appeal, where applicable.
(3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if—
(a) the enactment under which the decision is made expressly provides for any of the matters
referred to in those subsections so as to vary or exclude any of their requirements; or
(b) the departure is, under the circumstances, reasonable and justifiable, in which case the
administrative authority shall take into account all relevant matters, including:
(i) the objects of the applicable enactment or rule of common law;
(ii) the likely effect of its action;
(iii) the urgency of the matter or the urgency of acting thereon;
(iv) the need to promote efficient administration and good governance;
(v) the need to promote the public interest.

4 Relief against administrative authorities
(1) Subject to this Act and any other law, any person who is aggrieved by the failure of an
administrative authority to comply with section three may apply to the High Court for relief.
(2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be
appropriate–
(a) confirm or set aside the decision concerned;
(b) refer the matter back to the administrative authority concerned for consideration or
reconsideration;
(c) direct the administrative authority to take administrative action within the relevant period
specified by law or, if no such period is specified, within a period fixed by the High Court;
(d) direct the administrative authority to supply reasons for its administrative action within the
relevant period specified by law or, if no such period is specified, within a period fixed by the High
Court;
(e) give such directions as the High Court may consider necessary or desirable to achieve
compliance by the administrative authority with section three.
(3) Directions given in terms of subsection (2) may include directions as to the manner or procedure
which the administrative authority should adopt in arriving at its decision, and directions to ensure
compliance by the administrative authority with the relevant law or empowering provision.
(4) The High Court may at any time vary or revoke any order or direction given in terms of subsection
(2).

5 Determining factors
For the purposes of determining whether or not an administrative authority has failed to comply with
section three the High Court may have regard to whether or not–
(a) the administrative authority has jurisdiction in the matter;
(b) the enactment under which the action has been taken authorises the action;
(c) a material error of law or fact has occurred;
(d) a power has been exercised for a purpose other than that for which the power was conferred;
(e) fraud, corruption or favour or disfavour was shown to any person on irrational grounds;
(f) bad faith has been exercised;
(g) a discretionary power has been improperly exercised at the direction, behest or request of
another person;
(h) a discretionary power has been exercised in accordance with a direction as to policy without
regard to the merits of the case in question;
(i) a power has been exercised in a manner which constitutes an abuse of that power;
(j) the action taken is so unreasonable that no reasonable person would have taken it;
(k) there is any evidence or other material which provides a reasonable or rational foundation to
justify the action taken;
(l) an irrelevant matter has been taken into account;
(m) a relevant matter has not been taken into account;
(n) a breach of the rules of natural justice, where applicable, has occurred;
(o) the procedures specified by law have been followed;
(p) any departure from the requirements of section three is, in the circumstances, reasonable and justifiable.

6 Application for and issue of order to supply reasons
(1) Subject to this Act and any other enactment, any person—
   (a) whose rights, interests or legitimate expectations are materially and adversely affected by any administrative action; or
   (b) who is entitled to apply for relief in terms of section four;
and who is aggrieved by the failure of an administrative authority to supply written reasons for the action concerned within—
   (i) the period specified in the relevant enactment; or
   (ii) in the absence of any such specified period, a reasonable period after a request for such reasons has been made;
may apply to the High Court for an order compelling the administrative authority to supply reasons.
(2) Upon an application being made to it in terms of subsection (1) the High Court may, if it is satisfied that there has been a failure by the administrative authority concerned to supply any or adequate reasons for an administrative action, issue an order directing the administrative authority to supply written reasons to the applicant within such period as may be specified by the High Court.
(3) Where an administrative authority fails to comply with an order in terms of subsection (2), it shall be presumed, in the absence of proof to the contrary, that the administrative action concerned constituted an improper exercise of the power conferred by the relevant law or empowering provision.
(4) The High Court may at any time vary or revoke an order made in terms of subsection (2).

7 Discretion to entertain applications
Without limitation to its discretion, the High Court may decline to entertain an application made under section four, if the applicant is entitled to seek relief under any other law, whether by way of appeal or review or otherwise, and the High Court considers that any such remedy should first be exhausted.

8 Discretion to refuse or to restrict supply of reasons
(1) Without limitation to its discretion, the High Court may decline to issue an order in terms of section six, or may direct that disclosure of any reasons shall be limited or restricted, if it considers that—
   (a) it would be contrary to the public interest for such reasons to be disclosed; or
   (b) the failure to supply reasons by the administrative authority was reasonable and justifiable in the circumstances.
(2) For the purposes of determining any matter referred to in subsection (1) the High Court may—
   (a) direct that the reasons concerned be disclosed privately to the High Court for its consideration; or
   (b) after examination of reasons which have been privately disclosed to it, edit the reasons in such manner or to such extent as the High Court considers best suited to preserve the public interest and to serve the interests of the applicant concerned; or
   (c) consider whether disclosure should be limited or restricted in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04] or otherwise.
(3) For the purpose of subsection (1) but without limiting its meaning, “public interest” includes matters that relate to—
   (a) the security or defence of the State; or
   (b) the proper functioning of the Government; or
   (c) the maintenance of international relations; or
   (d) confidential sources of information pertaining to the enforcement or administration of the law; or
(e) the prevention or detection of offences or contraventions of the law.

9 Intervention by Attorney-General
In any proceedings brought under this Act the Attorney-General shall be entitled to be heard by the court and, whether or not he or she has exercised such right, the Attorney-General shall have the same right of appeal relating to such proceedings as if he or she had been a party to the proceedings.

10 Minister may make regulations
(1) The Minister may make regulations providing for any matter which he or she considers necessary or desirable for giving effect to the provisions of this Act.
(2) Regulations made in terms of subsection (1) may provide for—
(a) the form and manner in which applications in terms of this Act shall be made;
(b) the period within which applications in terms of this Act shall be made.

11 Application of Act to certain administrative authorities or actions limited or excluded
(1) The following provisions—
(a) paragraph (c) of subsection (1) of section three; and
(b) subsection (2) of section three; and
(c) section six;
shall not apply to any of the administrative actions specified in Part I of the Schedule.
(2) The following provisions—
(a) paragraph (c) of subsection (1) of section three; and
(b) section six;
shall not apply to any of the administrative actions specified in Part II of the Schedule.
(3) An application may be made to the High Court in terms of subsection (1) of section six for an order compelling the administrative authority concerned to supply reasons for any administrative action referred to in subsection (2) on the basis that no apparent public interest is served by withholding from the applicant the reasons for the action, but the Court shall not make any order on the application before directing that the reasons be disclosed privately to the Court for its consideration.
(4) After examination of the reasons which have been privately disclosed to it under subsection (3), the High Court may, subject to subsection (5)—
(a) issue an order directing the administrative authority to supply written reasons to the applicant within such period as may be specified by the Court; or
(b) edit the reasons in such manner or to such extent as the Court considers best suited to preserve the public interest and to serve the interests of the applicant concerned and issue an order directing the administrative authority to supply such edited reasons to the applicant within such period as may be specified by the Court; or
(c) decline to issue the order sought by the applicant.
(5) The High Court shall not make an order in terms of subsection (1) of section six compelling the supply of reasons for any administrative action referred to in subsection (2) if a Minister responsible in respect of the exercise of such action produces to the Court a certificate to the effect that such supply of reasons is contrary to the public interest on any of the grounds specified in subsection (3) of section eight or on any other grounds related to the public interest as the Minister shall specify in the certificate.
(6) The Minister may by notice in a statutory instrument amend the Schedule by adding or deleting any item in Part I of Part II of that Schedule or by altering any item when he or she deems it necessary or desirable to do so in the public interest.
(7) The Minister shall, on the next sitting day of Parliament after he or she makes a statutory instrument in terms of subsection (6), lay it before Parliament, and the statutory instrument shall come into effect on the thirtieth day after the date on which it was laid before it unless Parliament earlier resolves to annul the statutory instrument.
ADMINISTRATIVE ACTIONS IN RESPECT OF WHICH APPLICATION OF SECTIONS 3(1) (C), 3(2) AND 6 EXCLUDED OR QUALIFIED

PART I
ACTIONS TO WHICH SECTIONS 3(1) (C), 3(2) AND 6 DO NOT APPLY
1. Any exercise or performance of the executive powers or functions of the President or Cabinet.
2. Decisions to institute or continue or discontinue criminal proceedings and prosecutions.
3. Decisions relating to the appointment of judicial officers.

PART II
ACTIONS IN RESPECT OF WHICH APPLICATION OF SECTION 3(1) (C) MAY BE QUALIFIED
Any disciplinary action taken in terms of the following Acts:
(a) Defence Act [Chapter 11:02];
(b) Police Act [Chapter 11:10];
(c) Prisons Act [Chapter 7:11].

Promotion of Administrative Justice Act (South Africa Act No 3 of 2000)
As Amended by the Judicial Matters Amendment Act No 42 of 2001 and the Promotion of Administrative Justice Amendment Act No 53 of 2001

TO give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto.

PREAMBLE
WHEREAS section 33(1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons;
AND WHEREAS section 33(3) of the Constitution requires national legislation to be enacted to give effect to those rights, and to-
➢ provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
➢ impose a duty on the state to give effect to those rights; and
➢ promote an efficient administration;
AND WHEREAS item 23 of Schedule 6 to the Constitution provides that the national legislation envisaged in section 33(3) must be enacted within three years of the date on which the Constitution took effect;
AND IN ORDER TO–
➢ promote an efficient administration and good governance; and
➢ create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:–

Definitions
1. In this Act, unless the context indicates otherwise–
“administrative action” means any decision taken, or any failure to take a decision, by—
(a) an organ of state, when—
(i) exercising a power in terms of the Constitution 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—
(aa) the executive powers or functions of the National Executive, including the powers or
functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), m, (g), (h), (i) and (k),
85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the
Constitution;
(bb) the executive powers or functions of the Provincial Executive, including the powers or
functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2),
133(3)(b), 137,138, 139 and 145(1) of the Constitution;
(cc) the executive powers or functions of a municipal council;
(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the
Constitution or of a Special Tribunal established under section 2 of the Special Investigating
Units and Special 15 Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a
traditional leader under customary law or any other law;
(ff) a decision to institute or continue a prosecution;
(gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the
Judicial Service Commission;
(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion
of Access to Information Act, 2000; or
(ii) any decision taken, or failure to take a decision, in terms of section 4(l);

“administrator” means an organ of state or any natural or juristic person taking administrative action;
“court” means—
(a) the Constitutional Court acting in terms of section 167(6)(a) of the 30 Constitution; or
(b) (i) a High Court or another court of similar status; or
(ii) a Magistrate’s Court, either generally or in respect of a specified class of administrative actions,
designated by the Minister by notice in the Gazette and presided over by a magistrate or an
additional magistrate designated in terms of section 9A,
within whose area of jurisdiction the administrative action occurred or the administrator has his
or her or its principal place of administration or the party whose rights have been affected is domiciled
or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced;
“decision” means any decision of an administrative nature made, proposed to be made, or required to be
made, as the case may be, under an empowering provision, including a decision relating t-
(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or
permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
(d) imposing a condition or restriction;
(e) making a declaration, demand or requirement;
(f) retaining, or refusing to deliver up, an article; or
(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to
a failure to take a decision must be construed accordingly;
“empowering provision” means a law, a rule of common law, customary law, or an agreement,
instrument or other document in terms of which an administrative action was purportedly taken;
“failure”, in relation to the taking of a decision, includes a refusal to take the decision;
“Minister” means the Cabinet member responsible for the administration of justice;
“organ of state” bears the meaning assigned to it in section 239 of the Constitution;
“prescribed” means prescribed by regulation made under section 10;
“public”, for the purposes of section 4, includes any group or class of the public;
“this Act” includes the regulations; and
“tribunal” means any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act.

2 Application of Act.
(1) The Minister may, by notice in the Gazette—
(a) if it is reasonable and justifiable in the circumstances, exempt an administrative action or a group or class of administrative actions from the application of any of the provisions of section 3, 4 or 5; or
(b) in order to promote an efficient administration and if it is reasonable and justifiable in the circumstances, permit an administrator to vary any of the requirements referred to in section 3(2), 4(1)(a) to (e), (2) and (3) or 5(2), in a manner specified in the notice.

Any exemption or permission granted in terms of subsection (1) must, before publication in the Gazette, be approved by Parliament.

3. Procedurally fair administrative action affecting any person.
(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.
(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—
(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her discretion, also give a person referred to in subsection (1) an opportunity to—
(a) obtain assistance and, in serious or complex cases, legal representation;
(b) present and dispute information and arguments; and
(c) appear in person.

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—
(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.
4. Administrative action affecting public

(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—

(a) to hold a public inquiry in terms of subsection (2);
(b) to follow a notice and comment procedure in terms of subsection (3);
(c) to follow the procedures in both subsections (2) and (3);
(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
(e) to follow another appropriate procedure which gives effect to section 3.

(2) If an administrator decides to hold a public inquiry—

(a) the administrator must conduct the public inquiry or appoint a suitably qualified person or panel of persons to do so; and
(b) the administrator or the person or panel referred to in paragraph (a) must—

(i) determine the procedure for the public inquiry, which must—

(aa) include a public hearing; and
(bb) comply with the procedures to be followed in connection with public inquiries, as prescribed;

(ii) conduct the inquiry in accordance with that procedure;
(iii) compile a written report on the inquiry and give reasons for any administrative action taken or recommended; and
(iv) as soon as possible thereafter—

(aa) publish in English and in at least one of the other official languages in the Gazette or relevant provincial Gazette a notice containing a concise summary of any report and the particulars of the places and times at which the report may be inspected and copied; and
(bb) convey by such other means of communication which the administrator considers effective, the information referred to in item (aa) to the public concerned.

(3) If an administrator decides to follow a notice and comment procedure, the administrator must—

(a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
(b) consider any comments received;
(c) decide whether or not to take the administrative action, with or without changes; and
(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1)(a) to (e), (2) and (3).
(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account relevant factors, including—

(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.

