

**THE APPLICATION OF THE *AUDI ALTERAM PARTEM*
RULE TO THE PROCEEDINGS OF COMMISSIONS OF
INQUIRY**

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SUMMARY

Before 1994 administrative law was dominated by parliamentary supremacy which dictated that Parliament is the supreme law-making authority in the state. This position was radically changed by the new democratic order. To protect the rights of citizens a Bill of Rights was introduced in South Africa.

This research focuses on the uncertainty pertaining to the application of the *audi alteram partem* rule to the proceedings of commissions of inquiry. Section 24 of the interim Constitution, section 33 of the final Constitution and the *Promotion of Administrative Justice Act* 3 of 2000 were introduced to safeguard the individual against unfair administrative action. These legislative measures as well as applicable case law are analysed in order to establish whether they have brought about greater clarity concerning the application of the *audi alteram partem* rule to the proceedings of commissions of inquiry.

LIST OF KEY WORDS

Administrative law
Audi alteram partem
Bill of Rights
Commissions
Common law
Constitution
Constitutional Court
Constitutional State
Existing rights
Fairness
Legitimate expectation
Natural justice
Prejudice
Procedure
Rights
Rule

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THE APPLICATION OF THE *AUDI ALTERAM PARTEM* RULE TO THE PROCEEDINGS OF COMMISSIONS OF INQUIRY

1 Introduction

In terms of the common law, commissions of inquiry in South Africa are not subjected to the rules of natural justice. In *Bell v Van Rensburg*¹ the court reiterated that the rules of natural justice, including the *audi alteram partem* principle, the right to personal appearance, the right to cross-examination and the right to insight into evidence already delivered are not applicable to the proceedings of commissions of inquiry.

The reason for this approach is to be found in the fact that the rules of natural justice, more particularly the *audi alteram partem* rule, were initially regarded to be applicable only in those cases where it could be said that administrative action in question violated the rights of the individual. In this respect, so the argument goes, commissions of inquiry do not violate any individual rights. However, in *S v Mulder*² the court agreed that the recommendations of a commission of inquiry may in "*in los sin*" ("in a loose sense") have an adverse effect on citizens.

In 1989, in the landmark decision of *Administrator Transvaal v Traub*,³ the appellate division incorporated into South African law the concept of *legitimate expectation*. The concept means that, under certain circumstances, a person may insist on the application of the *audi alteram partem* rule, even though the administrative action in question does not violate any of his or her rights. Whether such a legitimate expectation may under appropriate circumstances be ascribed to an individual appearing before a commission of inquiry is not clear and has not been decided yet by the South African courts.

1 1971 3 SA 693 (C) 693-694A.

2 1980 1 SA 113 (T) 121F-121G.

3 1989 4 SA 731 (A) 762B-C.

The rules of natural justice are rules of procedure. In this regard, section 24 of the 1993 *Constitution of the Republic of South Africa*⁴ and section 33 of the 1996 *Constitution of the Republic of South Africa*⁵ both provide that every person has a fundamental right to administrative action that is procedurally fair. The term *administrative action* is defined in section 1 of the recently enacted *Promotion of Administrative Justice Act*⁶. The influence of these provisions on the common law position pertaining to the functioning of commissions of inquiry is not clear and has up to now not been subjected to judicial scrutiny.

By way of introduction to this study, it is worth noting the recommendation by both the Canadian Law Reform Commission⁷ and the New Zealand Public and Administrative Reform Committee⁸ that legislation governing commissions of inquiry should make adequate provision for the right of representations by individuals who may be adversely affected as a result of an investigation. This investigation will try to establish whether there is enough reason to advocate similar reforms in South Africa.⁹

The aim of this study is therefore to address the uncertainty pertaining to the application of the rules of natural justice to the proceedings of commissions of inquiry. The question to be addressed can be formulated as follows: To what extent and on what grounds can the *audi alteram partem* rule be made applicable to the proceedings of commissions of inquiry?

4 Act 200 of 1993.

5 Act 108 of 1996.

6 Act 3 of 2000.

7 Advisory and Investigatory Commissions Report (1979) 13.

8 Commissions of Inquiry (Thirteenth Report 1980) 30-31.

9 Baxter *Administrative Law* 223.

2 Position before 1994

2.1 Natural justice

2.1.1 General application of the *audi alteram partem* rule

If the rights of an individual have been violated by the actions of the government, a public body or certain domestic tribunals or associations, such an individual may claim, depending on the circumstances of the particular case, that there has been a breach of the rules of natural justice.¹⁰ The content of these rules can be summarized in the maxim *audi alteram partem*. Translated literally this means "hear the other side or case".¹¹ The *audi alteram partem* rule is an ancient rule that has existed since the dawn of time.¹² The cardinal principle that no man is to be judged without being heard was known to the Greeks, as can be gleaned from old inscribed-upon images in places where justice was administered.¹³

The application of the *audi alteram partem* rule, as is the case with many other concepts, has been eclectic,¹⁴ but it developed certain nuances in the decisions of the civil courts. The rule entails four principles. Firstly, a party to an administrative enquiry must be afforded an opportunity to state his or her case before a decision is reached, if such a decision is likely to affect his or her rights or legitimate expectations. Secondly, prejudicial facts must be communicated to the person who may be affected by the administrative decision, in order to enable him or her to rebut such facts. Thirdly, the rule also stipulates that the administrative tribunal which has taken the decision must give reasons for its decision. Fourthly, the rule entails that the administrative organ exercising the discretion must be impartial. As a general rule it may be said that the principles of natural justice apply whenever an administrative act is

10 Craig *Administrative Law* 253.

11 Wiechers *Administrative Law* 210.

12 Tladi *The audi alteram partem rule in administrative law* 1; Schwartz *Administrative Law* 202; Wade *Administrative Law* 444-446.

