

REPUBLIC OF SOUTH AFRICA

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# ADMINISTRATIVE JUSTICE BILL

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*(As introduced in the National Assembly as a section 75 Bill: explanatory summary of Bill  
published in Government Gazette No. 20572 of 25 October 1999)  
(The English text is the official text of the Bill)*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 56—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; to impose a duty on administrators to give effect to those rights; to establish fair administrative procedures; to provide for the review of administrative action; and to provide for matters incidental thereto.

**B**E IT 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 act performed, decision taken, rule or standard made, or such act, decision, rule or standard which should have been performed, taken or made, by—
- (a) an organ of state;
  - (b) a judicial officer;
  - (c) a prosecuting agency: or 10
  - (d) a natural or juristic person when exercising a public power or performing a public function, but does not include—
    - (i) the functions of the National Executive referred to in sections 79(1) and (4), 84(2), 85(2), 91(2), (3),(4) and (5), 92(3), 93,97,98,99 and 100 of 15 the Constitution;
    - (ii) the functions of the Provincial Executive referred to in sections 121(I) and (2), 125(2)(d), (e) and (f), 126, 127(2)(a), (b), (c), (d) and (f), 132(2), 133(3)(b), 137, 138, 139 and 145(1 ) of the Constitution;
    - (iii) the legislative functions of Parliament, a provincial legislature or a 20 municipal council;
    - (iv) the judicial functions of a judicial officer; or
    - (v) a decision to institute or continue a prosecution;
- (ii) **“administrator”** means an organ of state, judicial officer, prosecuting agency, or natural or juristic person taking administrative action; 25
- (iii) **“Constitution”** means the Constitution of the Republic of South Africa, 1996;
- (iv) **“court”** means—
- (a) the Constitutional Court acting in terms of section 167(6)(J) of the Constitution: or
  - (b) a High Court or another court of similar status; or 30
  - (c) a Magistrates Court designated in writing by the Minister, after consultation with the Magistrates Commission, either generally or in respect of a specified class of administrative action, within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration: 35
- (v) **“executing authority”** means—
- (1) in the case of the organs of state referred to in the definition of ‘executing authority.. in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994), the “executing authority” as so defined in relation to each such organ of state: 40
  - (b) in the case of all other organs of state and all juristic persons when exercising public powers or performing public functions, the chief executive officer thereof; or
  - (c) in the case of natural persons when exercising public powers or performing public functions, such persons: 45
- (vi) **“Minister”** means the Cabinet member responsible for the administration of justice;
- (vii) **“organ of state.”** bears the meaning assigned to it in section 239 of the Constitution;
- (viii) **“prescribed”** means prescribed by regulation made under section 11; 50

- (ix) **“qualified litigant”** means—
- (a) anyone acting in his or her own interest;
  - (b) anyone acting on behalf of another person who cannot act in his or her own name;
  - (c) anyone acting as a member, or in the interest, of a group or class of persons; 5
  - (d) anyone acting in the public interest; or
  - (e) an association acting in the interest of its members; and
- (x) **“this Act”** includes the regulations.

**Right to administrative justice** 10

2. (1) In accordance with section 33 of the Constitution, every person has the right to—

- (a) lawful administrative action where any of his or her rights or interests is adversely affected or threatened;
  - (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is adversely affected or threatened; 15
  - (c) be furnished with reasons in writing for administrative action which adversely affects any of his or her rights or interests unless the reasons for such action have been made public; and
  - (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is adversely affected or threatened. 20
- (2) Every administrator must give effect to the rights referred to in subsection (1).
- (3) A failure to give effect to the rights referred to in subsection (1) is reviewable—
- (a) by a court in terms of this Act; or
  - (b) by any independent and impartial tribunal, but nothing in any other law may be construed to exclude the jurisdiction of a court of law to review such administrative action. 25

**Interpretation of Act**

3. Any other rights and freedoms that are recognised or conferred by common law, customary law, international law or any other law shall be valid to the extent that they are consistent with this Act. 30

**Procedurally fair administrative action**

4. (1) Administrative action which adversely affects rights or interests must be procedurally fair.

(2) A fair procedure depends on the circumstances of each case, but includes at least— 35

- (a) adequate notice of the nature and purpose of the proposed administrative action;
- (b) a reasonable opportunity to make representations;
- (c) a clear statement of the administrative action; and 40
- (d) adequate notice of any right of appeal or review.