5. Reasons for administrative action

(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

(4) (a) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;
(ii) the nature, purpose and likely effect of the administrative action concerned;
(iii) the nature and the extent of the departure;
(iv) the relation between the departure and its purpose;
(v) the importance of the purpose of the departure; and
(vi) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

(6) (a) In order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the Gazette publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section.

(b) The Minister must, within 14 days after the receipt of a request referred to in paragraph (a) and at the cost of the relevant administrator, publish such list, as contemplated in that paragraph.

6. Judicial review of administrative action

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if—

(a) the administrator who took it—

(i) was not authorised to do so by the empowering provision;
(ii) acted under a delegation of power which was not authorised by the empowering provision; or
(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair

(d) the action was materially influenced by an error of law;

(e) the action was taken

(i) for a reason not authorised by the empowering provision;
(ii) for an ulterior purpose or motive;
(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
(iv) because of the unauthorised or unwarranted dictates of another person or body;
(v) in bad faith; or
(vi) arbitrarily or capriciously;

(f) the action was taken—

the action itself—

(i) contravenes a law or is not authorised by the empowering provision; or
(ii) is not rationally connected to—
(a) the purpose for which it was taken;
(b) the purpose of the empowering provision;
(c) the information before the administrator; or
(d) the reasons given for it by the administrator;
(g) the action concerned consists of a failure to take a decision;
(h) the exercise of the power or the performance of the function authorised by the empowering
 provision, in pursuance of which the administrative action was purportedly taken, is so
 unreasonable that no reasonable person could have so exercised the power or performed the
 function; or
(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect
 of a failure to take a decision, where—
(a) (i) an administrator has a duty to take a decision;
(ii) there is no law that prescribes a period within which the administrator is required to take that
decision; and
(iii) the administrator has failed to take that decision,
institute proceedings in a court or tribunal for judicial review of the failure to
take the decision on the ground that there has been unreasonable delay in taking the decision; or
(b) (i) an administrator has a duty to take a decision;
(ii) a law prescribes a period within which the administrator is required to take that decision; and
(iii) the administrator has failed to take that decision before the expiration of that period,
institute proceedings in a court or tribunal for judicial review of the failure to
take the decision within that period on the ground that the administrator has a duty to take the decision
notwithstanding the expiration of that period.

7. Procedure for judicial review

(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable
delay and not later than 180 days after the date—
(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal
remedies as contemplated in subsection (2)(a) have been concluded;
(b) where no such remedies exist, on which the person concerned was informed of the
administrative action, became aware of the action and the reasons for it or might reasonably
have been expected to have become aware of the action and the reasons.

(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in
terms of this Act unless any internal remedy provided for in any other law has first been
exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal
remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must
first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review
in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person
concerned, exempt such person from the obligation to exhaust any internal remedy if the court
or tribunal deems it in the interest of justice.

(3) The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law
Act, 1985 (Act No. 107 of 1985), must within one year after the date of commencement of this Act,
make and implement rules of procedure for judicial review.

(4) Before the implementation of the rules of procedure referred to in subsection (3), all proceedings for
judicial review must be instituted in a High Court or the Constitutional Court.

(5) Any rule made under subsection (3) must, before publication in the Gazette, be approved by
8. Remedies in proceedings for judicial review
(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—
(a) directing the administrator—
(i) to give reasons; or
(ii) to act in the manner the court or tribunal requires;
(b) prohibiting the administrator from acting in a particular manner;
(c) setting aside the administrative action and—
(i) remitting the matter for reconsideration by the administrator, with or without directions; or
(ii) in exceptional cases—
(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
(bb) directing the administrator or any other party to the proceedings to pay compensation;
(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
(e) granting a temporary interdict or other temporary relief or
(f) as to costs.
(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders—
(a) directing the taking of the decision;
(b) declaring the rights of the parties in relation to the taking of the decision;
(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
(d) as to costs.

9. Variation of time
(1) The period of—
(a) 90 days referred to in section 5 may be reduced; or
(b) 90 days or 180 days referred to in sections 3 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.

9A. Designation and training of presiding officers.
(1) (a) The head of an administrative region defined in section 1 of the Magistrates’ Court Act, 1944 (Act No. 32 of 1944), must, subject to subsection (2), designate in writing any magistrate or additional magistrate as a presiding officer of the Magistrates’ Court designated by the Minister in terms of section 1 of this Act.
   (b) A presiding officer must perform the functions and duties and exercise the powers assigned to or conferred on him or her under this Act or any other law.
(2) Only a magistrate or additional magistrate who has completed a training course—
   (a) before the date of commencement of this section; or
   (b) as contemplated in subsection (5),
and whose name has been included on the list contemplated in subsection (4)(a), may be designated in terms of subsection (1).
(3) The head of administrative regions must—

(a) take all reasonable steps within available resources to designate at least one presiding officer for each magistrate’s court within in his or her area of jurisdiction which has been designated by the Minister in terms of section 1; and

(b) without delay, inform the Director-General: Justice and Constitutional Development of any magistrate or additional magistrate who has completed a training course as contemplated in subsections (5) and (6) or who has been designated in terms of subsection (1).

(4) The Director-General: Justice and Constitutional Development must compile and keep a list of every magistrate or additional magistrate who has—

(a) completed a training course as contemplated in subsections (5) and (6); or

(c) been designated as a presiding officer of a magistrate’s court contemplated in subsection (1).

(5) The Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses with the view to building a dedicated and experienced pool of trained and specialised presiding officers for purposes of presiding in court proceedings as contemplated in this Act.

(6) The Minister must table a report in Parliament, as prescribed, relating to the content and implementation of the training courses referred to in subsections (5) and (6).

10. Relations

(1) The Minister must make regulations relating to—

(a) the procedures to be followed by designated administrators or in relation to classes of administrative action in order to promote the right to procedural fairness;

(b) the procedures to be followed in connection with public inquiries;

(c) the procedures to be followed in connection with notice and comment procedures;

(d) the procedures to be followed in connection with requests for reasons; and

(e) a code of good administrative conduct in order to provide administrators with practical guidelines and information aimed at the promotion of an efficient administration and the achievement of the objects of this Act.

(2) The Minister may make regulations relating to—

(a) the establishment, duties and powers of an advisory council to monitor the application of this Act and to advise the Minister on—

(i) the appropriateness of publishing uniform rules and standards which must be complied with in the taking of administrative actions, including the compilation and maintenance of registers containing the text of rules and standards used by organs of state;

(ii) any improvements that might be made in respect of internal complaints procedures, internal administrative appeals and the judicial review by courts or tribunals of administrative action;

(iii) the appropriateness of establishing independent and impartial tribunals, in addition to the courts, to review administrative action and of specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action;

(iv) the appropriateness of requiring administrators, from time to time, to consider the continuance of standards administered by them and of prescribing measures for the automatic lapsing of rules and standards;

(v) programmed for educating the public and the members and employees of administrators regarding the contents of this Act and the provisions of the Constitution relating to administrative action;

(vi) any other improvements aimed at ensuring that administrative action conforms with the right to administrative justice;

(vii) any steps which may lead to the achievement of the objects of this Act; and

(viii) any other matter in respect of which the Minister requests advice;
(b) the compilation and publication of protocols for the drifting of rules and standards;
(c) the initiation, conducting and co-ordination of programmed for educating the public and the members and employees of administrators regarding the contents of this Act and the provisions of the Constitution relating to administrative action;
(d) matters required or permitted by this Act to be prescribed; and
(e) matters necessary or convenient to be prescribed in order to—
(i) achieve the objects of this Act or
(ii) subject to subsection (3), give effect to any advice or recommendations by the advisory council referred to in paragraph (a).

(3) This section may not be construed as empowering the Minister to make regulations, without prior consultation with the Public Service Commission, regarding any matter which may be regulated by the Public Service Commission under the Constitution or any other law.

(4) Any regulation—
(a) made under subsections (1)(a), (b), (c) and (d) and (2)(c), (d) and (e) must, before publication in the Gazette, be submitted to Parliament; and
(b) made under subsection (1)(e) and (2)(a) and (b) must, before publication in the Gazette, be approved by Parliament.

(5) Any regulation made under subsections (1) and (2) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(6) The regulations contemplated in subsection (1)(e) must be approved by Cabinet and must be made within two years after the commencement of this Act.

11. Short title and commencement
This Act is called the Promotion of Administrative Justice Act, 2000, and comes into operation on a date fixed by the President by proclamation in the Gazette. (Commenced operation on 30 November 2000)
PART IV
PROCEDURE AND MANNER OF INVESTIGATIONS BY PUBLIC PROTECTOR

12. Manner of making complaint.
13. Complaint by person in mental institution.
14. Refusal to investigate.
15. Manner of conducting investigation.
17. Reports by Public Protector.
18. Reports, etc., of Public Protector to be privileged.

FIRST SCHEDULE: Forces, Services, Institutions, Authorities and Bodies Subject to Investigation.

SECOND SCHEDULE: Officers and Authorities Excluded from Investigation.

AN ACT to make provision for the Public Protector, the Deputy Public Protector and the staff of the Public Protector; to provide for their powers, duties and procedures; and to provide for matters incidental to or connected with the foregoing.

[Date of commencement: 10th September, 1982.]

WHEREAS sections 107 and 108 of the Constitution provide—

107 (1) There shall be an Public Protector and, where the President has deemed it desirable, a Deputy Public Protector, whose offices shall be public offices but shall not form part of the Public Service.
(2) The Public Protector and Deputy Public Protector shall be appointed by the President after consultation with the Judicial Service Commission.
(2a) If the appointment of an Public Protector or Deputy Public Protector is not consistent with any recommendation made by the Judicial Service Commission, the President shall cause Parliament to be informed as soon as is practicable.
(3) The Deputy Public Protector shall—
(a) assist the Public Protector in the exercise of his functions and duties and the Public Protector may authorize him to exercise any of his functions or duties on his behalf;
(b) act as Public Protector whenever the office of the Public Protector is vacant or the Public Protector is for any reason unable to perform the functions of his office.
(4) An Act of Parliament may make provision for the qualifications and remuneration of the Public Protector and the Deputy Public Protector.

108 (1) The Public Protector may investigate action taken by any officer or authority referred to in subsection (2) in the exercise of the administrative functions of that officer or authority in any case where it is alleged that a person has suffered injustice in consequence of that action and it does not appear that there is any remedy reasonably available by way of proceedings in a court or on appeal from a court.
(2) Subject to such exceptions and conditions as may be prescribed by or under an Act of Parliament, the provisions of subsection (1) shall apply in respect of any action taken by the following officers and authorities—
(a) any Ministry or department or any member of such Ministry or department; and
(b) such other persons or authorities as may be prescribed by or under an Act of Parliament for the purposes of this paragraph.
(3) An Act of Parliament may confer other functions on the Public Protector, and may make provision for the exercise of his functions including, without prejudice to the generality of the foregoing, the officers and authorities whose actions are not subject to investigation by him.

NOW, THEREFORE, be it enacted as follows:—

PART I
PRELIMINARY

1 Short title
This Act may be cited as the Public Protector Act [Chapter 10:18].

2 Interpretation
In this Act—
“action” includes failure to act;
“local authority” means a municipal council, town council, local board or rural district council;
“Minister” means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act;
“Public Protector”, in relation to any function exercisable by the Deputy Public Protector in terms of subsection (3) of section 107 of the Constitution, includes the Deputy Public Protector;
“pension benefit” means a pension, commutation of pension, gratuity or other like allowance or refund of pension contributions, including any interest payable thereon, for a person in respect of his service as the Public Protector or the Deputy Public Protector or in respect of any ill-health or injury arising out of and in the course of his official duties or for any spouse, child, dependant or personal representative of such a person in respect of such service, ill-health or injury;
“resident of Zimbabwe” means a person who in terms of the law is permitted to enter, be or remain in Zimbabwe but does not include a visitor to Zimbabwe;
“statutory body” means any corporate body established by or in terms of any enactment for special purposes and includes any company which is a subsidiary determined in accordance with section 143 of the Companies Act [Chapter 24:03] of such body.

PART II
PUBLIC PROTECTOR AND HIS STAFF

3 Qualifications of Public Protector and Deputy Public Protector
(1) A person shall not be qualified for appointment as the Public Protector or the Deputy Public Protector unless—
(a) he is or has been a judge in Zimbabwe or in a court having unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English and English is an official language; or
(b) he is and has been for not less than seven years, whether continuously or not, qualified to practise as a legal practitioner—
(i) in Zimbabwe; or
(ii) in a country in which the common law is Roman-Dutch or English and English is an official language;
or
(c) he is or has been a regional magistrate in terms of the Magistrates Court Act [Chapter 7:10]; or
(d) he is or has been a Secretary of the Cabinet or of a Ministry; or
(e) in the opinion of the President he is a person of ability and experience and distinguished in the public life of Zimbabwe.
(2) In computing, for the purposes of paragraph (b) of subsection (1), the period during which any person has been qualified to practise as a legal practitioner, any period during which he has held judicial office after having so qualified shall be included, and the reference therein to a legal practitioner shall include a reference to persons in other jurisdictions who are legal practitioners or who have comparable functions.
(3) A person shall not be qualified to be appointed or to hold office as the Public Protector or the Deputy Public Protector if—
(a) subject to subsection (3) of section eight, he performs the functions of any other public office; or
(b) he holds any other paid office or employment; or
(c) he is a director, consultant or adviser of any corporate body or partnership.
(4) A person, before assuming the office of Public Protector or Deputy Public Protector, shall declare in writing to the President if he has any financial, commercial or other interests that might conflict with his duties and responsibilities in his office as Public Protector or Deputy Public Protector, as the case may be, and shall likewise declare any such interests if he acquires them after assuming his office.

4 Terms of office of Public Protector and Deputy Public Protector

(1) The Public Protector shall vacate his office at the expiration of five years from the date of his appointment but shall be eligible for re-appointment for one or more further terms of office, each of which shall not exceed three years, as may be determined by the President.