13 Tladi *The audi alteram partem rule in administrative law* 1.

14 Craig *Administrative Law* 253.

quasi-judicial. An administrative act may be said to be quasi-judicial if it affects the rights and liberties of an individual.¹⁵

South African courts classify the functions of the administration into four broad categories: legislative, judicial, quasi-judicial, and purely administrative (including ministerial). It has generally been held that only judicial and quasi-judicial proceedings need follow the *audi alteram partem* rule.¹⁶ A quasi-judicial act is an act which resembles a judicial act but is not a judicial act because the organ performing it is not a judicial organ and therefore does not perform a judicial act.¹⁷ In *R v Nomveti*¹⁸ the court stated that a function which is judicial or quasi-judicial as opposed to one which may be called purely administrative involves the exercise of powers affecting legal rights and an enquiry into matters relating to such rights.

In *Laubscher v Native Commissioner, Piet Retief*¹⁹ the facts were as follows:

In terms of the *Native Trust and Land Act*²⁰ no person had the right to enter a native trust area without the written consent of the person acting under the authority of the trustee. In the case under consideration, the official authorised to give such written consent was the respondent, the Native Commissioner of Piet Retief. Laubscher, an attorney, applied for written permission to enter a trust area in order to consult his client, a local chief. Permission was refused by the Native Commissioner. Laubscher applied unsuccessfully to the Supreme Court (the Transvaal Provincial Division) for relief. He thereupon appealed to the Appellate Division. The gravamen of his complaint was that the respondent had not afforded him the opportunity to be heard before refusing his application to enter the trust property for the purposes of carrying out his lawful profession.

15 Baxter 1979 SALJ 608-609.

16 Baxter 1979 SALJ 610.

17 Wiechers *Administrative Law* 123.

18 1960 2 SA 108 (E) 120F.

19 1958 1 SA 546 (A) 549E-G.

20 Act 18 of 1936.

The Appellate Division held that the *audi alteram partem* rule did not apply to the appellant. The court further stated that the refusal of permission did not prejudicially affect Laubcher's liberty or property or other legal right and that the granting of permission was intended by the legislature to be a purely administrative act allowing the official an absolute discretion.

In *Administrateur van Suidwes-Afrika v Pieters*,²¹ an application by the respondent, a coloured attorney who had formerly practised in Johannesburg, for a permanent resident permit in the Territory of South West Africa had been refused by the second appellant, the Administrator-in-Executive Committee. An application to review this decision and to have it set aside was granted by the court. Pieters' case was *inter alia* that he had not been afforded the opportunity of being heard. The Appellate Division found that Pieters had no existing rights that required protection and it also found that the Administrator-in-Executive Committee, in considering the application, had exercised a "purely administrative" function with unlimited discretion.

Wiechers²² does not agree with the court's decision in the *Pieters* case. He argues that Pieters' freedom to settle in South West Africa and to practice a profession for which he was fully qualified, were violated. He further argues that government functions that are performed in the exercise of government power must – in the absence of express statutory permission to the opposite – always take into account both the rights and the general freedoms of subjects. According to the court, the administrator had an unfettered discretion to grant or refuse permission. However, in administrative law it is unacceptable to speak about unbounded or unfettered discretions, because this reasoning is contrary to the basic principle of legality. This principle, it is agreed, should underpin the administration of every state founded on legality, including South Africa.

21 1973 1 SA 850 (A) 861-866F-I.

22 Wiechers *Administrative Law* 133-134.

The *audi alteram partem* rule seeks to promote objective and informed decisions. Thus it is important that it be observed prior to the decision.²³ The rule would normally apply before an administrative organ performs its act.²⁴

The application of the *audi alteram partem* rule was brought out in the case of *Board of Education v Rice*,²⁵ when the court stated that the Board of Education had to ascertain the facts as well as listen to both sides, for that is a duty upon everyone who decides an issue that may have an impact on a person's rights.

In *Chief Constable Pietermaritzburg v Ishim*²⁶ the court held that it is a principle of common law that no man shall be condemned unheard, and it would require very clear words in the statute to deprive a man of that right. This court's decision shows that the *audi alteram partem* rule would only be excluded if parliament intended its exclusion, irrespective of whether or not the rights of individuals are affected. The *audi alteram partem* rule ensures a free and impartial administrative process, within which decisions and cognisance of facts and circumstances, occur altogether openly.²⁷

In *S v Moroka en Andere*²⁸ the Appellate Division held that the *audi alteram partem* rule is inapplicable where a decision by a minister or public official affects the public in general. However, a decision by the Attorney-General to make an order prohibiting an arrested person from obtaining bail is one which prejudicially affects the liberty of an individual and, therefore, the *audi alteram partem* rule applies unless the enabling act shows, either expressly or by implication, a clear intention that the individual's right to be heard is to be excluded.²⁹

23 Baxter *Administrative Law* 587.

24 Wiechers *Administrative Law* 208.

25 1911 AC 182.