(3) A fair procedure may also entail—

- (a) access to relevant information, subject to the Open Democracy Act, 1999;
- (b) an opportunity to obtain assistance and, in serious or complex cases, legal representation; 45
- (c) an opportunity to present and dispute information and arguments;
- (d) an opportunity to appear in person; and
- (e) subject to the procedures in section 6, the reasons for the administrative action.

(4) If circumstances justify it, an administrator may depart from the requirements referred to in subsection (2), to the extent necessary. 50

(5) Where an administrator is empowered by any other law to follow a procedure which is fair but different from the provisions of subsections (2) and (3), the administrator may act in accordance with that different procedure.

(6) The Minister may, by notice in the *Gazette*—

- (a) in exceptional circumstances, exempt an administrator, administrative action or a group or class of administrative actions from the application of this section to the extent necessary; or
- (b) in order to promote efficient administration, permit an administrator to vary 5 the requirements referred to in subsections (2) and (3) and section 5(2) and (3), in a manner specified in the notice,

but such exemption or permission must be compatible with the right to procedurally fair administrative action.

#### **Administrative action affecting public** 10

5. (1) In cases where an administrative action adversely affects the public, an administrator must give effect to section 4, and in order to do so he or she or it 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); 15
- (c) to follow the procedures in both subsections (2) and (3);
- (d) where the administrator is empowered by any other law 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 4. 20

(2) If an administrator decides to hold a public inquiry— 20

- (a) the executing authority must conduct the public inquiry or appoint a suitably qualified person or panel of persons to do so; and
- (b) the executing authority or the person or panel referred to in paragraph (a) must—
  - (i) determine the procedure for the public inquiry, which must— 25
    - (aa) include a public hearing; and
    - (bb) comply with the rules regulating the procedure to be followed in connection with public inquiries, as may be prescribed;
  - (ii) conduct the inquiry in accordance with that procedure;
  - (iii) report in writing on the inquiry and give reasons for any administrative 30 action taken or recommended; and
  - (iv) as soon as possible thereafter, publish in English and in at least one of the other official languages in the *Gazette* or relevant provincial *Gazette* a notice containing—
    - (aa) a concise summary of any report; and 35
    - (bb) the particulars of the places and times at which the report may be inspected and copied.

(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 40 likely to be 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 rules regulating the procedure to be followed in connection 45 with notice and comment procedures, as may be prescribed.

(4) If circumstances justify it, an administrator may depart from the requirement referred to in subsections (1) to (3), to the extent necessary.

(5) In this section “public” includes any group or class of the public.

#### **Reasons for administrative action** 50

6. (1) Subject to the Open Democracy Act, 1999, a person whose rights have been 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. 55

(2) The administrator to whom the request is made must, at the time the action is taken or as soon as possible thereafter, and in any event not more than 90 days after receiving the request, give that person adequate reasons in writing for the administrative action, incorporating the essential facts and the legal basis for the action.

(3) If an administrator fails to furnish adequate reasons for an administrative action, it must be presumed in any proceedings for review, in the absence of proof to the contrary, that the administrative action was taken without good reason.

(4) If circumstances justify it, an administrator may depart from the requirements referred to in subsection (2) to the extent necessary, 5

(5) Where an administrator is empowered by any other law 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) The Minister may, by notice in the *Gazette*—

(a) in exceptional circumstances, exempt an administrator, administrative action<sup>10</sup> or a group or class of administrative actions from the application of this section to the extent necessary; or

(b) in order to promote efficient administration, permit an administrator to vary the requirements referred to in subsection (2), in a manner specified in the notice. 15

but such exemption or permission must be compatible with the right of persons adversely affected by administrative action to be given written reasons for that administrative action.

### Grounds of review

7. (1) A court has the power to review an administrative action if— 20

(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: 25

(a) a mandatory procedure or mandatory condition prescribed by law 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— 30

(i) for a reason not authorised by the empowering provision:

(ii) for an ulterior purpose or motive or in bad faith;

(iii) because irrelevant considerations were taken into account or relevant considerations not considered:

(iv) because of too rigid an adherence to a standard: 35

(v) because of the unauthorised or unwarranted dictates of another person or body; or

(vi) arbitrarily, capriciously or without properly considering the matter;

(f) the action itself—

(i) contravenes a law or is not authorised by law; 40

(ii) is vague or uncertain: or

(iii) 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 45

(dd) the reasons given for it by the administrator:

(g) the effect of the action is unreasonable, including any—

(i) disproportionality between the adverse and beneficial consequences of the action: and

(ii) less restrictive means to achieve the purpose for which the action was<sup>50</sup> taken: or

(h) the administrative action is otherwise unconstitutional or unlawful.