(2) The Public Protector or the Deputy Public Protector shall retire when he attains the age of sixty-five years unless, before he attains that age, he has elected to retire on attaining the age of seventy years:
Provided that—

(i) an election under this subsection shall be subject to the submission to, and acceptance by, the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the Public Protector or the Deputy Public Protector, as the case may be, so to continue in office;

(ii) this subsection shall not apply to an acting Deputy Public Protector.

(3) The Public Protector and the Deputy Public Protector may at any time resign their offices by notice in writing to the President.

(4) The Public Protector or the Deputy Public Protector may, notwithstanding that he has ceased to hold office, complete any investigation commenced by him while in office:
Provided that this subsection shall not apply if the Public Protector or the Deputy Public Protector, as the case may be, has ceased to hold office in terms of section 110 of the Constitution.

5 Conditions of service of Public Protector and Deputy Public Protector

(1) The Public Protector and the Deputy Public Protector shall hold office on such terms and conditions, including terms and conditions relating to the payment of salary, allowances and pensions benefits as the President may fix.

(2) The salaries and any pensions benefits payable to the Public Protector and the Deputy Public Protector shall be a charge on the Consolidated Revenue Fund, which is hereby appropriated to the purpose.

(3) When fixing the conditions of service of the Public Protector or the Deputy Public Protector, the President may direct that any enactment relating to the conditions of service of members of the Public Service shall apply to the Public Protector or the Deputy Public Protector, as the case may be, subject to such modifications or exceptions as the President may specify, and thereupon the enactment concerned shall so apply to the Public Protector or the Deputy Public Protector, as the case may be.

6 Staff of Public Protector

(1) The Public Service Commission shall appoint such members of staff of the Public Protector as may be necessary to assist the Public Protector in exercising his functions.

(2) The Public Protector may authorize any member of his staff to exercise on his behalf such of his functions as he thinks fit.

7 Oaths to be taken

The Public Protector and the Deputy Public Protector shall, before entering upon their offices, take and subscribe before the President, or some person authorized by the President in that behalf, the oath or affirmation of loyalty and the oath or affirmation of office as set out in Schedule I to the Constitution.

PART III
INVESTIGATIONS BY PUBLIC PROTECTOR

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Additional functions of Public Protector

(1) In addition to the actions that the Public Protector may investigate by virtue of subsection (2) of section 108 of the Constitution, the Public Protector may investigate any action taken by any force, service, institution, authority or body set out in the First Schedule or by any officer or employee thereof.

(2) Notwithstanding item 1 of the First Schedule, the President may make regulations providing for all or any of the powers of the Public Protector to be exercised over the Defence Forces, the Police Force and the Prison Service by the Public Protector or by any other person or authority which he may appoint or establish for that purpose.

(3) The Public Protector or the Deputy Public Protector may exercise the functions of chairman or member of—
   (a) the tribunal appointed for the purposes of paragraph 2 of Schedule 2 to the Constitution; and
   (b) any other tribunal, board or committee that may be specified by the President by statutory instrument.

Investigations that Public Protector may not undertake

(1) The Public Protector shall not investigate any action taken by any officer or authority set out in the Second Schedule or by any member of the staff thereof.

(2) Notwithstanding that the Public Protector is prohibited by subsection (1) or any other provision of this Act from investigating the conduct of any body or person, such prohibition shall not prevent the Public Protector investigating a complaint against such body or person by an officer or employee of the body or person relating to the conduct of such body or person in relation to the officer or employee.

(3) Except as hereinafter provided, the Public Protector shall not conduct an investigation in terms of this Act in respect of any of the following matters—
   (a) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal established by any enactment; or
   (b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law:
      Provided that the Public Protector may conduct an investigation notwithstanding that the person aggrieved has or had such remedy if he is satisfied that in the particular circumstances it is or was not reasonable to expect such person to resort or have resorted to such remedy; or
   (c) any matter of which notice is given in writing by the President that the investigation of the complaint would not be in the interests of the security or the foreign relations of the State; or
   (d) any matter which the Public Protector considers frivolous, vexatious or trivial or where he considers the person aggrieved has no sufficient interest in the subject matter of the complaint.

(4) For the purposes of subsection (2), the reference therein to any body shall be deemed to include a reference to any force, service, institution or authority.

Initiation of investigation by Public Protector

(1) Any person may make a complaint to the Public Protector requesting him to investigate any action taken by any force, service, institution, authority, body or officer or employee or member of the staff thereof made subject to investigation by section 108 of the Constitution or this Act.

(2) Notwithstanding subsection (1), the following shall not be entitled to make a complaint to the Public Protector—
   (a) a local authority;
   (b) any authority or body constituted for carrying out duties on behalf of the Public Service or a local authority;
   (c) any organization controlled or owned by the State;
   (d) any organization whose governing body is appointed by the President, a Vice-President or a Minister;
   (e) any organization the revenue of which consists wholly or mainly of moneys provided by Act of Parliament.
(3) When the person by whom a complaint might have been made under this section has died or is for any reason unable to act for himself, the complaint may be made by his personal representative or by a member of his family or such other person as the Public Protector considers suitable to represent him, but except as aforesaid a complaint shall not be entertained in terms of this Act unless made by the person aggrieved himself.

(4) A complaint shall not be entertained in terms of this Act unless it is made within twelve months from the date on which the person aggrieved first had notice of the act complained of unless the Public Protector considers that there are special reasons which make it proper for the period to be extended.

(5) A complaint shall not be entertained in terms of this Act unless the person aggrieved—
   (a) in the case of an individual, is a citizen or resident of Zimbabwe or, if dead, was such a citizen or resident at the time of his death; or
   (b) in any other case, carries on any business or activity in Zimbabwe.

11 Discretion of Public Protector regarding investigations

(1) In determining whether to initiate, continue or discontinue an investigation in terms of this Act, the Public Protector shall, bearing in mind the provisions of this Act, act in accordance with his own discretion, and any question whether a complaint is duly made under this Act shall be determined by the Public Protector:

Provided that, if any question arises as to whether the Public Protector has jurisdiction to initiate, continue or discontinue an investigation or to exercise any powers in connection therewith, the Public Protector may apply to the High Court for a declaration, direction or decision to determine such a question.

(2) No action of the Public Protector or his staff in the bona fide exercise of their powers or the performance of their duties shall be called in question in any court, except on the ground of lack of jurisdiction.

(3) Any expenses incurred by the Public Protector in the determination of any question referred to in the proviso to subsection (1) shall be met from moneys appropriated for the purpose by Act of Parliament.

PART IV
PROCEDURE AND MANNER OF INVESTIGATIONS BY PUBLIC PROTECTOR

12 Manner of making complaint

(1) The Public Protector shall, by notice in a statutory instrument, set out the form in which complaints to him should be made, the information he will require and the documents, if any, that should be attached to the complaint.

(2) The Public Protector shall not refuse to consider a complaint solely on the grounds that the complaint is not in proper form or not accompanied by the required documents.

(3) The staff of the Public Protector shall assist a complainant in making his complaint and advise him on the requirements of the Public Protector and, if he is illiterate or not able to complete his complaint, shall write out his complaint on his behalf and assist him in obtaining any documents required to substantiate his complaint.

13 Complaint by person in mental institution

Any person who is detained in terms of the Mental Health Act [Chapter 15:06] may complain to the Public Protector and his complaint shall be forwarded to the Public Protector without alteration or comment.

14 Refusal to investigate

(1) The Public Protector shall refuse to investigate any complaint if he is satisfied from the complaint that he is not authorized in terms of this Act to carry out the investigation.

(2) The Public Protector shall discontinue any investigation if he is satisfied by the evidence he has
received that he is not authorized in terms of this Act to carry the investigation any further.

(3) If the Public Protector refuses to investigate a complaint or discontinues such an investigation he shall, in writing—

(a) inform the complainant and the party or parties complained against of his decision, stating his reasons for the decision; and

(b) advise the complainant of any remedy that appears to him to be available to him.

15 Manner of conducting investigation

(1) When an investigation in terms of this Act is held—

(a) the proceedings shall be conducted in private;

(b) subject to this section, the procedure shall be such as the Public Protector considers appropriate in the circumstances;

(c) the principal officer of any authority or body concerned and any other person who is alleged to have taken or authorized the action in question shall be afforded an opportunity to comment on any allegations made to the Public Protector in respect thereof;

(d) the Public Protector may permit any person involved in the proceedings to be represented by a legal practitioner or otherwise;

(e) the Public Protector may obtain information from such persons, in such manner, and may make such inquiries, as he thinks fit;

(f) the Public Protector may require a Vice-President or any Minister or Deputy Minister or member of any authority or body concerned and any other person who, in his opinion, is able to furnish information or produce documents relevant to the investigation to furnish any such information or produce any such document;

(g) the Public Protector shall, subject to paragraph (h), have the same powers as commissioners under the Commissions of Inquiry Act [Chapter 10:07] in respect of the summoning and examination of witnesses;

(h) no obligation to maintain secrecy and no other restriction upon the disclosure of information obtained by or furnished to persons employed by the State which is imposed by any law shall apply to the disclosure of information for the purposes of the investigation, and the State shall not be entitled, in relation to any such investigation, to any such privilege in respect of the production of documents or the giving of evidence as is allowed in law in legal proceedings:

Provided that no person shall be required or authorized, by virtue of this paragraph, to furnish any information or answer any question or produce any document relating to the proceedings of the Cabinet or any committee thereof comprised wholly or partly of members of the Cabinet or Ministers, and, for the purposes of this proviso, a certificate issued by the Secretary to the Cabinet, and certifying that any information, question or document so relates, shall be conclusive.

(2) If the Minister gives notice to the Public Protector with respect to any document or information or class of documents or information specified in the notice that, in his opinion, the disclosure of that document or information or of documents or information of that class would be contrary to the public interest in relation to defence, external relations or internal security, or to the economic interests of the State, the Public Protector or any member of his staff shall not communicate any such document or information to any person outside the office of the Public Protector for any purpose otherwise than with the authority of the Minister and subject to such conditions as he may fix.

(3) The Public Protector or any member of his staff to whom is disclosed any information obtained by or furnished to any person employed by the State subject to an obligation referred to in paragraph (h) of subsection (1) shall not communicate any such information to any other person outside the office of the Public Protector for any purpose.

(4) Information obtained by the Public Protector or any member of his staff in the course of or for the purposes of an investigation shall not be disclosed to any person except—

(a) for the purposes of the investigation and for any report to be made thereon in terms of this Act;
or
(b) for the purposes of any proceedings for perjury alleged to have been committed in the course of an investigation in terms of this Act or for the purposes of an inquiry with a view to taking such proceedings; or
(c) for the purposes of any proceedings in terms of this Act or the Commissions of Inquiry Act [Chapter 10:07] as applied to this Act by paragraph (g) of subsection (1).

(5) Any person who—
(a) contravenes subsection (2), (3) or (4) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment;
(b) has been subpoenaed to give evidence or to produce any book or document in terms of the Commissions of Inquiry Act [Chapter 10:07] as applied to this Act by paragraph (g) of subsection (1) for the purposes of an investigation and who fails to attend or to remain in attendance until duly excused by the Public Protector from further attendance or refuses without sufficient cause, the onus of proof whereof lies upon him, to be sworn as a witness or to answer fully and satisfactorily a question lawfully put to him or to produce such book or document, shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

16 Proceedings after investigation
(1) If, after conducting an investigation, the Public Protector is of the opinion—
(a) that the action which was the subject-matter of the investigation was contrary to law, based wholly or partly on a mistake of law or fact, unreasonably delayed or otherwise unjust or manifestly unreasonable; and
(b) that—
(i) the matter should be given further consideration; or
(ii) an omission should be rectified; or
(iii) a decision should be cancelled, reversed or varied; or
(iv) any practice on which the act, omission, decision or recommendation was based should be altered; or
(v) any law on which the act, omission, decision or recommendation was based should be reconsidered; or
(vi) reasons should have been given for the decision; or
(vii) any other steps should be taken;
the Public Protector shall report his opinion, together with his reasons therefor, to the Secretary or principal officer of any Ministry, authority or body concerned and may make such recommendations as he thinks fit and shall also send a copy of his report and recommendations to the President and, where the report or recommendations concern any function exercisable by a Vice-President or a Minister, to that Vice-President or Minister, as the case may be.

(2) The Public Protector may request the Secretary or principal officer referred to in subsection (1) to notify him, within a specified time, of the steps, if any, that it is proposed to take to give effect to his recommendations.

(3) If, within a reasonable time after a report is made in terms of subsection (1), no action is taken which, in the opinion of the Public Protector, is adequate and appropriate, he may if he thinks fit after considering the comments, if any, made by or on behalf of any Ministry, authority or body affected make a personal report on the matter to the President.

17 Reports by Public Protector
(1) If, after conducting an investigation under this Act, it appears to the Public Protector that injustice has been done to the person aggrieved in consequence of maladministration and the injustice has not been, or will not be, remedied, he may, if he thinks fit, lay before the President and Parliament a
special report on the case.

(2) The Public Protector shall annually lay before Parliament a general report on the performance of his functions in terms of this Act and may from time to time lay before Parliament such other reports with respect to those functions as he thinks fit.

18 Reports, etc., of Public Protector to be privileged

For the purpose of the law of defamation, any of the following publications shall be absolutely privileged—

(a) the publication of any matter by the Public Protector in terms of this Act;
(b) the publication, by any member of Parliament in communicating with the Public Protector or his staff, of any matter relating to any report made by the Public Protector;
(c) the publication to a person aggrieved of a report from the Public Protector and the publication of such report by that person to any other person;
(d) any complaint to the Public Protector or a member of his staff:

Provided that the publication by any other person than the Public Protector or a member of his staff of such complaint to any other person shall not be protected by this section.