26 1908 29 NLR 338 341.

27 Wiechers *Administrative Law* 209.

28 1969 2 SA 394 (A) 398D.

29 *Attorney-General, Eastern Cape v Blom and Others* 1988 4 SA 645 (A) 660H.

In *R v Ngwevela*³⁰ the court held that when a statute empowers a public official to give a decision prejudicially affecting an individual's property or liberty, that individual has a right to be heard before action is taken against him. The law should be made to reach out and come to the aid of persons prejudicially affected by an administrative decision.³¹

In *Le Roux v Minister van Bantoe-Administrasie en -Ontwikkeling*³² the court held that in general the *audi alteram partem* rule is applied only where a statutory functionary is assigned the power to give a decision that affects the rights of another.

In *Pretoria City Council v Modimola*³³ the local authority was empowered by law to expropriate immovable property in the interest of the community in terms of section 24(1) of the *Group Areas Development Act*.³⁴ The local authority did not afford the registered owner of the property an opportunity of being heard before the expropriation order was made. Modimola successfully instituted proceedings in the Transvaal Provincial Division for setting aside of the expropriation order on account of the failure of the authority to comply with the *audi alteram partem* rule. On appeal this decision was set aside, the reason being that there was no obligation on the part of the local authority to afford a person affected by expropriation of being heard in regard to it. In this case the appeal court stated:

In the absence of a provision prescribing a quasi-judicial enquiry as a prerequisite to the exercise of a power of expropriation, the act of expropriation is a purely administrative act.

According to Wiechers³⁵ expropriation comprises the power to infringe an owner's right of ownership and that fact is used to deny the existence of such a right of ownership. This totally prejudices the entire matter. At the time of the expropriation, or rather at the time before the

30 1954 1 SA 123 (A) 127F.

31 1989 4 SA 731 (A) 761F.

32 1966 1 SA 481 (A) 491E-F.

33 1966 3 SA 250 (A) 263F.

34 Act 69 of 1955.

35 Wiechers *Administrative Law* 219.

expropriation takes place, when observance of the rules of natural justice would have an impact, the owner is still the owner and his right of ownership is encroached upon. Where the expropriation is in the discretion of the administrative organ, and is not imposed upon the organ as a statutory duty, the submission of arguments and objections may have a real influence on the organ's ultimate decision. The fact that a person is no longer owner once expropriation has taken place and that he can no longer exercise his powers of ownership, is no reason for denying the existence of his right of ownership before expropriation.

The *audi alteram partem* rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party.³⁶

2.1.2 The doctrine of legitimate expectation

Traditionally, South African courts adopted the approach that the *audi alteram partem* rule would only apply where liberty, property or existing rights had been affected. The fact that more interests or expectations, not amounting to rights, could be affected was consequently not considered.

The refusal to enforce compliance with the *audi alteram partem* rule, in the absence of a definite right, had grossly prejudiced individuals who were subjects of investigations. In *Administrator Transvaal and Others v Traub and Others*³⁷ the Appellate Division rejected the long established-traditional approach to the application of the *audi alteram partem* rule in

36 Wiechers *Administrative Law* 210-211.

37 1989 4 SA 731 (A) 762-764.

South African law. In broad terms, the doctrine holds that where a decision-maker, either through the adoption of a regular practice or through an express promise, leads those affected legitimately to expect that the decision maker will decide in a particular way, then that expectation is protected, and the decision maker cannot ignore it in making his decision.³⁸

In *Administrator Transvaal and Others v Traub and Others*³⁹ the then Chief Justice remarked:

There may be many cases where an adherence to the formula of liberty, property and existing rights, would fail to provide a legal remedy, when the facts cry out for one, and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected.

In South Africa there was no movement by our courts to enforce the application of the *audi alteram partem* rule on domestic tribunals, of which are said that they are exercising administrative functions and that their functions are affecting a wide variety of interests which do not constitute rights in the strict sense. The concept which has been fashioned to identify such interests is the concept of legitimate expectation.

In *Administrator, Transvaal and Others v Traub and Others*⁴⁰ the court stated that:

The legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned would reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.

There were situations in which individual rights had not been affected, but where the citizen could legitimately expect to be treated fairly. In *Lunt v University of Cape Town*,⁴¹ the University refused to register a student because he did not have a training post at a hospital, a

38 Forsyth 1990 SALJ 387 389.

39 1989 4 SA 731 (A) 761E-F.

40 1989 4 SA 731 (A) 758D-F.

41 1989 2 SA 438 (C) 450-451; Wade and Forsyth *Administrative Law* 464.

prerequisite for post graduate studies. The court set the decision aside on the basis that the applicant had a legitimate right to be heard. Our courts have clearly indicated that the doctrine of legitimate expectation has already become part of our common law.

