

**ARTICLE 13 – JUDICIAL, ARBITRAL OR ADMINISTRATIVE REVIEW**

Paper by South Africa

The following communication, dated 11 October 2004, is being circulated at the request of the Delegation of South Africa.

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**Legislative framework in South Africa**

Prior to 1994 (first democratic election) the Supreme Court in South Africa had an inherent power to review administrative action on various common-law grounds. However, while the courts could review the lawfulness of an administrative action, Parliament was free to decide what counted as lawful and what did not, and no court of law could enquire into or pronounce upon the validity of an Act of Parliament in relation to its content. The doctrine of parliamentary supremacy was therefore a deep-seated constraint on the common-law review powers of the Supreme Court.

South Africa entered a new era of administrative law with the enactment of the Constitution. The right to just administrative action is guaranteed in Section 33 of the Constitution of the Republic of South Africa, 1996. Since the implementation of the Constitution, public power has been controlled by the said Constitution, which is the supreme law of South Africa.

The Promotion of Administrative Justice Act, Act 3 of 2000, (PAJA) gives 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. This law constitutes important checks and balances on the operation of the administration.

The International Trade Administration Act, Act 71 of 2002, (ITA Act) is the enabling legislation for the International Trade Administration Commission of South Africa (ITAC) to conduct trade remedies investigations. Section 46(1) of the ITA Act provides that a person affected by a determination, recommendation or decision of ITAC, may apply to a High Court for a review of that determination, recommendation or decision. Section 46(2) of the ITA Act further provides that the High Court may, in a review, make an order for the payment of costs against any party or against any person who represents a party in the proceedings, according to the requirements of the law and fairness.

In terms of Section 47(1) of the ITA Act the Supreme Court of Appeal or the Constitutional Court has jurisdiction to hear an appeal against a decision of a High Court in respect of a review application.

PAJA contains the provisions for the Courts to review an administrative action in South Africa. An action will qualify as administrative action under PAJA if it is a decision of an administrative nature that is made in terms of an empowering provision, not specifically excluded by the list of exclusions in the Act, made by an organ of State or by a private person exercising a public power that adversely affects the rights of an individual or the public. A decision taken in terms of the ITA Act is a decision capable of review under PAJA.

### **Grounds on which Judicial Review Action can be taken**

Section 6 of PAJA clearly sets out the grounds on which administrative action can be reviewed. In judicial reviews the courts focus more on the way a decision was made and not necessarily the merits of that decision. The courts will only do a qualitative assessment of the administrative action under review, on any ground, if the administrative action is irrational or so unreasonable that no reasonable person could have reached that decision. The courts can intervene when a decision is unlawful, unreasonable or procedurally unfair.

#### **1. Unlawful**

A number of grounds of review flow from the requirement that administrative action must be lawful, such as:

- The administrator who took the decision is not authorized by an empowering provision to make the decision.
- The administrator who took the decision acted in terms of an unlawful delegation of power.
- A mandatory and material procedure or condition prescribed by an empowering provision was not complied with.
- The administrative action was materially influenced by an error of law.
- The administrator had an ulterior purpose or motive in taking the decision.
- The decision by administrator was taken in bad faith.
- The administrator failed to consider an application or refused to make a decision.
- The administrator failed to make a decision within the prescribed time limit or within a reasonable time when no time limit was prescribed.
- The administrator failed to take relevant considerations into account when he made his decision or the administrator took into account irrelevant considerations.
- The administrator made a decision that was arbitrary, that is a decision that is irrational or senseless or without foundation.
- The administrator made a decision because of the unauthorized or unwarranted dictates of another person or body.
- The administrator was biased or is reasonably suspected of bias.

## 2. Unreasonable

The following grounds of review flow from the requirement that the administrative action must be reasonable:

- The decision of the administrator is not rationally connected to the purpose for which it was taken.
- The decision of the administrator is not rationally connected to the purpose of the empowering provision.
- The decision of the administrator is not rationally connected to the information before the administrator.
- The decision of the administrator is not rationally connected to the reason given for the decision by the administrator.
- The exercise of the administrative function authorized by the empowering provision in terms of which the administrative action was taken, is so unreasonable that no reasonable person could have so exercised his or her power or perform the administrative function.