FIRST SCHEDULE (Section 8)

FORCES, SERVICES, INSTITUTIONS, AUTHORITIES AND BODIES SUBJECT TO INVESTIGATION

1. Any force or service maintained and controlled by the State, other than the Defence Forces, the Police Force and the Prison Service.
2. Any local authority.
3. Any hospital, clinic, school or training institute directly or indirectly controlled by the State.
4. Any statutory body.
5. Any authority empowered to determine the person with whom any contract or class of contracts is to be entered into by or on behalf of the State or any authority mentioned in subsection (2) of section 108 of the Constitution or by or on behalf of any force, service, institution, authority or body referred to in items 1, 2, 3 or 4, but including the Defence Forces, the Police Force and the Prison Service.

SECOND SCHEDULE (Section 9)

OFFICERS AND AUTHORITIES EXCLUDED FROM INVESTIGATION

1. The President and his personal staff.
2. The Attorney-General and the Secretary to the Ministry which is responsible for giving legal advice to the Government and any member of their staff in relation to the conduct of any prosecution, the conduct of any civil action or any legal advice given to the Government or any of the forces, services, institutions, authorities or bodies set out in the First Schedule.

State Liabilities Act [Chapter 8:14]


ARRANGEMENT OF SECTIONS

Section
1. Short title.
2. Claims against the State cognizable in any competent court.
3. Proceedings to be taken against Minister of department concerned.
This Act may be cited as the State Liabilities Act [Chapter 8:14].

2 Claims against the State cognizable in any competent court
Any claim against the State which would, if that claim had arisen against a private person, be the ground of an action in any competent court, shall be cognizable by any such court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any officer or employee of the State acting in his capacity and within the scope of his authority as such officer or employee, as the case may be.

3 Proceedings to be taken against Minister of department concerned
In any action or other proceedings which are instituted by virtue of section two, the plaintiff, the applicant or the petitioner, as the case may be, may make the Minister to whom the headship of the Ministry or department concerned has been assigned nominal defendant or respondent:
Provided that, where the headship of the Ministry or department concerned has been assigned to a Vice-President, he may be made nominal defendant or respondent.

4 Citation of President, a Vice President, Minister or public official in proceedings
Whenever the President or a Vice-President or any Minister, Deputy Minister or public official is cited in any action or other proceedings in his official capacity he shall be cited by his official title and not by name.

5 No execution or attachment to be issued, but nominal defendant or respondent authorized to pay the sum awarded
(1) In subsection (3)–
“judgment debtor” means a person who, under any order of any court, is liable to pay any money to any other person, and “judgment creditor” shall be construed accordingly.

(2) Subject to this section, no execution or attachment or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings referred to in section two or against any property of the State, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or the petitioner, as the case may be.

(3) Where any money is payable by the State to a judgment debtor and the judgment creditor would, if the money so payable were money payable by a private person, be entitled to obtain from any court an order, known as a garnishee order, for the attachment of the money, such court may, subject to any other enactment and in accordance with any rules of court, make a garnishee order restraining the judgment debtor from receiving the money and directing payment thereof to the judgment creditor or any other person specified in the order.

6 Notice to be given of intention to institute proceedings against State and officials in respect of
certain claims

(1) Subject to this Act, no legal proceedings in respect of any claim for—
(a) money, whether arising out of contract, delict or otherwise; or
(b) the delivery or release of any goods;
and whether or not joined with or made as an alternative to any other claim, shall be instituted against—
(i) the State; or
(ii) the President, a Vice-President or any Minister or Deputy Minister in his official capacity; or
(iii) any officer or employee of the State in his official capacity;
unless notice in writing of the intention to bring the claim has been served in accordance with subsection
(2) at least sixty days before the institution of the proceedings.

(2) A notice referred to in subsection (1)—
(a) shall be given to each person upon whom the process relating to the claim is required to be served; and
(b) shall set out the grounds of the claim; and
(c) where the claim arises out of goods sold and delivered or services rendered, shall specify the
date and place of the sale or rendering of the services and shall have attached copies of any relevant
invoice and requisition, where available; and
(d) where the claim is against or in respect of an act or omission of any officer or employee of the
State, shall specify the name and official post, rank or number and place of employment or station of
the officer or employee, if known.

(3) The court before which any proceedings referred to in subsection (1) are brought may condone any
failure to comply with that subsection where the court is satisfied that there has been substantial
compliance therewith or that the failure will not unduly prejudice the defendant.

(4) For the purposes of this section, legal proceedings shall be deemed to be instituted by the service of
any process, including a notice of application to court and any other document by which legal
proceedings are commenced, in which the claim concerned is made.

7 Exemptions
Section six shall not apply to—
(a) a claim in which the debt concerned has been admitted to the claimant, expressly and in writing; or
(b) a counter-claim; or
(c) a claim which the court or a judge or magistrate, on application, has determined to be urgent; or
(d) a claim in respect of which the defendant has waived, expressly and in writing, the notice
required by section six.

8 Court not to take notice of failure to comply with section 6
No court of its own motion shall take notice of any failure to comply with section six.

9 Provisions of other laws relating to prescription of claims etc. not affected
Sections two and six shall not be construed as affecting the operation of any other law which—
(a) limits the liability of—
(i) the State; or
(ii) the President, a Vice-President or any Minister or Deputy Minister; or
(iii) any officer or employee of the State; or
(b) prescribes a specific period within which a claim in respect of any liability referred to in
paragraph (a) shall be made; or
(c) imposes conditions on the institution of any proceedings;
and accordingly sections two and six shall be construed as being complementary and supplementary to
any such law.
LIST OF CASES

Abbey Estates v Property Renting Corporation 1981 ZLR 39 (G)
ABBM Printing & Publishing v Transnet Ltd 1998 (2) SA 109 (W)
Acting Minister of Industry and Technology v Tanaka Power 1990 (2) ZLR 208 (S)
Adams Stores (Pty) Ltd v Charlestown Board 1951 (2) SA 508 (N)
Adler v Salisbury City Council 1947 (3) SA 220 (SR)
Administrator, Natal & Anor v Sibiya & Anor 1992 (4) SA 532 (A)
Administrator, SWA v Pieters 1973 (1) SA 850 (A)
Administrator, Transvaal & Ors v Traub 1989 (4) SA 731 (A)
Administrator, Transvaal & Ors v Zenzile & Ors 1991 (1) SA 21 (A)
Adjud-Minister van Landbou v Heatherdale Farms (Pty) Ltd 1970 (4) SA 184 (T)
Affretair (Pty) Ltd & Anor v MK Airlines (Pty) Ltd 1996 (2) ZLR 15 (S)
African National Congress v Chairman, Council of State of Ciskei 2003 (3) BCLR 288 (C)
African Consol Resources plc & Ors v Minister of Mines & Ors HH-57-10
African Tribune Newspapers (Pty) Ltd & Ors v Media & Information Commission & Anor 2004 (2)
ZLR 7 (H)
Archipelago (Pty) Ltd v Liquor Licensing Board 1986 (1) ZLR 146 (H) at 150; 1986 (4) SA 397 (ZH)
Arenstein v Durban Corporation 1952 (1) SA 279 (A)
ARNI v Brookes (1) 1972 (2) SA 680 (R); 1972 (1) RLR 144 (G)
Art Printers Ltd v Regional Hearing Officer & Anor HH-168-87
Associated Newspapers of Zimbabwe (Pty) Ltd & Anor v Diamond Insurance Co (Pty) Ltd HH-58-01
Associated Newspapers of Zimbabwe (Pty) Ltd v The Minister of State for Information and Publicity & Ors 2004 (1) ZLR 538 (S)
Associated Newspapers of Zimbabwe v Media & Information Commission & Anor 2007 (1) ZLR 272 (H)
ANZ (Pty) Ltd v Minister for Information & Anor 2005 (1) ZLR 222 (S) 252
Attorney-General v van der Merwe & Anor 1946 OPD 196
Austin & Anor v Chairman, Detainees’ Review Tribunal & Anor 1986 (4) SA 281 (ZS)
Austin & Anor v Chairman Detainees’ Tribunal & Anor 1988 (2) ZLR 21 (S)
Austin & Anor v Minister of State & Ors 1986 (1) ZLR 174 (H)
Austin & Anor v Minister of State (Security) & Ors 1986 (2) ZLR 28 (S)

Badenhorst v Minister of Home Affairs 1984 (2) SA 13 (ZS)
Bagnall v Colonial Government (1907) 24 SC 470
Bailey v Health Professions Council 1993 (2) ZLR 17 (S)
Bamford v Minister of Community Development 1981 (3) SA 1054 (C)
Bam-Mugwanya v Minister of Finance and Provincial Expenditure, Eastern Cape, and Others 2001 (4) SA 120 (CK)
Barrows & Anor v Minister of Home Affairs & Ors 1995 (2) ZLR 139 (S)
Behr v Oberholzer Liquor Licensing Board 1955 (2) SA 577 (T) at 589
Bell v van Rensburg NO 1971 (3) SA 693 (C)
Berlin Motors v Kotze NO 1992 (1) SA 505 (W)
Bhatti v Chief Immigration Officer & Anor 2001 (2) ZLR 114 (H)
Binza v Acting Director of Works & Anor 1998 (2) ZLR 364 (H)
Bishi v Secretary for Education 1989 (2) ZLR 240 (H)
Blacker v University of Cape Town & Anor 1993 (4) SA 402 (C)
Blue Ribbon Foods Ltd v Dube NO & Anor 1993 (2) ZLR 146 (S)
Bozzoli v Station Commander John Vorster Square 1972 (3) SA 934 (W)
Bothe v Cavanagh 1953 (2) SA 418 (N)
Breen v Amalgamated Workers Union [1971] 2 QB 175
B-Sky Energy (Pvt) Ltd v Minister of Energy & Anor 2009 (2) ZLR 241 (H)
BTR Industries Ltd v Metal & Allied Workers Union 1992 (3) SA 673 (A)
Bulawayo Bottlers v Minister of Labour 1988 (2) ZLR 129 (H)
Bulawayo Municipality v Bulawayo Indian Sports Ground Committee 1956 (1) SA 34 (SR)
Bull v Attorney-General 1986 (1) ZLR 117 (S)
Bull v Minister of State (Security) & Ors 1987 (1) SA 422 (ZH)
Burmah Oil v Bank of England 1980 AC 1090
Bushell v Secretary of State for Environment [1981] AC 75, 97

Cargo Carriers (Pvt) Ltd v Zambezi & Ors 1996 (1) ZLR 613 (S)
Carter v Director of Civil Aviation & Anor 1986 (1) ZLR 219 (H)
Caterers & Entertainers (Pvt) Ltd v City of Salisbury 1974 (2) RLR 65 (G); 1974 (4) SA 515 (R)
CCJPZ v AG & Ors 1993 (1) ZLR 242 (S)
CCSU v Minister of the Civil Service [1985] AC 374
CCSU v Ministry of Civil Service [1984] 3 All ER 935 (HL)
Chairman, PSC & Ors v Zimbabwe Teachers Association & Ors 1996 (1) ZLR 91 (S)
Chairman, PSC & Anor v Marumahoko 1992 (1) ZLR 304 (S)
Chairman, PSC & Ors v ZIMTA & Ors 1996 (1) ZLR 637 (S)
Chairman, PSC & Anor v Chigwedere S-56-90
Chairman, PSC & Ors v Hall S-49-89
Chairman, PSC & Anor v Gwisai S-188-91
Chataira v ZESA 2001 (1) ZLR 30 (H)
Chataira v ZESA S-83-01
Chatizembwa v Circle Cement Ltd HH-121-94
Chidziva & Ors v ZISCO Ltd 1997 (2) ZLR 368 (S)
Chideya v Makwavarara HH-13-07
Chigwerere v Chairman, PSC HH-151-89
Chituku v Minister of Home Affairs & Ors 2004 (1) ZLR 36 (H)
Chirasasa & Ors v Nhamo NO & Ors 2003 (2) ZLR 206 (S)
Chirenga v Delta Distribution 2003 (1) ZLR 517 (H)
Chitunga v Minister of Home Affairs HH-261-89
Chitzanga v Chairman, PSC & Anor 2000 (1) ZLR 201 (H)
Chiura v Public Service Commission & Anor 2002 (2) ZLR 562 (H)
Chotabhai v Union Government 1910-11 AD 301
Cinamon v Independence Mining (Pvt) Ltd 1980 ZLR 247 (A)
City of Mutare v Mlambo S-229-91
Claude Neon v City Council of Germiston 1995 3 SA 710 (W)
Clan Transport Co v Swift Transport Services (Pty) Ltd 1956 (3) SA 480 (FS)
Cluff Mineral Exploration Ltd v Union Carbide Management Services (Pvt) Ltd 1989 (3) ZLR 338 (S)
Combined Harare Residents Association & Anor v Registrar General HH-210-01
Commissioner of Police v Wilson 1981 ZLR 451 (A); 1981 (4) SA 726 (ZAD) 737
Controller of Road Motor Transportation v President, Administrative Court HH-207-85
Conway v Rimmer [1968] AC 910 (HL); [1968] 1 All ER 874
Cooper v Wandsworth Board of Works 143 ER 414
Cottle v Cottle [1939] 2 All ER 537
Crow v Detained Mental Patients Special Board 1985 (1) ZLR 202 (H); 1985 (4) SA 175 (ZH)