The question could be posed whether the legitimate expectation doctrine and the *audi alteram partem* rule generally apply to the functioning of commissions of inquiry.

2.1.3 Application of the *audi alteram partem* rule to commissions of inquiry

An administrative decision that has serious or drastic consequences for the subject's rights, privileges and freedoms very often goes through a process of investigation and recommendation beforehand.⁴² But our courts are unable to see the administrative decision-making process as a coherent process of investigation and recommendation. In *Bell v Van Rensburg NO*⁴³ the court stated that:

A commission of enquiry appointed by the State President and to which the Commissions Act, 8 of 1947, has been made applicable is not a *quasi* judicial tribunal but a fact-finding body. A mere witness has no right to demand legal representation while giving evidence before it, nor to demand sight of the evidence recorded by it prior to his appearance as a witness, nor to demand to be allowed to present a 'case', lead evidence, cross-examine other witnesses, and address it. The commission has a discretion to allow these things but it is not required to exercise its discretion in favour of a witness merely because some other witness may make allegations prejudicial to him. The discretion is an absolute one and, as the Act confers no such rights on a witness, the *audi alteram partem* rule need not be observed by the commission.

The opportunity to participate in the decision-making process is provided by the application of the *audi alteram partem* rule.⁴⁴ The *Commissions Act*⁴⁵ confers certain powers on commissions of inquiry appointed by the President for the purpose of investigating matters of public concern. These commissions may determine their own procedure, including the application of the *audi alteram partem* rule. Therefore, an individual

42 *Wiechers Administrative Law* 223.

43 1971 3 SA 693 (C) 693-694H.

44 *Wiechers Administrative Law* 224.

45 Act 8 of 1947.

appearing before a commission of inquiry is very often not in a position to defend himself against potentially prejudicial facts.

In *South African Defence and Aid Fund v Minister of Justice*⁴⁶ the State President, acting under powers conferred by section 2(2) of the *Suppression of Communism Act*,⁴⁷ declared the Defence and Aid Fund to be an unlawful organisation for the purposes of the act. The Fund and its chairman applied for an order setting aside the proclamation. The ground of attack was that in violation of the *audi alteram partem* rule the Fund had not been given any advance opportunity to be heard.

The question in issue was whether the rights of the appellant were in any way affected by the exercise by the State President of his functions under section 17 of the act.⁴⁸ The act directs that three stages must take place in the liquidation of an organisation: Firstly the Minister appoints a fact-finding committee, secondly he considers its factual report in the light of such other information he may have and thirdly the State President thereafter exercises his power. In determining whether the rights of the appellant were affected by the exercise by the committee of its functions under section 17 of the act, the court pointed out that the committee was not required to make any recommendations, or to make any findings on any of the matters mentioned in section 2(2)⁴⁹ of the act in regard to which the State President was required to be satisfied before declaring an organisation an unlawful organisation.

The committee was not required to decide anything and there was no link between the report and the decision by the State President to declare an organisation unlawful, such as a relationship which would justify the conclusion that the rights of the organisation were affected by the report. Flowing from this ruling, the court further held that unless the (administrative) act was of a "quasi-judicial nature" the individual concerned was not entitled to a hearing.

46 1967 1 SA 263 (A) 270C-G, 271-272C.

47 Act 44 of 1950.

48 Act 44 of 1950.

49 S 2(2) of Act 44 of 1950.

Ideally, the decision-maker should be the person who elicits the information upon which his decision is to be based. But since this is usually not practical, the decision-maker is often obliged to appoint others to make inquiries on his behalf. Indeed, this is the very *raison d'être* of commissions of inquiry. This gives rise to questions such as by whom and when must natural justice be observed? As the decision-making process becomes progressively more fragmented, the answer to these questions becomes more difficult, and it may be that if natural justice is to be satisfactorily applied, it ought to be specifically regulated by the enabling statute. In the absence of express statutory provisions, however, it is obvious that somewhere along the line natural justice ought to be observed. For the individual affected by the ultimate decision, the whole process is a unitary one.⁵⁰

The approach of not applying the *audi alteram partem* rule to commissions of inquiry is one-sided because in the past some decisions of the South African courts have based the *audi alteram partem* rule upon a statutory implication while other decisions have viewed the right to be heard as a substantive right which is to be enforced unless the particular statute excludes it expressly or implicitly, or unless exceptional circumstances exist that warrants its non-observance.⁵¹ The *audi alteram partem* rule must be observed whenever the rights of an individual or organisation are affected.

As far as could be established, no case has advanced the application of the *audi alteram partem* rule to proceedings of commissions of inquiry. All relevant cases consistently emphasise the requirement that one's rights must be adversely affected before the *audi alteram partem* rule could be assumed to apply. Because of this latter requirement, which limits the application of the *audi alteram partem* rule in the proceedings of commissions of inquiry, justice and fairness in this regard are neglected by our courts and legislature.⁵²

50 Baxter *Administrative Law* 585.

51 *Moodley v Minister of Education and Culture House of Delegates* 1989 3 SA 221 (A) 235H.