(2) In this section—

(1) **“empowering provision..”** means the legislative or constitutional provision, the rule of common law, customary law, international law, the agreement<sup>55</sup> or document in terms of which the administrative action was purportedly taken;

(b) **“law”** means the common law, customary law, international law, the empowering provision or any other applicable constitutional or legislative provision, including this Act and the prescribed code of conduct; and 60

- (c) “**relevant considerations**” include all material information, objections and alternatives to the administrative action.

### Procedure for review

8. (1) A qualified litigant may, without unreasonable delay and not later than 180 days after the date on which that person 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, institute proceedings in a court for judicial review of the administrative action. 5

(2) 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. 10

(3) Before the implementation of the rules of procedure in terms of the provisions of subsection (2), all proceedings for judicial review must be instituted in the High Courts or the Constitutional Court. 15

### Remedies in proceedings for judicial review

9. The court, in proceedings for judicial review, may grant any order that is just and equitable, including orders—

- (a) directing the administrator—
  - (i) to give reasons; or 20
  - (ii) to act in the manner the court 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: 25
  - (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; 30
  - (iii) making a declaration of rights;
  - (iv) granting a temporary interdict or other temporary relief; or
  - (v) making any order as to costs.

### Variation of time

10. (1) The period of— 35

- (a) 90 days referred to in section 6 may be reduced; or
- (b) 90 days or 180 days referred to in sections 6 and 8 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court on application by the person or administrator concerned. 40

(2) The court may grant an application in terms of subsection (1) where the interests of justice so require.

### Regulations

11. (1) The Minister may 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; 45
- (b) rules to regulate the procedure to be followed in connection with public inquiries;
- (c) rules to regulate the procedure to be followed in connection with notice and comment procedures; 50
- (d) the procedures to be followed in connection with requests for reasons;
- (e) the formulation and publication in the *Gazette* of a code of good administrative conduct;

- (f) the compilation and publication of protocols for the drafting of rules and standards;
- (g) 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 exercise of administrative actions, including the compilation and maintenance of registers containing the text of rules and standards used by organs of state; 5
  - (ii) any improvements that might be made in respect of internal complaints procedures, internal administrative appeals and the review by courts of administrative action; 10
  - (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; 15
  - (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) initiating, conducting and co-ordinating 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; 20
  - (vi) any other improvements aimed at ensuring that administrative action conforms with the right to administrative justice; 25
  - (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:
- (h) matters required or permitted by this Act to be prescribed; and 30
- (i) matters necessary or convenient to be prescribed in order to—
- (i) achieve the objects of this Act; or
  - (ii) subject to subsection (2), give effect to any advice or recommendations by the advisory council referred to in paragraph (g).
- (2) This section may not be construed as empowering the Minister to make regulations regarding any matter which may be regulated by the Public Service Commission under the Constitution or any other law. 35
- (3) Any regulation made under subsection (1) must, before publication in the *Gazette*, be submitted to Parliament.
- (4) Any regulation made under subsection (1) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance. 40

### Short title and commencement

**12.** This Act is called the Administrative Justice Act, 1999, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

## MEMORANDUM ON THE OBJECTS OF THE ADMINISTRATIVE JUSTICE BILL, 1999

### 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(i) 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 Commissions 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 functions of the National Executive and Provincial Executives and the legislative actions 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. Other important features of clause 1 are the wide definition of standing (in the definition of "qualified litigant"), and provision for a review jurisdiction which includes designated magistrates, courts.

2.2 Clause 2 imposes a duty on all administrators to give effect to the rights to just administrative action in section 33(1) and (2) of the Constitution and provides for the review of such actions by the courts and independent and impartial tribunals.

2.3 Clause 4 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 in exceptional circumstances, and then only to the extent necessary. Clause 6 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.

2.4 Clause 7 specifies the grounds for review of an administrative action, established at common law and adapted in the light of recent formulations in South Africa, whilst clause 8 sets out the procedure for review. The orders that a court can grant in proceedings for judicial review are set out in clause 9. Clause 10 makes provision for the variation of time periods specified in the statute.

2.5 Clause 11 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.

2.6 Clause 12 provides for the short title and commencement of the Bill.

### **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 11 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 may 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.