Dabengwa v Minister of Home Affairs HH-244-86
Dalrymple v Colonial Treasurer 1910 TS 372
Da Silva v Coutinho 1971 (3) SA 123 (A)
De Lille v Speaker of the National Assembly 1998 (3) SA 430 (C)
De Villiers & Ors v Sports Pools Ltd & Anor 1976 (1) RLR 283 (G)
de Villiers v Pretoria Municipality 1912 TPD 626
De Vos v Die Ringkommissie 1952 (2) SA 83 (O)
de Wet v Patch NO 1976 (1) RLR 65 (G); 1976 (2) SA 316 (R)
Deary v The Acting President of Rhodesia & Ors 1979 RLR 200 (G)
Dimes v Grand Junction Canal [1852] 3 HLC 759
Director of Civil Aviation v Hall 1990 (2) ZLR 354 (S)
Director of Education, Transvaal v Mc Cagie 1918 AD 616
Director: Mineral Development, Gauteng Region v Save the Vaal 1999 (2) SA 709 (SCA)
District Commandant of SA v Murray 1924 AD 13
Divaris v Liquor Licensing Board 1956 (3) SA 462 (SR)
Djordjevic v Chairman, Practice Control Committee, Medical & Dental Practitioners Council of Zimbabwe 2009 (2) ZLR 221 (H)
Dladla v Administrator Natal 1995 (3) SA 769 (N)
Dolner v SA Railways & Harbours 1920 AD 583
Donges NO v Dadoo 1950 (2) SA 321 (A)
Duncan v Cammel, Laird and Co. [1942] AC 624 (HL); [1942]1 All ER 587
Dube v Chairman, PSC & Anor 1990 (2) ZLR 181 (H)
Du Preez v Truth and Reconciliation Commission 1997 (3) SA 204 (A)
Durban North Estates v Durban Corporation 1935 NPD 558
Edwards & Sons Ltd v Stumbles & Anor 1963 (2) SA 140 (SR)
Ellis v Dubowski [1921] 2 KB 621
Enderby Town FC v The Football Association [1971] 1 All ER 215
Errington v Minister of Health [1935] 1 KB 249
Evans & Anor v Chairman of Review Tribunal & Anor HH-131-86
Evans & Anor v Chairman, Review Tribunal & Anor HH-485-84
Executive Council of Western Cape Legislature v President of Republic of South Africa 1995 (4) SA 877 (CC); 1995 BCLR 1289 (CC)
Ex parte Farquhar 1938 TPD 213
Ex parte Nell 1963 (1) SA 754 (A)
Ex parte Zelter 1951 (2) SA 54 (SR)

Faber v Barrow (1) 1963 (1) SA 422 (SR)
Fellner v Minister of the Interior 1954 (4) SA 523 (A)
Ferreira v Levin NO & Ors: Vryenhoek & Ors v Powell NO & Ors 1996 (1) SA 984 (CC)
Fikilini v Attorney-General 1990 (1) ZLR 105 (S)
Fisher & Ors v Air Zimbabwe Corporation HH-306-88
Ford v Law Society 1977 (2) RLR 40 at 55-56 (A); 1977 (4) SA 175 (RAD)
Foreman & Anor v KLM Royal Dutch Airlines 2001 (1) ZLR 108 (H)
Founders Building Society v Mazuka 2000 (1) ZLR 528 (H)
Fredericks v Stellenbosch Divisional Council 1977 (3) SA 113 (C)
FSI Hldgs Ltd v Rio Tinto Zimbabwe Ltd & Anor HH-42-96

Ganyile v Minister of Justice 1962 (1) SA 647 (E)
Gelcon Investments (Pvt) Ltd v Adair Properties (Pvt) Ltd 1969 (2) RLR 120 (G); 1969 (3) SA 142 (R)
Gentel v Rapps [1902] 1 KB 160
Golden Dragon Restaurant v Liquor Licensing Board GS-230-78
Gosschalk v Roussow 1966 (2) SA 476 (C)

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Granger v Minister of State 1985 (1) ZLR 153 (H)
Gula-Ndebele v Bhunu NO 2010 (1) ZLR 78 (H)
Guruva v Traffic Safety Council of Zimbabwe 2009 (1) ZLR 58 (S)
Gwatirisa v Chairman, PSC & Anor 1989 (3) ZLR 1 (H)

Hack v Venterspost Municipality 1950 (1) SA 172 (W)
Hamata & Ors v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Ors 2002 (5) SA 449 (SCA)
Hambly v Chief Immigration Officer 1995 (2) ZLR 264 (H)
Haruperi & Ors v Minister of Home Affairs HH-258-84
Hayes v Baldachin & Ors (2) 1980 ZLR 422 at 427(S); 1981 (1) SA 749 (ZS)
Hayes v Director of Security Manpower GS-102-79
Health Professions Council v McGown 1994 (2) ZLR 329 (S)
Heatherdale Farms (Pty) v Deputy Minister of Agriculture 1980 (3) SA 476 (T)
Helderberg Butcheries v Municipal Valuation Court 1977 (4) SA 99 (C)
Hewlett v Minister of Finance 1981 ZLR 571 (S)
Hira v Booyzen 1992 (4) SA 69 (A)
Hlabangana v Chairman, PSC HB-76-89
Hlongwa v Minister of Justice, KwaZulu 1993 (2) SA 267 (D)
Holland v Minister of the Public Service & Ors 1997 (1) ZLR 186 (S)
Holman v Lardner-Burke NO 1968 (2) RLR 57 (G)
Holman v Salisbury Defence Exemption Board 1977 (1) RLR 148 (G)
Home Service Security (Pty) Ltd v Knysna Divisional Council 1975 (2) SA 562 (C)
Hooper v Superintendant, Johannesburg Gaol (1) 1958 (2) SA 152 (W)
Hussey v Rhodesia Conscientious Objectors Exemption Board 1976 (2) RLR 73 (G)
Huyser v Louw NO 1955 (2) SA 321 (T)

In Re Certification of the Constitution of the Republic of South Africa 1996 1996 (10) BCLR 1253 (CC)
In re Willem Kok & Anor (1879) 9 Buch 45
Ismail & Anor v Durban City Council 1973 (2) SA 362 (N)

Jacobs v Waks 1992 (1) SA 521 (A)

JCI Co v Marshalls Township Syndicate Ltd 1917 AD 662
Jeffries v Komgha Divisional Council 1958 (1) SA 233 (A)
Jesse v Pratt & Anor 2001 (1) ZLR 48 (H)
Jiah v PSC 1999 (1) ZLR 17 (S)
Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A)
Johannesburg Local Road Motor Transportation Board v David Morton Transport 1976 (1) SA 887 (A)
Johannesburg Municipality v Davies 1925 AD 395
Jooste Lithium Mines v Fricke 1957 (1) SA 133 (S)

Kambasha Bros & Anor v Thompson NO & Anor 1970 (2) RLR 97; 1971 (1) SA 155 (SR)
Kanonhuwa v COTTCO 1998 1 ZLR 68 (H)
Kaplan v Salisbury Liquor Licensing Court 1951 (4) SA 223 (SR)
Kemana v Mangope & Ors 1978 (2) SA 322 (T)
Khan v Chairman, Road Transportation Board & Anor 1990 (3) SA 234 (N)
Knop v Johannesburg City Council 1995 (2) SA 1 (A)
Kruse v Johnson [1898] 2 QB 91
Kweremu & Ors v Minister of Lands and Water Development & Ors HH-230-93
Lake v Law Society of Zimbabwe 1987 (2) SA 459 (ZH)
Langeni & Ors v Minister of Health and Welfare 1988 (4) SA 93 (W)
Lapham v Minister of Mines & Ors 1989 (2) ZLR 56 (H)
Laubscher v Native Commissioner, Piet Retief 1989 (3) ZLR 147 (S)
Laurence v Verhoef & Ors NNO 1993 (2) SA 328 (W)
Law Society of Zimbabwe v Lake 1988 (1) ZLR 168 (S)
Law Society v Minister of Justice & Anor 2006 (2) ZLR 19 (S)
Lawson v Cape Town Municipality 1982 (4) SA 1 (C)
Leach v Secretary for Justice 1965 (3) SA 1 (ECD)
Lee v PSC S-201-90
Lenton Ranch Safaris (Pvt) Ltd v Minister of Natural Resources & Tourism S-179-89
Lenz Township Co Ltd v Lorenz & Ors 1961 (1) SA 450 (A)
Logan v Morris NO 1990 (2) ZLR 65 (S)
Lorenz Township Co Ltd v Lorenz 1961 (2) SA 450 (A)
Lovemore v Rhoguard GS-154-72
Lowenthal v Liquor Licensing Board 1956 (1) SA 227 (SR)
Lunt v University of Cape Town & Anor 1989 (2) SA 438 (O)

M & J Morgan Investments (Pvt) Ltd v Pinetown Municipality 1997 (4) SA 427 (SCA)
Mabuza v Tjolotjo District Council HB-52-92
Macara v Minister of Information and Tourism 1977 (1) RLR 67 (G); 1977 (2) SA 264 (R)
Machiya v BP Shell Marketing Services (Pvt) Ltd 1997 (2) ZLR 473 (H)
Mafuva & Ors v City of Mutare 1984 (2) SA 124 (ZH)
Mahlaela v De Beer NO 1986 (4) SA 782 (T)
Mathale v Secretary for Education, Gazankulu 1986 (4) SA 427 (T)
Makgoto & Ors v Sethogelo Technikon & Ors 1994 (4) SA 115 (BGD)
Makomberedze v Minister of State Security 1986 (1) ZLR 73 (H); 1986 (4) SA 26 (ZH)
Makwavarara v Secretary for Transport & Anor HH-154-89
Mandirwe v Minister of State 1981 (1) SA 759 (ZS)
Mandirwe v Minister of State 1986 (1) ZLR 1 (S)
Manyonda & Ors v PTC 1999 (2) ZLR 81 (H)
Marawa v Minister of Transport & Ors 2000 (2) ZLR 225 (S)
Marufu v Minister of Transport & Ors 2009 (2) ZLR 458 (H)
Maruta & Ors v Minister of Home Affairs HH-3-84
Masenda v Estate Agents Council HH-20-84
Matambanadzo Bus Services Ltd v Blackie & Anor 1979 RLR 501 (G)
Mavuta v Secretary for Finance 2003 (2) ZLR 323 (H)
Metsola v Chairman, Public Service Commission & Anor 1989 (3) ZLR 147 (S)
Mhora & Anor v Minister of Home Affairs & Anor 1990 (2) ZLR 236 (H)
Mhora & Anor v Minister of Home Affairs 1986 (1) ZLR 88 (H)
Middleburg Municipality v Gertzen 1914 AD 544
Minister of Home Affairs v Allan 1986 (1) ZLR 263 (S)
Minister of Home Affairs v Austin & Anor 1986 (1) ZLR 240 (S); 1986 (4) SA 281 (ZS)
Minister of Home Affairs v Austin 1986 (1) ZLR 240 (S)
Minister of Home Affairs & Anor v Bangajena 2000 (1) ZLR 306 (S)
Minister of Home Affairs & Anor v Dabengwa 1984 (2) SA 345 (ZS)
Minister of Home Affairs v York & Anor 1982 (2) ZLR 48 (S); 1982 (4) SA 496 (ZS)
Minister of Information v Mackeson 1980 ZLR 76 (G); 1980 (1) SA 747 (R)
Minister of Justice and Law and Order & Anor v Musarurwa 1964 RLR 298 (A); 1964 (4) SA 209 (SRA)
Minister of Justice, Transkei v Gemi 1994 (3) SA 28 (TkA)
Minister of Natural Resources & Tourism v FC Hume (Pvt) Ltd 1989 (3) ZLR 55 (S)
Minister of Police v Gamble 1979 (4) SA 759 (A)
Ministry of Labour v PEN Transport S-45-89
Mlambo v City of Mutare HH-114-91
MMCZ v Mazyimavu 1995 (2) ZLR 353 (S)
Moch v Nedtravel (Pvt) Ltd 1996 (3) SA 1 (A)
Moeca v Additionele Kommissaris Bloemfontein 1981 2 SA 357 (O).
Motsi v A-G & Ors 1995 (2) ZLR 278 (H)
Moyo v Secretary for Justice, Legal and Parliamentary Affairs 1988 (2) ZLR 185 (H)
Moyo v Forestry Commission HB-10-96
Moyo v President, Board of Inquiry & Ors 1996 (1) ZLR 319 (H)
Msomi v Abrahams NO & Anor 1981 (2) SA 256 (N)
Mugugu v Police Service Commission & Anor HH-157-10
Mukarati v Director of Housing and Community Services & Anor HH-281-90
Municipal Council of Sydney v Campbell [1925] AC 338
Murray v McLean NO 1969 (2) RLR 541 (G); 1970 (1) SA 133 (R)
Musandu v Chairperson of Cresta Lodge Disciplinary and Grievance Committee HH-115-94
Mushaishi v Life line Syndicate & Anor 1990 (1) ZLR 284 (H)
Musson v Rodrigues 1953 AC 530
Mutamba & Ors v Minister of Home Affairs HH-231-89
Mutare City Council v Mafiya & Ors 1984 (2) SA 124 (ZH)
Mutemeri v Chairman, PSC S-31-90
Muwenga v PTC 1997 (2) ZLR 483 (S)
Mwanyera Bazaars v Liquor Licensing Board 1979 RLR 9 (G)

Naidoo v Pretoria Municipality 1927 TPD 1013
N & B Ventures (Pvt) Ltd v Min of Home Affairs & Anor HB-138-04
Natal Newspapers (Pty) v State President of the Republic of South Africa 1986 (4) SA 830 (A)
Natural Stone Export Co (Pvt) Ltd & Anor v Director of National Parks and Wildlife Management & Ors 1997 (2) ZLR 215 (H)
Nel & Anor v Minister of Defence 1978 RLR 455 (G)
Ngaru v Chief Immigration Officer & Anor 2004 (1) ZLR 501 (S)
Ngema/Chule v Minister of Justice, KwaZulu & Anor 1992 (4) SA 349 (N)
Nguruve v Secretary, Commission of Inquiry HH-158-86
Nyakabambo v Minister of Justice, Legal and Parliamentary Affairs & Ors 1989 (1) ZLR 96 (H)
Nyamandhlovu Farmers’ Association v Minister of Lands & Anor 2003 (1) ZLR 185 (H)
Nyamukapa v Minister of Local Government and Town Planning HH-363-85
Nyandinu v Municipality of Chegutu HH-181-84
Nganganzi v Forestry Commission HH-169-96
Nyokong v Western Transvaal Bantu Administration & Anor 1975 (1) SA 212 (T)

Olivine Industries (Pvt) Ltd v Gwekwerere 2005 (2) ZLR 421 (H)
Omar & Ors v Minister of Law and Order & Ors 1987 (3) SA 859 (A)