52 Cameron 1982 *SALJ* 38, 54-56.

In South Africa the application of the *audi alteram partem* rule to commissions of inquiry has been hampered by three factors. The first is an imperfect or defective recognition and acknowledgement of the rights, privileges and freedoms of subjects which are infringed; the second is an erroneous concept of what discretionary power entails; and the third is a defective view of the coherence and course of the administrative process.⁵³ When one examines the South African case law, it is worth noting that the application of the *audi alteram partem* rule has often been applied restrictively. This is so, on the one hand, because before 1994 the courts took an extremely narrow view of the subject's rights, privileges and freedoms that might be infringed. On the other hand, when dealing with the question whether a subject's rights, privileges and freedoms were at stake, our courts prejudiced the enquiry by finding that, because the statute authorised the infringement of such rights, freedoms and privileges, the latter no longer existed and the subject could therefore no longer demand that the *audi alteram partem* rule be observed.

In *Beukes v Administrateur-Generaal Suidwes-Afrika*⁵⁴ it was found that a review committee investigating complaints by detainees need not give detainees a hearing because the committee merely makes recommendations, and also that a professional association making enquiries and drawing up complaints about the conduct of one of its members need not give the member concerned the opportunity to state his case.⁵⁵

However, in *S v Mulder*⁵⁶ the court stated that:

'n Kommissie van hierdie aard se bedrywighede en verslag mag in 'n los sin burgers nadelig affekteer, maar het in werklikheid geen uitwerking op hulle wetlike regte en verpligtinge nie, omdat dit geen geskille besleg tussen die Regering en getuies of getuies onderling nie. Daar is geen aanklaer of beskuldigde nie, en daar is ook geen geskilkpunte wat deur die kommissie opgelos moet word nie. Die opdrag is gewoonlik van so 'n aard dat met die inkwisitoriale metode van ondervraging die verloop van die kommissie se verrigtinge afhang van die inligting wat in die loop van die ondersoek ingewin word.

53 Wiechers *Administrative Law* 216-217.

54 1980 2 SA 664 (SWA) 668H-669.

55 Wiechers *Administrative Law* 225.

56 1980 1 SA 113 (T) 121F-G.

Central to the debate that commissions of inquiry only make recommendations, the point is that, where the decision-maker and the investigator occupy positions independent of each other and the decision-maker decides for himself whether to accept the findings of the committee, there is truly a causal link – a process in which the decision-maker is influenced or convinced by the committee's findings. Therefore the opportunity to participate in the decision-making process is provided by the application of the rules of natural justice⁵⁷ to the proceedings of the fact finding body.

It was held in *Meyer v Law Society, Transvaal*⁵⁸ that a hearing preparatory to a decision by a law society to apply to court for the removal of an attorney from the roll does not affect the rights of the practitioner and consequently is not one to which the rules of natural justice apply. The reason of the court was that the society does not itself make any finding, it does not seek to impose any punishment, and it does not decide anything more than that there is a *prima facie* case which should be considered by the court.

In *Minister of Interior v Bechler and Others*⁵⁹ the government appointed a commission to make recommendations concerning the deportation of any person who, being an enemy alien, had committed certain specified acts or who had conducted himself in certain specified ways, and whose presence, in the opinion of the commission was incompatible with the purpose of the government of preventing the resurgence of Nazi and fascist doctrines in the Union. Owing to the large number of people to be investigated, the commission did not give a separate hearing to each individual but required each one to reply to a question. The Appellate Division held that in this exercise of its prerogative, the executive had power to deport enemy aliens without giving them the opportunity to be heard.

57 *Wiechers Administrative Law* 223.

58 1978 2 SA 209 (T) 214G-H.

59 1948 3 SA 409 (A) 455-544.

A commission of inquiry that does not give an individual who is the subject of an inquiry an opportunity to state his case and to defend himself, surely cannot be said to have applied its mind to the matter.⁶⁰ It is clear from the authority referred to that the ambit of the application of the *audi alteram partem* rule has never been precisely defined by our law.⁶¹

The judgments by the appellate division before 1994 exposes the disturbing and questionable judicial failure to enforce the application of the *audi alteram partem* rule to commissions of inquiry. In South Africa statutory authorities have the power to affect the lives and liberties of individuals irreparably. Our courts' approach to the right of individuals to be heard by commissions of inquiry precludes implementation of the principle of the *audi alteram partem* rule. Apart from the instances that indicate that the rights of individuals appearing before commissions of inquiry may in some way or other be affected by commissions of inquiry, an analysis of the leading appellate division cases indicates that the position of the courts in the application of the *audi alteram partem* rule to commissions of inquiry is not above criticism.

The *audi alteram partem* rule can possibly be enforced before a commission of inquiry by employing the concept of legitimate expectation. An individual who is a subject of investigation can insist that the *audi alteram partem* rule be observed by the commissions of inquiry because the concept of legitimate expectation does not require a violation of an individual's rights in order to be applicable. This fact leaves room for a commission to apply the *audi alteram partem* rule through the concept of legitimate expectation.

In the light of the new constitutional dispensation post 1994, the viewpoint that the *audi alteram partem* rule should be applied to the proceedings of commissions of inquiry could be argued to be in conformity with the principles underlying the Bill of Rights as contained

60 Wiechers *Administrative Law* 227.

61 Baxter *Administrative Law* 587.

in the interim Constitution. This aspect is dealt with in the discussion below.

