

REPUBLIC OF SOUTH AFRICA

PROMOTION OF ADMINISTRATIVE JUSTICE BILL

*(As presented by the Portfolio Committee on Justice and Constitutional Development
(National Assembly), after consideration of Administrative Justice Bill [B 56—99]) (The
English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 56B—99]

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BILL

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—

- (i) “**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), (f), (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; 5
 - (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; 10
 - (cc) the executive powers or functions of a municipal council; 10
 - (dd) the legislative functions of Parliament, a provincial legislature or a municipal council; 10
 - (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 Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law; 15
 - (ff) a decision to institute or continue a prosecution; 15
 - (gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission; 20
 - (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 20
 - (ii) any decision taken, or failure to take a decision, in terms of section 4(1); 20
- (ii) “**administrator**” means an organ of state or any natural or juristic person taking administrative action; 25
- (iii) “**Constitution**” means the Constitution of the Republic of South Africa, 1996; 25
- (iv) “**court**” means—
 - (a) the Constitutional Court acting in terms of section 167(6)(a) of the Constitution; or 30
 - (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 designated in writing by the Minister after consultation with the Magistrates Commission, 35

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; 40
- (v) “**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 to— 45
 - (a) making, suspending, revoking or refusing to make an order, award or determination; 45
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; 45
 - (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; 50
 - (d) imposing a condition or restriction; 50
 - (e) making a declaration, demand or requirement; 50
 - (f) retaining, or refusing to deliver up, an article; or 50
 - (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; 55
- (vi) “**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; 55
- (vii) “**failure**”, in relation to the taking of a decision, includes a refusal to take the decision; 60
- (viii) “**Minister**” means the Cabinet member responsible for the administration of justice; 60

- (ix) “**organ of state**” bears the meaning assigned to it in section 239 of the Constitution;
- (x) “**prescribed**” means prescribed by regulation made under section 10;
- (xi) “**public**”, for the purposes of section 4, includes any group or class of the public; 5
- (xii) “**this Act**” includes the regulations; and
- (xiii) “**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.

Application of Act 10

2. (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. 15

(2) Any exemption or permission granted in terms of subsection (1) must, before publication in the *Gazette*, be approved by Parliament. 20

Procedurally fair administrative action affecting any person

3. (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)— 25

- (a) adequate notice of the nature and purpose of the proposed administrative action;
- (b) a reasonable opportunity to make representations; 30
- (c) a clear statement of the administrative action;
- (d) adequate notice of any right of review or internal appeal, where applicable; and
- (e) 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 or its discretion, also give a person referred to in subsection (1) an opportunity to— 35

- (a) obtain assistance and, in serious or complex cases, legal representation;
- (b) present and dispute information and arguments; and
- (c) appear in person. 40

(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— 45

- (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. 50

(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.

Administrative action affecting public

4. (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— 55

- (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 5
 - (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— 10
 - (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; 15
 - (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 20
 - 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. 25
- (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; 30
 - (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. 35
- (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 all relevant factors, including— 40
- (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. 45

Reasons for administrative action

5. (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 50 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, 55 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 60 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.

Judicial review of administrative action

6. (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 itself—
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to—
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) 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.

Procedure for judicial review

7. (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; or
- (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 Parliament.

Remedies in proceedings for judicial review

8. (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.

Variation of time

9. (1) The period of— 10
- (a) 90 days referred to in section 5 may be reduced; or
 - (b) 90 days or 180 days referred to in sections 5 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. 15
- (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.

Regulations

10. (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; 20
 - (b) the procedures to be followed in connection with public inquiries;
 - (c) the procedures to be followed in connection with notice and comment procedures; 25
 - (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— 30
- (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; 35
 - (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; 40
 - (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; 45
 - (v) programmes 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; 50
 - (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; 55
 - (b) the compilation and publication of protocols for the drafting of rules and standards;
 - (c) the initiation, conducting and co-ordination of programmes 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).

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(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. 10

(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. 15

(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. 20

Short title and commencement

11. 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*.

MEMORANDUM ON THE OBJECTS OF THE PROMOTION OF ADMINISTRATIVE JUSTICE BILL

1. BACKGROUND

1.1 In terms of section 33(1) and (2) of the Constitution, everyone—

- (a) has the right to administrative action that is lawful, reasonable and procedurally fair; and
- (b) whose rights have been adversely affected by administrative action has the right to be given written reasons.

Section 33(3) requires that national legislation must be enacted to give effect to the rights set out in section 33(1) and (2) and must provide for the additional matters specified in section 33(3)(a), (b) and (c) which include, among others, that provision be made for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal and the imposition of a duty on the state to give effect to the rights in section 33(1) and (2). In terms of item 23(1) of Schedule 6 to the Constitution, such legislation must be enacted “within three years of the date on which the new Constitution took effect”, that is by February 2000. Item 23(2) of this Schedule provides for a default position, namely that section 33(3) of the Constitution shall lapse if the legislation concerned is not enacted within three years of the date that the new Constitution took effect.

1.2 The Bill, which emanates from the South African Law Commission’s investigation into administrative justice (Project 115), purports to give effect to the requirements in section 33(3) of the Constitution.

2. CONTENTS OF BILL

2.1 Clause 1 contains a list of definitions. Following section 33 of the Constitution, the concept of “administrative action” which is widely defined, is at the core of the Bill. Key exclusions from the provisions of the Bill are, among others, the listed executive powers or functions of the National Executive and Provincial Executives and the legislative functions of Parliament, the provincial legislatures and municipal councils. Administrative action by natural or juristic persons contemplated in section 8(2) of the Constitution and exercising a public power or performing a public function is specifically included. Another important feature of clause 1 is the provision for a review jurisdiction which includes designated magistrates’ courts.

2.2 Clause 3 requires administrative action to be procedurally fair and sets out core requirements which apply to all administrative acts. However, additional requirements may apply in appropriate circumstances. There is also provision for a departure from the mandatory provisions if it is reasonable and justifiable in the circumstances. Clause 5 contains provisions relating to the furnishing of reasons for administrative action. A general obligation is placed on an administrator to give reasons in writing when requested. Provision is also made for the enforcement of the obligation to furnish reasons.

2.3 Clause 6 specifies the grounds for judicial review of an administrative action, established at common law and adapted in the light of recent formulations in South Africa, whilst clause 7 sets out the procedure for review. The orders that a court can grant in proceedings for judicial review are set out in clause 8. Clause 9 makes provision for the variation of time periods specified in the statute.

2.4 Clause 10 empowers the Minister for Justice and Constitutional Development to make regulations relating to various matters necessary or convenient to be prescribed in order to achieve the objects of the Bill, including the establishment, duties and powers of an advisory council to monitor the application of the Bill and to advise the said Minister on, among others, improvements aimed at ensuring that administrative action conforms with the right to administrative justice and any steps which may lead to the achievement of the objects of the Act.

3. OTHER DEPARTMENTS/BODIES CONSULTED

All government departments were consulted as well as provincial and local government representatives, individuals and bodies representing the legal community and non-governmental organisations.

4. FINANCIAL IMPLICATIONS FOR THE STATE

The establishment of the advisory council referred to in clause 10 may lead to financial expenditure for the Department. The extent of such expenditure will, however, depend on the size, composition and functions of the council, as envisaged by the regulations in terms of which it must be established. Should additional funds be required for this purpose, the Department will have to request the necessary allocation from the Treasury.

5. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice are of the opinion that this Bill must be dealt with in accordance with section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

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