Palley v Knight NO 1961 (4) SA 633 (SR)
Patel v Witbank Council 1931 TPD 284
Patz v Greene & Co 1907 TS 427
Pett v Greyhound Racing Association [1969] 1 QB 125
PF-ZAPU v Minister of Justice (1) 1985 (1) ZLR 261 (H)
PF-ZAPU v Minister of Justice, Legal and Parliamentary Affairs 1985 (1) ZLR 305 (S); 1986 (1) SA
532 (ZS)

Phiri & Ors v Industrial Steel and Pipe (Pvt) Ltd 1996 (1) ZLR 45 (S)

Pillay v Hyde 1950 (2) SA 739 (N)

Premier of Mpumalanga v Executive Committee of State-Aided Schools: Eastern Transvaal 1999 (2) BCLR 151 (CC)

President of Republic of South Africa 1997 (4) SA 1 at 12

President of South Africa & Ors v SA Rugby Football Union & Ors President of South Africa & Ors v SA Rugby Football Union & Ors 2000 (1) SA 1 (CC)

Pretoria North Town Council v Al Ice Cream Factory 1953 (3) SA 1 (A)

President of the Republic of South Africa v Hugo 1997 (6) BCLR 708 (CC)

PSC & Anor v Makorovodo S-187-89

PTC v Mahachi 1997 (2) ZLR 71 (H)

PTC v Modus Publications 1997 (2) ZLR 492 (S)

Public Service Commission v Tsomondo 1988 (1) ZLR 427 (S)

Public Services Board of New South Wales v Osmond [1987] LRC (Const) 681

Quintas v Controller of Customs & Excise 1976 (1) RLR 208 (G)

R v Agricultural Land Tribunal [1955] 2 QB 140

R v Aston University Senate [1969] 2 QB 538

R v Campbell (Pty) Ltd 1956 (1) SA 256 (SR)

R v Carto 1917 EDL 87 at 92

R v Daniels 1936 CPD 331

R v Dembo 1952 (2) SA 244 (T)

R v Foya 1963 (3) SA 459 (FS)

R v Gaming Board [1970] 2 All ER 528

R v Gluck 1923 AD 149 at 151

R v Home Secretary, Ex P Khan [1984] 1 WLR 1337

R v Inland Revenue Commissioners, Ex P Preston [1985] AC 835

R v Jeremiah 1956 (1) SA 8 (SR)

R v Jopp 1949 (4) SA 11 (N)

R v Kahn 1945 NPD 304


R v North and East Devon Health Authority, Ex P Coughlan [2000] 2 WLR 622

R v Nyandoro 1959 (1) SA 639 (SR)

R v Padsha 1923 AD 281

R v Pretoria Timber Co (Pty) Ltd 1950 (3) SA 163 (A)

R v Secretary of State for the Home Department, ex p Khan [1985] 1 All ER 40

R v Secretary of State for the Home Office, ex parte Bentley [1993] 4 All ER 442

R v Secretary for State for the Home Department, Ex P Ruddock & Ors [1987] 1 WLR 1482 (QBD)

Ramani v National Social Security Authority S-38-03

R.A.N. Mines (Pvt) Ltd v Minister of Labour and Social Services HH-521-86

Ramburan v Minister of Housing (House of Delegates) & Ors 1995 (1) SA 353 (D)

Redriakiebolaget ‘Amphitrite’ v The King [1921] 3 KB 500

Reid-Daly v Hickman & Ors (1) 1980 ZLR 201 (G)

Rent Control Board v SA Breweries 1943 AD 456

Reynolds v US 345 US 1, 12 (1953)

Ridge v Baldwin [1964] AC 40

Rimayi v Minister of National Supplies & Anor S-86-90

Road Services Board & Anor v John Bishop Ltd 1956 (2) SA 504 (FS)
Roberts & Letts v Fynn 1920 AD 23
Roberts v Chairman, Local Transportation Board 1980 (2) SA 472 (C)
Robertson v Minister of Pensions [1948] 2 All ER 767
Roman v Williams NO 1998 (1) SA 270 (C)
Rose v Johannesburg Local Transport Board 1947 (4) SA 272 (W)
Rushwaya v Minister of Local Government and Town Planning S-6-87
Russell v Duke of Norfolk [1949] 1 All ER 109
Rwodzi v Chegutu Municipality 2003 (1) ZLR 601 (H)

S v Beswick 1980 ZLR 199 (A)
S v Delta Consolidated (Pvt) Ltd & Ors 1991 (2) ZLR 234 (S)
S v Dube 1977 (2) RLR 108 (G)
S v Musindo 1997 (1) ZLR 395 (H)
S v Nyamapfukudzi 1983 (2) ZLR 43 (S)
S v Seedat 1977 (1) RLR 102
S v Seedat 1977 (1) RLR 102 (A); 1977 (2) SA 686 (RA)
S v Sibanda (1) 1980 ZLR 413 (G)
S v Sithole 1996 (2) ZLR 575 (H)
S v Tao 1997 (1) ZLR 93 (H)
S v Tsvangirai & Ors HH-169-2004
Sachs v Donges NO 1950 (2) SA 265 (A)
Salisbury Bottling Ltd v Central African Bottling Ltd 1958 (1) SA 750 (FS)
Schmidt v Secretary of State for Home Affairs [1969] 1 All ER 904 (CA)
Secretary for Transport & Anor v Makwavarara 1991 (1) ZLR 18 (S)
Secretary of State v Management Board of Thameside [1977] AC 1014
Shidiack v Union Government 1912 AD 642
Sibanda v Law Society of Zimbabwe S 162-91
Silver Trucks (Pvt) Ltd & Anor v Director of Customs and Excise (2) 1999 (2) ZLR 88 (H)
Simms Motor Units Ltd v Minister of Labour [1946] 2 All ER 201
Solomon & Anor v De Waal 1972 (1) SA 575 (A)
South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 283 (A)
Stambolie v Commissioner of Police S-178-89
Stevenson v Minister of Local Government and National Housing & Ors 2001 (1) ZLR 321 (H)
Stevenson v Minister of Local Government and National Housing & Ors 2002 (1) ZLR 498 (S)
Struben v Minister of Agriculture 1910 TPD 903
Students Union, University of Zimbabwe & Ors v Vice Chancellor, University of Zimbabwe & Ors 1998 (2) ZLR 454 (H)
Swift Transport Services & Anor v Road Service Board & Anor 1956 (2) SA 514 (SR)

Tabakian v DC, Salisbury 1973 (2) RLR 348 (G); 1974 (1) SA 604 (R)
Tanaka Power (Pvt) Ltd v Acting Minister of Industry & Technology HH-225-89
Taylor v Minister of Higher Education & Anor 1996 (2) ZLR 772 (S)
Taylor v Prime Minister 1954 (3) SA 956 (SR)
Taylor v Prime Minister and Minister of Internal Affairs 1954 (3) SA 956 (SR)
Tobacco Finance Ltd v Zimnat Insurance 1982 (1) ZLR 47 (H); 1982 (3) SA 55 (ZH)
Tribac (Pvt) Ltd v Tobacco Marketing Board 1996 (2) ZLR 315 (S)
Troake v Salisbury Bookmakers’ Licensing Committee 1971 (2) RLR 118; (A) 1972 (2) SA 40 (RA)
Tselentis v Salisbury City Council 1965 (4) SA 61 (SRA)
Tsvangirai & Anor v Registrar-General & Ors 2002 (1) ZLR 251 (H)
Tsvangirai v Registrar-General of Elections & Ors 2002 (1) ZLR 268 (S)
Turner v Chairman, PSC S-36-90
Turner v Master & Anor HH-116-92
Turner v Jockey Club of SA 1974 (3) SA 633 (A)
Tutani v Minister of Labour & Ors 1987 (2) ZLR 88 (H)

Union Government & Anor v West 1918 AD 556
Union Government v Fakir 1923 AD 466
Union of Teachers’ Associations of SA & Anor v Ministry of Education and Culture & Anor 1993 (2) SA 828 (2)
University of Cape Town v Ministers of Education and Culture 1988 (3) SA 203 (C)
United Parties v Minister of Justice, Legal and Parliamentary Affairs 1997 (2) ZLR 254 (S)
University of Ceylon v Fernando [1960] 1 KB 223
Urban Housing Co Ltd v Oxford City Council [1940] Ch 70
US v Andolschek 142 F2d 503 (1944)
US v Grayson 166 F.2d 863, 870 (1948)
UTC (Zimbabwe) v Chigwedere 2001 (1) ZLR 147 (S)
U-Tow Trailers (Pvt) Ltd v City of Harare & Anor 2009 (2) ZLR 259 (H)

van Buuren v Minister of Transport 2000 (1) ZLR 292 (H)
van Eck v Ema Stores 1947 (2) SA 984 (A)
van Heerden NO v Queen’s Hotel 1972 (2) RLR 472 (A); 1973 (2) SA 14 (RA)
van Wyk v Chief Intelligence Officer, Matabeleland North & Ors S-101-86
van Wyk v Director of Education 1974 (1) SA 396 (N)
Vandayer v Port Elizabeth Municipality 1957 (2) SA 67 (E)
Vengesai & Ors v Zimbabwe Glass Industries 1998 (2) ZLR 593 (H)
Vice-Chancellor, University of Zimbabwe & Ors v Mutasa & Ors 1993 (1) ZLR 162 (S)

Watchtower Bible and Tract Society of Pennsylvania & Anor v Drum Investments (Pvt) Ltd 1993 (2) ZLR 67 (S)
Waterfalls TMB v Ministry of Housing 1957 (1) SA 336 (SR)
Welkom Village Board v Leteno 1958 (1) SA 490 (A)
Wessels v General Court Martial 1954 (1) SA 220 (EDL)
Whaley & Ors v Cone Textiles S-130-88
White & Collins v Minister of Health [1939] 2 KB 838
Wildlife Society of South Africa & Ors v Minister of Environment 1996 (3) SA 1095 (TK)
Wing Lee Ltd v Johannesburg City Council 1931 AD 45
Witham v Director of Civil Aviation 1983 (1) ZLR 52
Wood & Ors v Ondangwa Tribal Authority 1975 (2) SA 294 (A)

Xu v Minister van Binnelandse Sake 1995 (1) SA 185 (T)

Yates v University of Boputatswana 1994 (3) SA 815 (B)
Yuen v Minister of Home Affairs & Anor 1998 (1) SA 958 (C)

Zacky v Germiston Municipality 1926 TPD 380
Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment & Tourism & Anor 1996 (1) ZLR 378 (H)
ZBC v Sones S-63-82
ZFC Ltd v Geza 1998 (1) ZLR 137 (S)
Zikiti v United Bottlers 1998 (1) ZLR 389 (H)
Zimbabwe Teachers Association & Ors v Minister of Education & Culture 1990 (2) ZLR 48 (H)
Zinyemba v Minister of Public Service & Anor HH-45-90
Zulu v Pharmanova (Pvt) Ltd S-66-92
Zvobgo v City of Harare & Anor 2005 (2) ZLR 164 (H)
GENERAL INTRODUCTION

This is a broad overview of local government institutions. Local government is administration locally by elected bodies whose functions are conferred upon them by central government. Local government thus is a form of de-centralised administration. In the context of Zimbabwe, local government institutions play a key role in urban and rural development. The Ministry that is in charge of local government is the Ministry of Local Government and Rural and Urban Development.

PROVINCIAL GOVERNANCE

At provincial level, the key legislation is the Provincial Councils and Administration Act [Chapter 29:11]. This system consists of the following main components:

- Provincial Governors appointed by the President; and
- Provincial Councils.

The main functions of Provincial Governors are:

- by a process of consultation, suggestion and advice, to foster and promote the activities of the various Ministries and organs of central government in implementing development plans prepared by the provincial council established for his province; and
- to co-ordinate the preparation of development plans for his province and to promote the implementation of such plans by other Ministries, authorities, agencies or persons.

The Provincial Governor is the Chairperson of the Provincial Council in his Province.

A Provincial Council consists of:

- the Provincial Governor as chairperson;
- the mayor or chairperson of each municipal council, town council and local board in the province;
- one other councillor appointed by each municipal council, town council and local board in the province;
- the chairperson of and one other councillor appointed by rural district councils in the province;
- one chief appointed from amongst its membership by the provincial assembly of chiefs;
- three persons appointed by the President.

The functions of provincial councils:

- to promote the development of the province;
- to formulate policies, both long-term and short-term, for the province;
to prepare annual development and other plans for the province;
- to review and evaluate the implementation of development plans and policies within the province;
- to exercise any other functions that may be conferred upon it by or in terms of the Act or any other enactment.

At district level, there are different structures of local government for rural and urban areas.

A new office has also been introduced, that of Metropolitan Governors and Resident Ministers for the two metropolitan provinces of Harare and Bulawayo. There are now Provincial Administrators and various District Administrators for the two cities. The introduction of these new posts has been seen as designed to neutralise the influence of the opposition MDC party which has controlled the two city councils.

**Rural local governance**

**Introduction**

Up to 1988, there was a separate system of local government on the one hand, for communal lands and purchase areas and, on the other, for the commercial farming areas. This reflected the racially differentiated system established by the old regime. For the communal and purchase lands there were district councils established in terms of the District Councils Act [Chapter 231 of 1974], whereas the local government bodies for commercial farming areas were known as rural councils (set up under the Rural Councils Act [Chapter 211 of 1974]). These rural councils had as their primary activity the development and maintenance of district roads, although it was intended that their main function would be the conservation of natural resources within their areas.

In 1988, the Rural Districts Council Act [Chapter 29:13] was passed. This Act repealed the Rural Councils Act and the Districts Councils Act. Its main purpose was to replace the dual system of local government in rural areas with a single unified system of local government that would apply in all rural areas. By-laws and regulations made by the former rural and district councils remain in force until the successor rural district councils repeal them.

**Establishment of councils**

Whenever he or she considers it desirable, the President may, by proclamation in the Gazette establish a rural district council for any district, give it a name and divide the council area into wards [s 8].