3 Position after 1994

3.1 Introduction

The interim Constitution⁶² came into force on 27 April 1994. Its effect on the South African legal system can be described as revolutionary. Basically, the interim Constitution brought about three fundamental changes.⁶³

Firstly, for the first time in South Africa's history, the franchise and associated political rights were accorded to all citizens without racial qualification. The interim Constitution brought to an end the racially qualified constitutional order that accompanied three hundred years of colonialism, segregation and apartheid. Secondly, the doctrine of parliamentary supremacy was replaced by the doctrine of constitutional supremacy. A Bill of Rights was put in place to safeguard human rights, ending centuries of state-sanctioned abuse and lastly the strong central government of the past was replaced by a state with federal elements. The Westminster-style electoral system was replaced by a system based on proportional representation.

Before 1994 effective protection of human rights through the courts was virtually impossible. Constitutional law was dominated by the doctrine of parliamentary supremacy, which dictated that Parliament was the supreme law-making authority in the state. The common law provided some protection for individual rights but Parliament could pass legislation amending the common law in whatever way it thought fit.⁶⁴ This position was changed by the interim Constitution. The development of administrative common law by the courts was substituted by a

62 Act 200 of 1993.

63 De Waal, Currie and Erasmus *Bill of Rights 2*.

64 De Waal, Currie and Erasmus *Bill of Rights 2*.

process in which legislatures and the courts develop administrative law by giving effect to constitutional concepts and principles.⁶⁵

The interim Constitution developed various guidelines, indicating when to apply the *audi alteram partem* rule within the broader framework of constitutional supremacy. This common law rule was codified in section 24 of the interim Constitution. The rule could no longer be regarded as a common law rule of administrative law, it now had a constitutional basis. Section 24 of the interim Constitution provided:⁶⁶

24. Every person shall have the right to -
- (a) lawful administrative action where any of his or her rights or interests are affected or threatened;
 - (b) procedurally fair administrative action where any of his or her rights or legitimate expectations are affected or threatened;
 - (c) be furnished with reasons in writing for administrative action which 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 are affected or threatened.

Section 24(b) of the interim Constitution extended the application of procedural fairness to those whose rights or legitimate expectations were affected or threatened. The immediate significance of this provision is that the application of fairness no longer depends on legislative whim.⁶⁷

3.2 Interim Constitution

3.2.1 General application of the *audi alteram partem* rule

The *audi alteram partem* rule is more than a mere procedural norm. It constitutes a fundamental system of justice because it guarantees, *inter alia*, elementary justice in administrative matters between individuals and the state. The right to procedural fairness found constitutional

65 Rautenbach and Malherbe *Constitutional Law* 232.

66 S 24(a)-24(d) of the interim *Constitution of the Republic of South Africa*, 1993.

67 Hoexter and Currie *The New Constitutional and Administrative Law* Volume two 211.

expression in section 24(b) of the interim Constitution. In *Van Huyssteen v Minister of Environmental Affairs and Tourism*⁶⁸ the court stated that the constitutional right to procedural fairness should not merely be regarded as a codification of pre-constitution rules of natural justice. In the court's view, the interpretation of the phrase "the right to procedurally fair administrative action" set out in section 24(b) of the interim Constitution, had to be a "general" one, so that individuals were to be accorded the full benefit of the fundamental rights encapsulated in the Bill of Rights and to more than just the application of the *audi alteram partem* rule.⁶⁹ What a person is entitled to in the court's view is the principles and procedures which, in the particular situation or set of circumstances, are right, just and fair.

The rules of our administrative law, and section 24(b) of the Constitution must surely be viewed as being concerned with upholding respect for individual rights by applying fair procedures whenever these rights are affected.⁷⁰ The right to procedural fairness such as the right to be heard includes aspects of fair procedures which have not, as yet, been properly addressed by our courts.⁷¹

A rigid application of the *audi alteram partem* rule in the case of the so-called quasi-judicial acts no longer finds universal application. In *Toerien v De Villiers*⁷² it was held that the administrative law rules of natural justice, including the *audi alteram partem* rule, should be applied in regard to the termination of a contract of employment where the employer is a public authority whose decision to terminate the contract of employment amounts to the exercise of public power. In *Ramburen v Minister of Housing*⁷³ the court found that the *audi alteram partem* rule applied to the decision-making powers of the community development and housing development boards, because the decisions of these two boards were taken in the course of implementing government policy,

68 1995 9 BCLR 1191 (C) 1212F-G.

69 1996 1 SA 283 (CPD) 305C.

70 Hoexter 1994 SALJ 717.

71 Devenish *Administrative Law and Justice in South Africa* 277.

72 1995 2 SA 879 (C) 880E.

73 1995 1 SA 353 (D) 362D-E, 364E/F and 364I.

which amounted to the exercising of public powers. Non-compliance with the *audi alteram partem* rule amounted to an irregularity and the boards' decisions were set aside.