## 3. Procedural Fairness

An administrative action which materially and adversely affects the right of any person, must be procedurally fair. Section 3(2)(a) of PAJA states that a fair administrative procedure depends on the circumstances of each case. The grounds of review can be, *inter alia*:

- The administrator did not give a person that may be adversely affected by an administration action an adequate notice of the nature and purpose of the proposed administrative action.
- The administrator did not give a person that may be adversely affected by an administrative action reasonable opportunity to make representations.

## **Procedures in Judicial Review**

Section 7 of PAJA requires review proceedings to be instituted without unreasonable delay and no later than 180 days from the date on which the applicant was informed of the decision and reasons or became aware of the decision and reasons or might reasonably have been expected to have become aware of the decision and reasons. If an internal remedy is provided for in any other law the applicant must first exhaust that internal remedy process before the courts will entertain an application for review. After the applicant has exhausted the internal remedy process, the applicant has to institute the review proceedings within 180 days. The administrator and a party affected by a decision of the administrator may agree on an extension of the 180 days and the courts may also grant condonation for the late institution of review proceedings.

An application of review is made to the High Court by way of a notice of motion. The notice of motion must set out the decision or proceedings sought to be reviewed and must be supported by an affidavit setting out the grounds on which the applicant seeks relief, the facts and circumstances on which the applicant bases the claim for relief and the relief sought by the applicant.

The notice of motion must call on the administrator whose decision is being reviewed, and all other parties affected, to show cause why the decision should not be reviewed and corrected or set aside.

The administrator must submit a record of the proceedings wherein the decision to be reviewed was taken, together with any reasons the administrator wishes to give, or which the law requires him to give, to the High Court within 15 days of receiving the notice of motion. The administrator must then notify the applicant that he has done so. The registrar of the High Court will make the record available to the applicant. The applicant has the right to waive the right to the record of the proceedings. After the registrar has made the record available to the applicant, the applicant has 10 days to amend the notice of motion and supplement the founding affidavit. If the administrator wishes to oppose the application for review, he or she must deliver a notice to the applicant and the High Court within 15 days of receiving the notice of motion or any amendment thereof. The administrator must submit an answering affidavit within 30 days after the expiry of the 10-day period that the applicant had to amend his notice of motion. The applicant can then submit a replying affidavit and apply for a date for the review application to be heard by a judge of the High Court.

### **Remedies**

The remedies in proceedings for judicial review are set out in clause 8 of PAJA. The courts are given wide powers as to the remedies that may be granted in review applications. In terms of Section 8(1) of PAJA, the courts have a residual power to make an order that is just and equitable. In cases where relief is granted, a judge may:

1. Set aside the decision that was reviewed and remit the matter back to the administrator for consideration, with or without specific directions.
2. Set aside the decision that was reviewed and substituting or varying the administrative action or correcting a defect resulting from the administrative action. This can only be done in exceptional cases, for example where the end result is a foregone conclusion and it would be a waste of time to remit the decision to the administrator.
3. Set aside the decision that was reviewed and direct the administrator or any other party to the proceedings to pay compensation. This can only be done in exceptional cases.
4. Make an order declaring the rights of parties in respect of any matter to which the administrative action relates.
5. Direct the administrator to act in a specific manner or to give reasons for the decision.
6. Prohibit the administrator from acting in a specific manner.
7. Grant a temporary interdict.
8. Direct an administrator to take a decision and declare the rights of parties in relation to taking of the decision.
9. Make an order towards cost.

### **Compliance with Anti-Dumping Agreement**

Judicial review is the only avenue by which an anti-dumping decision can be reviewed in South Africa. The judicial review of administrative proceedings is under the jurisdiction of the courts

in South Africa. Therefore the administrative review process in South Africa meets the requirements of Article 13 of the Anti-Dumping Agreement in that the review procedure of anti-dumping actions is independent from the authority responsible for the anti-dumping determination.

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