**Composition**

A council consists of one elected councillor for each ward of the council area plus persons appointed by the Minister to represent special interests but these appointed members must not exceed one-quarter of the number of elected councillors [s 11].
Elections for councillors are now held at the same time as elections for parliamentarians. Section 58(1) of the Constitution provides that a general election and elections for members of the governing bodies of local authorities must be held within four months of a proclamation dissolving Parliament.

In 1980 government made the District Administrator the Chief Executive Officer of the District Council. Previously the District Commission was the President of Rural Councils. The District Administrator effectively became chief advisor to council, chief implementer, government regulator and monitor.

The councillors are directly elected and the council is chaired by a chairperson elected by the council. All rural councillors are part-time. Councils must establish five mandatory committees: finance, roads, rural district development, natural resource conservation, and ward development and village development committees. The council may create other committees as the need arises.

**Body corporate**

Every council is a body corporate with perpetual succession and, in its own name, it can sue and be sued and may carry out any of the functions assigned to it [s 12].

**Powers**

These powers include the following: Farming, roads, bridges, dams, water, hospitals, clinics, health services, sewerage, pollution, education, libraries, halls and grants to charity.

A council has the power to undertake or carry out any or all of the matters and things set out in the First Schedule, subject to the Act and any law to the contrary. Additionally or as an extension of these powers the Minister may authorise a council to do or carry on any act or thing which, in his opinion, is incidental to the exercise of the council’s powers or necessary or desirable in the interests of all or some of the inhabitants of the council area [s 71].

**Classification of land in council area**

For the purposes of this Act, the Minister may declare that any land in Council area is -

- large-scale commercial land; or
- resettlement land; or
- small-scale commercial land; or
- urban land.

See section s 3.

**Council committees**

The council must establish a finance committee, a town board (where any land in the council area is classified as a town area), a road committee, a ward development committee, a rural
district development committee and a natural resources conservation committee if the council has an intensive conservation area. It may also appoint an area committee, to exercise any function of the council within any area of urban land within the council area and such other committees as it considers desirable [ss 55-62].

The town board consists of the councillors elected for the town wards in a town area and the council must delegate to that board its powers which are solely concerned with the town area for which the town board is appointed, except that the council will retain the power to impose levies, rates, special rates, rents or charges, to borrow money, to expropriate property or to make by-laws and it will also retain certain other specified powers.

The functions of ward development committees are to draw up development plans for their wards. Rural district development committees are there to assist in the development of the council area by doing such things as considering ward development plans and making recommendations to the council about matters to be included in the annual development plan and other plans.

**Financing**

The operations of a council are financed in various ways. These include—

- grants from central government for the general administration costs, including paying for recurrent expenditure like salaries and wages;
- loans received under the Public Sector Investment Programme for infrastructure development;
- levies, rates, and rents paid to council for services rendered by government such as refuse collection, sewerage and water;
- charges, rates and levies on various types of property within its area (Part XII).
- taxes on land owners, mining locations, licensed dealers and permit holders.
- charges for the issuing of licences and permits,
- charges rental for property let out by it;
- interest earned on moneys invested by council in any investment instrument as provided for in the Act.

With the written approval of the Minister and subject to such terms and conditions as he or she may impose, a council may engage in any commercial, industrial, agricultural or other activity for the purpose of raising revenue for the council [s 80].

Rural District Councils have far more limited powers than Urban Councils as regards revenue raising and borrowing. A Rural District Council can borrow only from central government unlike municipalities and cities that can borrow from many other sources, including the money market.

After the council has approved council estimates, the council is obliged to ensure that copies of such estimates are forthwith made available for inspection by the public free of charge at the council offices. [s 121 (5) a i)]
Co-operation agreements

Rural District Councils can enter into co-operation agreements with the state, another local authority or any other entity or person “for the better or more economic carrying out … of any matter which the council may by law perform and in which the contracting parties are mutually interested”. The Minister may also enter into such agreements with other parties on behalf of the council. [s 82]

By-laws

A council has the power to make by-laws [s 88]. After passing a resolution for the making of any by-laws, a council must place for inspection for fourteen days a copy of the proposed by-laws at the offices of the council or at any other place where notices of the council are usually displayed or published. It must also publish a notice in a newspaper and cause it to be posted at some prominent place in the council area. The notice must:

- describe the general effect of the proposed by-laws and the area to which they will apply;
- state that a copy of the proposed by-laws is open for inspection; and
- invite persons who have objections to the proposed by-laws to lodge their objections, in writing, with the council within fourteen days after the last day on which the proposed by-laws are open for inspection.

If any objections to any proposed by-laws are lodged with a council the council must not pass a resolution to make the proposed by-laws until it has reconsidered them in the light of the objections.

The Minister must approve all by-laws [s 90]. After a council has resolved to pass any proposed by-law, it must be submitted to the Minister for his approval together with a copy of any objections thereto that have been lodged and the comments or recommendations of the council thereon. The Minister may approve them or withhold his or her approval as he or she thinks fit. After consulting with the council, he or she may amend or modify the by-law if this seems to him or he to be advisable and this is not opposed to the true spirit and intent of the proposed by-laws as advertised.

The by-law becomes law after it has been approved by the Minister and has been published as a statutory instrument.

Powers of Minister

The Minister has various powers in relation to councils. He or she may appoint any person to examine the accounts and records of a council [s 138]. If he or she considers it necessary or desirable in the public interest, he or she may appoint one or more persons as investigators, to investigate any matter that relates to the good government of a council area or district, or anything relates to or arises out of the affairs or conduct of a council or any of its committees [s 154].
Where, in the opinion of the Minister, a council has failed to give effect to any duty whatsoever imposed upon it by the Act or any other enactment, he or she may after having given the council an opportunity to submit any representations it may wish to make in connection therewith, direct the council to take such action as he or she considers necessary within a time specified by him or her. Where a council fails to take action in accordance with such a direction within the time specified, the Minister may take appropriate action on behalf of the council and recover the expenses incurred in connection therewith from the council [s 155].

If anything required to be done in terms of the Act is omitted to be done, or is not done in the manner or within the time so required, the Minister may order all such steps to be taken as in his opinion are necessary or desirable to rectify the matter, and the thing done will be of the same force and effect as if originally done in accordance with the appropriate provision of the Act [s 156].

In terms of s 157, the Minister may, by written notice to the councillor and the council concerned, suspend a councillor from exercising all or any of his functions as a councillor in terms of the Act or any other enactment if he or she has reasonable grounds for suspecting that the councillor:

- has contravened any provision of the Prevention of Corruption Act [Chapter 9:16];
- has contravened s 48 of the Rural Districts Council Act;
- has committed any offence involving dishonesty in connection with the funds or other property of the council;
- has been responsible through serious negligence, for the loss of any funds or property of the council, or for gross mismanagement of the funds, property or affairs of the council; or
- has not relinquished office after his seat became vacant in terms of the Act.

As soon as is practicable after he or she has suspended a councillor the Minister must cause a thorough investigation to be conducted with all reasonable dispatch to determine whether or not the councillor has been guilty of any act, omission or conduct referred to above.

If, following investigation, the Minister is satisfied that the grounds of suspicion on the basis of which he or she suspended a councillor have been established as fact, he or she may, by written notice to the council and the councillor concerned, dismiss the councillor, and the councillor’s seat will then become vacant.

A person who has been dismissed in terms of s 157(3) of the Act is disqualified from nomination or election as a councillor for a period of five years.

The Minister may appoint one or more commissioners to act as the council if there are no councillors for a council area or all the councillors for a council area are unable, for any cause whatsoever, to exercise all or some of their functions as councillors. The commissioner however cannot, without the approval of the Minister, exercise any power conferred on the council to impose levies or to alienate any land or interest in land or to increase any charge fixed or levied by the council or to fix any new charge [s 158].
Association of Rural District Councils

The Association of Rural District Councils has been actively involved in research, training and advocacy with a view to strengthening local governance. The Association meets with the local government ministry on an ad hoc basis.

Structures for development

The main structures established for developmental purposes in rural areas include:

- The District Development Fund (established in terms of the District Development Fund Act [Chapter 29:06]). This fund was set up for developing the communal lands. The Minister of Local Government controls the fund with his Assistant Secretary (Development) acting as executive officer in relation to disbursements. The Minister may declare an area to be a development area and apply funds to development projects in this area. At district level the District Administrator will assist rural district councils in forward planning for development. This is an institution created by central government to assist in the provision of infrastructure and is one of the main sources of public finance for the development of rural areas, especially the communal lands. Though the agency scored some resounding successes in the early 1980s, it has since lost momentum and has become a vehicle for massive mismanagement of resources and corruption. The Association of Rural District Councils has called for the DDF to be put under the direct supervision of local authorities and for a Commission of Inquiry to be set up to investigate its activities. At its biennial conference in August 2004 this association the DDF came under heavy criticism for not consulting local authorities, who are the planning authorities, on its activities, resulting in the duplication of roles. *(The Herald 24 August 2004)*

- The Provincial Governors whose main function is by a process of consultation, suggestion and advice, to foster and promote the activities of the various Ministries and organs of central government in implementing development plans prepared by the provincial council established for his or her province;

- In each province there is a Provincial Council which is headed by the Provincial Governor, with the function of developing projects beyond the reach of individual rural district councils.

- Within each province there are a number of rural district councils, as indicated above, with developmental functions such as establishing and maintaining roads, schools and clinics and the establishment of income generating projects such as establishing townships and business centres.

- The District Administrator co-ordinates government and local government activities at district level. He or she liaises between rural district councils and central government.

- In the Communal Land there are Village and Ward Development Committees. (See next section.)

Traditional leadership and governance of Communal Land

Chiefs and Headmen are appointed in terms of the Traditional Leaders Act [Chapter 29:17] and
their powers and functions are laid down in this Act. Chiefs are traditional leaders who exercise powers in the Communal Land. The main duties and functions of Chiefs are to provide traditional leadership to their communities and to promote and uphold cultural values among members of the community under their jurisdiction, particularly the preservation of the extended family and the promotion of traditional family life. [s 5(1)] Together with Headmen they exercise a variety of administrative functions. They also have adjudicatory functions at local level in terms of the Customary Law and Local Courts Act [Chapter 7:05]. They preside over community courts, which courts apply customary law to resolve civil disputes. A Chief can be removed from office by the President if he or she is found guilty of offences involving dishonesty or misconduct and the Minister recommends his removal.

The President appoints Chiefs taking into account certain factors such as the prevailing customary principles of succession applicable to the community over which the chief is to preside and the administrative needs of the communities in the area concerned in the interests of good governance. Wherever practicable, the President must appoint a person nominated by the appropriate persons in the community concerned in accordance with these principles. [s 3] The local government Minister must appoint a sufficient number of persons nominated by the chief as headmen for each community to assist the chief to properly carry out his duties. [s 8(1)].

Communal and Resettlement Land is divided into a number of provinces. In each of these provinces there is a body called Provincial Assembly which consists of all the chiefs in that province and is headed by one of the Chiefs elected by the Chiefs. [s 35] The main functions of this body is to bring to the attention of the Council of Chiefs or the local government Minister matters of national and local interest which affected persons living in their province. [s 36] The Council of Chiefs consists of chiefs elected by the provincial assemblies. [s 37] The Minister or the Council of Chiefs is entitled to refer matters to Provincial Assemblies.

- Each village must establish a village assembly composed of all inhabitants of the village concerned who are over the age of eighteen years. This assembly is presided over by the village head. [s 14] Its function include considering all matters, including cultural matters, affecting the interests and well-being of all the inhabitants of the village, and ensuring the good government of the village. In more detail its functions are as follows:
  - Identification and articulation of village needs;
  - Co-ordination and forwarding of village needs to the Wadco;
  - Co-ordination and co-operating with government extension workers in the operations of development planning;
  - Co-ordinating and supervision of all activities relating to production and general development of the village area; and
  - Organising the people to undertake projects that require a considerable workforce.

Every village assembly must elect members of the village to a village development committee in accordance with regulations made in terms of the Rural District Councils Act [Chapter 29:13]. The village development committee is presided over by the village head. [s 17]

Each communal and resettlement ward in a rural district council area must have a ward assembly which will consist of all headmen, village heads and the councillor of the ward. [s 18]
The functions of the ward assembly include the following:

- to supervise the activities of the village assemblies within its jurisdiction;
- to review and approve development plans or proposals submitted by the village assembly and to submit such plans for incorporation into the rural district development plan;
- generally to oversee the discharge of functions by village assemblies to ensure good government at that level.

In terms of s 59 of the Rural District Councils Act each ward of a council area must have a ward development committee consisting of the councillor for the ward, who will be the chairman of the committee; and the chairman and secretary of every village development committee and neighbourhood development committee in the ward. Section 20 of the Traditional Leaders Act provides that a ward development committee established in terms of the Rural District Councils Act will, in addition to the functions conferred upon it in terms of the Rural District Councils Act, be responsible for reviewing and integrating village development plans in accordance with the directions of the ward assembly.

The Ward Development Committee is supposed to be the central planning authority in the ward, overseeing and co-ordinating development plans in their area of jurisdiction. However, in practice, it appears that it is primarily the receiver of information and directives from above (i.e., from central government and from ZANU PF party officials), rather than acting as a channel for bottom-up initiatives.

Urban local governance

Introduction

Soon after independence, the government did away with the previous system under which the so-called township areas were separately administered. Now both high and low-density areas are administered under the same system of local government. Under the scheme of decentralisation incorporated into the Urban Councils Act [Chapter 29:15] elected local government bodies are given the responsibility of providing services to the public and regulating the affairs of their local areas.

There are various types of urban local government bodies. There are town, municipal and city councils. The powers of these bodies will depend upon the nature and extent of the area they administer. They range from a small authority such as a town council which will have powers to determine and execute only very limited measures within a small area to a large body such as a city council which will have broad permissive powers as well as having obligatory functions to perform and will possess considerable autonomy in determining and financing priorities in its area.