In *Gardener v East London Transitional Local Council*,⁷⁴ the court stated:

I do not understand section 24(b) to mean that the *audi* principle is absolutely applicable to every administrative act. Such interpretation would make possible the misuse of the Constitution to hold up necessary social reform measures, or for that matter any executive or administrative acts.

It is accepted under the interim Constitution that procedural fairness imposed flexible demands. However, these demands are still determined by the statutory context. Given the range of procedural protection provided by the Constitution, it cannot be said with certainty that there has not been a violation of section 24(b) by the person who conducts the investigation.⁷⁵

In *Directory Advertising v Minister for Posts and Telecommunications and Broadcasting*,⁷⁶ the applicant contended that the refusal by Telkom to give the applicant access to up-to-date price lists or price information determined by Telkom and the Minister constituted procedural unfair administrative action. The applicant needed to use the price lists to advise clients of all the alternatives which existed and the applicable pricing structures that could achieve considerable cost savings. The applicant further argued that the information about prices was necessary, not just for the applicant, but also for those who would advertise in the directories. The court, however, ruled that no right was affected. What was affected, the court said, was the right to information and not the right to be given a hearing as envisaged by section 24(b) of the interim Constitution.

3.2.2 The doctrine of legitimate expectation

There is no definition of legitimate expectation in the interim Constitution, and no reference is made to the scope or application of this

74 1996 3 SA 99 (E) 116E-F.

75 Kriel 1996 *Annual Survey of South Africa* 123.

76 1996 3 SA 800 (T) 806H-J, 811E-F.

doctrine. However, it was clearly stated in *Jenkins v Government of the Republic of South Africa*⁷⁷ that a definition is unnecessary since the doctrine has become part of our common law. Section 24(b) of the interim Constitution provided that persons whose "rights" and "legitimate expectations" are affected are entitled to procedural fairness. Therefore, the concept of legitimate expectation was accorded protection in the interim Constitution. The right to procedurally fair administrative action in terms of section 24(b)⁷⁸ is guaranteed to any person where any of his or her rights or legitimate expectations are affected or threatened. In *Claude Neon Ltd v City Council of Germiston and Another*,⁷⁹ the applicant sought the review and setting-side of a decision by the first respondent to award a tender to the second respondent. An official in the Germiston City Council had promised to inform the applicant of the date on which tenders for a particular contract were due. This was not done, the applicant was unaware of the tender date and the tender was awarded to the second respondent. The court held that the express promise made by the official to the applicant gave rise to a "legitimate or reasonable expectation and that the conduct of the first respondent ... amounted to a failure of "administrative justice" within the meaning of section 24 of the Constitution".

3.2.3 Application of the *audi alteram partem* rule to commissions of inquiry

A particular characteristic of the democratic process in South Africa, is the extensive utilisation of commissions of inquiry to investigate a wide variety of matters. These commissions of inquiry are appointed in terms of the *Commissions Act*⁸⁰ or other special legislation.

In *Podlas v Cohen and Bryden*,⁸¹ the court stated that the master's decision to hold an inquiry and to issue a notice to persons who might be called to testify did not prejudicially affect the witness's liberty,

77 1996 3 SA 1083 (Tk) 1093F-G.

78 S 24(b) of Act 200 of 1993.

79 1995 3 SA 710 (W) 720I-J 721B.

80 Act 8 of 1947.

81 1994 4 SA 662 (T) 675.

property or any existing right that would require the master to apply the *audi alteram partem* rule. The court further stated that the inquiry in terms of section 152 of the *Insolvency Act*⁸² is purely investigative. The presiding officer makes no findings that can detrimentally affect a person's rights, nor does he determine any rights. He simply records evidence and regulates proceedings.

In *Jeeva v Receiver of Revenue, Port Elizabeth*⁸³ the applicants were subpoenaed to attend a liquidation enquiry and they instituted urgent proceedings for access to all information held by the Receiver relating to the liquidation of the relevant companies. The Receiver of Revenue admitted that he was in possession of information which was relevant to the interrogation of the applicants at the inquiry, but he denied that the applicants had a constitutionally guaranteed right under section 23⁸⁴ to have access to it.

The court stated that a commission of inquiry authorised by the Master of the Supreme Court and held under the machinery of the *Companies Act*⁸⁵ was administrative action against the applicants which in that case has a material bearing upon their rights and interests. It was quasi judicial in nature. The applicants were accordingly entitled to administrative action which was lawful, justifiable and both substantially and procedurally fair. Because they must submit to interrogation, they were entitled to prepare themselves to deal with the subject-matter of the inquiry. As the applicants had not seen the documents before the hearing, they could not be treated fairly and equally at the interrogation. The court held that the applicants were entitled to all information before the hearing could start.

It is submitted that it is procedurally unfair for an individual appearing before a commission of inquiry to be denied the opportunity to state his or her case. There can be no doubt that the proceedings of commissions of inquiry constitute substantial inroads into the ordinary

82 Act 24 of 1936.

83 1995 2 SA 433 (SE) 443.

84 S 23 of Act 203 of 1993.

85 Act 61 of 1973.

rights of individuals who are subjects of investigations. Accordingly section 24(b) should be interpreted broadly to support the application of the *audi alteram partem* rule to the proceedings of commissions of inquiry.