The powers and functions of urban councils are set out in the Urban Councils Act. (However, the smaller councils will be given power to carry out only some of these functions.) The functions specified in the Act include housing development (including low cost housing), road maintenance, organising water supplies, operating hospitals, acquiring land, running markets,
Also contained in the Urban Councils Act are provisions setting out the multiplicity of matters upon which urban councils can pass by-laws such as by-laws regulating building construction, licensing by-laws and by-laws aimed at the prevention of disease. When creating by-laws urban councils can either simply adopt model by-laws or they can draw up their own by-laws to suit local conditions.

As regards services provided by urban councils, these can be sub-divided into obligatory services which are essential services which the public is obliged to use and to pay for, such as refuse and sewerage disposal and supply of potable water, and optional services such as public transport and health services.

In certain specified circumstances, the Minister of Local Government can interfere in the affairs of these elected bodies. Under s 315, he or she may intervene and take appropriate action where the council fails to perform its duties or to deal with its budgetary problems.

**Finance**

The main sources of finance for urban councils are rates charged on land and buildings and rentals of properties. Licensing fees are also a source of revenue.

Urban councils may also, with the consent of the minister responsible for local government and the minister responsible for finance, raise the necessary funds by issuing stock, bonds, debentures or bills, or from any other source not mentioned in the Urban Councils Act. [s 290].

The Act provides for a series of stringent financial control measures.

**Establishment of municipalities and towns**

Whenever the President considers it desirable he or she may, subject to the Act, by proclamation in the *Gazette*, after any local authority concerned has been consulted establish a municipality or town. After doing this he or she must then establish a municipal council or a town council, fix the area of the municipality or town and give it a name. He or she may also divide the council area into any number of wards [s 4].

**Town and city status**

A growth point, unincorporated urban area, local board or council may apply to the Minister for a change of its status. The Minister must consider any application made and, if he or she decides to grant the application, he or she must take the necessary steps under the Act to effect the change of status applied for. On receipt of an application for city status by a municipal council, the Minister must appoint, at the expense of the municipality concerned, a commission consisting of such number of persons as the Minister may determine to consider the matter and make recommendations to him or. He or she must then publish in the *Gazette* and in three issues of a newspaper notice of the appointment of the commission and calling upon any person...
who wishes to make representations to submit them to the commission before a date specified in that notice, being not less than thirty days after the date of the first publication of the notice in the newspaper. The commission must consider the matters set out in the First Schedule in addition to any other matters that it considers to be relevant and must thereafter submit its report to the Minister, and any such report must refer to the substance and number of any representations made to it. As soon as practicable after receiving the report the Minister must lay it before Parliament. If, in pursuance of a resolution of Parliament, an address is presented to the President requesting him or her to accord city status to the municipality specified in the address, the President may, by proclamation in the Gazette, declare that the status of the municipality concerned is altered to that of a city.

**Types of urban local authorities**

There are four species of urban council. These are Local Boards, Town Councils, Municipalities and City Councils. The smallest body with the least powers is the Local Board and the largest with the greatest powers is the City Council. Presently there are twenty-seven urban councils and of these, four are local boards, seven town councils, nine municipalities and seven city councils.

**Composition of councils**

City councils and municipalities consist of elected councillors. Elections for councillors are now held at the same time as elections for parliamentarians. Section 58(1) of the Constitution provides that a general election and elections for members of the governing bodies of local authorities must be held within four months of a proclamation dissolving Parliament.

A council consists of a number of councillors. The Minister decides on the number of councillors for each council but the number must not less than six. If the council area is divided into wards there will be one councillor for each ward unless the Minister fixes different numbers of councillors for different wards [s 39].

In addition to the elected councillors the Minister may now also appoint councillors to represent special interests but the numbers of these councillors may be more than a quarter of the elected members. The appointed councillors hold office “during the pleasure of the Minister.” This provision for appointed councillors was introduced in 2008. The appointed participate in the business of the councils and perform the same functions as elected councillors, except they do not have a vote at council meetings. They are also entitled to the same benefits as if they were elected councils.

Each City Council and municipality must establish an Executive Committee. This comprises the mayor, his or her deputy and the chairpersons of the other compulsory committees specified in the Act. The chairpersons of committees are elected by the other councillors and not chosen by the mayor.

A Town Council consists of elected councillors and is headed by a chairperson elected by the councillors. The local government minister appoints all or some of the councillors of a Town Board.
Mayors

Previously executive mayors headed municipal councils. These were directly elected by local people in local government elections. The system of executive mayors came into operation in 1997 by an amendment to the Urban Councils Act. In 2008 the system of executive mayors was abolished. Majors are now elected by the elected councillors. A person who is elected as mayor does not have to be a person who is himself or herself an elected councillor. This is because section 103 provides that the person who is elected as mayor can be a councillor or “other person.” The term “other person” is not defined. Thus in 2008 the person elected as mayor of Harare was not a person who had stood for election as a councillor.

The first meeting at which the mayor is elected will be chaired by the provincial administrator in respect of the Harare and Bulawayo municipal councils and the district administrator in respect of other councils.

The mayor or deputy mayor chairs all council meetings and these councils use the committee system to conduct their affairs, with the various specialist committees dealing with matters of detail, and matters of policy being dealt with by the full council. Co-ordination is required in order to avoid duplication and overlap.

Town councils are not presided over by mayors. Instead these councils elect a chairperson and a deputy chairperson.

Disqualifications of councillors

If a councillor is convicted of a criminal offence and sentenced to at least 6 months’ imprisonment, he or she ceases to be a councillor [s 41(7)].

Functions of mayors

A mayor presides over all meeting of his or her council and has both a deliberative and casting vote. [s 104]

Dismissal and suspension of mayors

The President may require a mayor to vacate his office if the mayor has been guilty of any conduct that renders him or her unsuitable as mayor, or if he or she is mentally or physically incapable of efficiently carrying out the functions of his office.

The Minister can suspend a mayor whom he or she suspects on reasonable grounds of engaging in conduct that renders him or her unsuitable as mayor or where criminal proceedings have been instituted against the mayor for an offence that can attract a sentence of imprisonment without the option of a fine.
Local Government Board

This Board mainly deals with the organisation and control of staff of urban councils. The Board consists of seven members appointed by the Minister as follows:

- one must be chosen from a list of not less than three names submitted by the Urban Councils Association;
- one must be chosen from a list of not less than three names submitted by the town clerks; and
- one must be chosen from a list of not less than three names submitted by the Municipal Workers Union; and
- one must be a member of the Public Service Commission chosen from a list of not less than three names submitted by the Minister responsible for the Public Service; and
- two must be appointed for their ability and experience in public administration and who are or have been employed by a local authority or the Public Service for a period of not less than five years in a senior post.

[ s 116]

The functions of this Board are:

- to provide guidance for the general organization and control of employees in the service of councils;
- to ensure the general well-being and good administration of councils staff and the maintenance thereof in a high state of efficiency;
- to make model conditions of service for the purposes above for adoption by councils;
- to make model regulations stipulating the qualifications and appointment procedures for senior officials of councils;
- to approve the appointment and discharge of senior officials;
- to conduct inquiries into the affairs and procedure of councils; and
- to exercise any other functions that may be imposed or conferred upon the Board in terms of this Act or any other enactment.

Local government staff members are recruited by local authorities themselves and have the power to discipline and dismiss staff but the Local Government Board must approve the appointments and dismissals of senior staff.

Suspension and dismissal of councillors

In terms of s 114 the Minister has the power to suspend and dismiss councillors. The Minister may suspend a councillor if he or she has reasonable grounds for suspecting that a councillor—

- has contravened any provision of the Prevention of Corruption Act [Chapter 9:16]; or
- has contravened section 107, 108 or 109; or
- has committed any offence involving dishonesty in connection with the funds or other property of the council; or
- has been responsible through serious negligence, for the loss of any funds or property of the council or through gross mismanagement of funds, property or affairs of the council; or
- has not relinquished office after his seat became vacant in terms of this Act.
Not later than 45 days after suspending a councillor, the Minister must cause a thorough investigation to be conducted with all reasonable dispatch into the allegations. After the investigation, if the Minister is satisfied that the grounds for suspension have been established, he or she may dismiss the councillor.

If, following investigation, the Minister is satisfied that the grounds of suspicion on the basis of which he

**Inquiries by the Minister and appointment of investigators**

The Minister may, if he or she considers it necessary or desirable in the public interest, appoint one or more persons as investigators to carry out investigations and report to him or her. He or she can appoint these investigators to inquire into any matter which relates to the good government of a council area or local government area or arises out of the government of a council area or local government area; or relates to the failure of a council to undertake any function or provide any facilities for which it has the necessary power in terms of this Act, which power it has failed to exercise; or relates to or arises out of the affairs of a council. On receipt of the report from the investigators the Minister may take such steps as in his opinion are necessary or desirable to rectify any defect or omission revealed by the report [s 311].

**Minister may give directions on policy**

Under s 313 the Minister may give a council such directions of a general character as to the policy it is to observe in the exercise of its functions, as appear to the Minister to be requisite in the national interest. But where he decides to do this, he must give notice to the council of his or her proposal and the council must submit to the Minister its views on the proposal and the possible financial implications on the finances and other resources of the council. The council must, with all due expedition, comply with any direction given by the Minister.

**Power of Minister to reverse, suspend, or rescind resolutions, decisions of councils**

Under s 314 where the Minister is of the view that any resolution, decision or action of a council is not in the interests of the inhabitants of the council area concerned or is not in the national or public interest, the Minister may direct the council to reverse, suspend or rescind such resolution or decision or to reverse or suspend such action. The council must, with all due expedition, comply with any such direction.

**Minister’s power to direct certain actions and elimination of deficit**

Under s 315 Where—

- a council has failed to give effect to any of the duties imposed upon it by or under this Act or any other law; or
- the final accounts of a council for any financial year reveal an accumulated deficit on the consolidated revenue account and the council has not provided to the satisfaction of the Minister for the elimination or reduction of such deficit;

the Minister may, after having given the council an opportunity to submit any representations it may wish to make in connection therewith, direct the council to take such action as he considers necessary within a time specified by him or her. If the council fails to take the action directed, the Minister may take appropriate action on behalf of the council and recover the expenses incurred in connection therewith from the council.
Correction of errors or omissions

Under s 316 if an act or thing required to be done or in terms of this Act is not done or is not done in the manner or within the time so required, the Minister may order all such steps to be taken as in his opinion are necessary or desirable to rectify such act or thing, and when it is done in this manner it will have the same force and validity as if originally done the said act or thing when done in terms of the said order shall be of the same force and validity as if originally done in accordance with the appropriate provisions of this Act. But such action must not deprive a person of any right he or she has acquired before the Minister made his or her order.

Appointment of caretakers

Under s 80 the Minister has the power to appoint three caretakers to run the affairs of the council area where there are no elected councillors for a council area or the elected councillors have been suspended or imprisoned or are otherwise unable to exercise all or some of their functions. The persons appointed as caretakers do not have to be qualified to become elected councillors. The caretakers may exercise all the functions of elected councillors except that they need the Minister’s approval for such actions as levying rates or taxes or increasing charges. Caretakers are paid monthly salaries at a rate determined by the Minister.

Previously the Minister was empowered to appoint what were called Commissioners where there were no councillors. These Commissioners held office for a maximum period of 6 months but frequently these Commissioners were kept in place illegally for periods exceeding 6 months. See Zvobgo v City of Harare 2005 (2) ZLR 164 (H)

By-laws

The Act lays down complex procedures for the passing of by-laws, which include laying open for any objections the proposed by-laws. These procedures must be strictly adhered to otherwise the by-laws will be invalid.

A council has the power to make by-laws [s 228]. After passing a resolution for the making of any by-laws, a council must place for inspection for thirty days a copy of the proposed by-laws at the offices of the council or at any other place where notices of the council are usually displayed or published. It must also publish a notice in a newspaper and post it at some prominent place in the council area. The notice must:

- describe the general effect of the proposed by-law and the area to which it will apply;
- state that a copy of the proposed by-law is open for inspection; and
- invite persons who have objections to the proposed by-law to lodge their objections, in writing with the council within 30 days of publication of the notice in the newspaper.

If any objection to any proposed by-law is lodged with a council the council must not pass a resolution to make the proposed by-law until it has reconsidered them in the light of the objections.
The Minister must approve all by-laws [s 229]. After a council has resolved to pass any proposed by-law, it must be submitted to the Minister for his approval together with a copy of any objections thereto that have been lodged and the comments or recommendations of the council thereon. The Minister may approve it or withhold his approval as he or she thinks fit. After consulting with the council, the Minister may amend or modify the by-law if this seems to him or her to be advisable and this is not opposed to the true spirit and intent of the proposed by-laws as advertised.

The by-law becomes law after it has been approved by the Minister and has been published as a statutory instrument.

**Ministerial power in relation to by-laws**

Where a council has not made by-laws for any matter in respect of which it may make by-laws and the Minister considers that the matter should be controlled or regulated by by-laws, he or she may direct the council to make by-laws or to adopt model by-laws in relation to that matter within such period as he or she may specify. If the council fails to do so the Minister may make by-laws on behalf of the council in respect of that matter, or make by-laws adopting the appropriate model by-laws on behalf of the council. If the Minister proposes to make by-laws on behalf of a council he or she must lay the proposed by-laws open for inspection and receive any objections [s 233].

**Urban Council Association of Zimbabwe**

This association, together with the Association of Rural District Councils, has been actively involved in research, training and advocacy with a view to strengthening local governance. It has established a committee that meets reportedly regularly with the Minister for Local Government to discuss matters of mutual concern.

These two associations made useful submissions about reforming the local government sector during the Presidential Constitutional Commission with both in strong favour of “constitutionalising” local government in Zimbabwe.

**Planning and development**

The Regional, Town and Country Planning Act *(Chapter 29:12)* provides the mechanisms for planning in regions, districts and local areas. It provides for the compilation of regional plans, master plans and local plans in both urban and rural areas. As regards development the most important legislation is the Provincial Councils and Administration Act *(Chapter 29:11).*