The court's approach renders a constitutional development of the *audi alteram partem* rule extremely problematic. Should South African courts, for example, after the acceptance of the Bill of Rights not be obliged to apply the *audi alteram partem* rule to the proceedings of commissions of inquiry? One could argue that the application of the *audi alteram partem* rule to the proceedings of commissions of inquiry conforms with section 24(b) of the interim Constitution. Section 24(b) specifically recognises the concept of legitimate expectation. This concept could to my mind be employed in order to enforce the *audi alteram partem* rule before a commission of inquiry. After all, it is quite evident that in most cases the interests of a person appearing before a commission could warrant the application of the *audi alteram partem* rule.

Section 24(b) of the interim Constitution was replaced by the unqualified wording of section 33(1)⁸⁶ of the 1996 Constitution, which gives a right to administrative action that is lawful, reasonable and procedurally fair. This aspect is dealt with in the discussion below.

3.3 Final Constitution

3.3.1 Introduction

The requirements of natural justice oblige a functionary to act fairly whenever a decision which is likely to prejudice another is taken by such a person. Section 33⁸⁷ of the final Constitution does not distinguish between rights, interests, property and legitimate expectations. This section provides that everyone is entitled to administrative action which is lawful, reasonable and procedurally fair.

86 S 33(1) of Act 108 of 1996.

87 S 33(1) of Act 108 of 1996.

In terms of the common law, the courts required the administration to act procedurally fairly where their actions affected rights. The interim Constitution also required procedurally fair administrative action when rights or legitimate expectation were affected or threatened.⁸⁸

3.3.2 General application of the *audi alteram partem* rule

There has been much creative development of the *audi alteram partem* rule since the introduction of the interim Constitution.⁸⁹

In line with section 33(1) of the Constitution⁹⁰ our courts have begun to develop the notion of fairness or a duty to act fairly whenever an administrative decision is made.

The provisions of section 33(1) of the 1996 Constitution only apply to conduct defined as administrative action. The *Promotion of Administrative Justice Act* reaffirms the view that the right to procedural fairness is not simply a codification of the *audi alteram partem* rule as contained in common law.⁹¹

Section 33 of the 1996 Constitution has been qualified and given more detailed content by the *Promotion of Administrative Justice Act (PAJA)*.⁹² Section I of PAJA describes administrative action as any decision taken, or any failure to take a decision, by an organ of state, juristic or natural person exercising or performing public power or authority which adversely affects the rights of any person and which has a direct external legal effect. Clearly the definition requires that the decision taken must firstly adversely affect the rights of an individual and secondly have a direct external legal effect. This implies that the decision must be final and binding.⁹³

88 Devenish *Administrative Law and Justice in South Africa* 159.

89 Hoexter and Lyster *Constitutional and Administrative Law* 196-197.

90 S 33(1) of Act 108 of 1996.

91 Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* 151.

92 Act 3 of 2000.

93 Currie and Klaaren *Promotion of Administrative Justice Act* 80.

Section 3(1) of PAJA *inter alia* provides that administrative action that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. A fair administrative procedure depends on the circumstances of each case.⁹⁴

In *Minister of Public Works and Others v Kyalami Ridge Environmental Association*,⁹⁵ the respondents objected to a government decision to provide temporary accommodation to a group of people who lost their houses in Alexandra because of floods. The temporary accommodation was to be provided on the land of the Leeuwkop prison, which belonged to the state. The objection raised, was that the provision in the area of accommodation to homeless people would negatively affect the value of the fixed property of members of the first respondent and that since the latter's rights were being affected, they had been entitled to be given a hearing before a decision was taken.

The court held that no rights of the respondent's members had been violated, that the members of the respondent were not entitled to put their case, and that the interest that they had in the price of their properties and the nature of their neighbourhood was in terms of section 33(b) of the 1996 Constitution not sufficient ground to warrant procedural protection in terms of the Constitution.⁹⁶

In *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere*⁹⁷ the appellants had been moved from the prisons in which they were serving long sentences, to C-Max, a part of Pretoria Central Prison. They were denied an opportunity to state their case against being transferred, either before or after the move. The court held that the right to be heard comes into play when an administrative decision affects a person to such an extent that the decision, according to the person's legitimate expectation, may not be taken without allowing him to state his case. Furthermore, in each case the question must be asked whether the

94 S 3(2)(c) of Act 3 of 2000.

95 2001 3 SA 1151 (CC) 1183G-H/I and 1183I/J-1184E.

96 Driver 2001 *Annual Survey of South Africa* 106-107.

97 2001 3 SA 472 (SCA) 479B-F; Driver 2001 *Annual Survey of South African Law* 107.

person who was prejudiced by the relevant decision had had a fair and equitable opportunity to state his case. The court held that it was beyond doubt that the Deputy Director in the Department of Correctional Services to whom the Commissioner of Correctional Services had delegated his powers in this regard, had significantly prejudiced the privileges the appellant had enjoyed up to that time. In such a case the appellants had the legitimate expectation that such a decision would not be taken unless they had been offered the right to be heard.⁹⁸ In terms of section 33 of the 1996 Constitution every person has the right to procedurally fair administrative action. Despite the changing constitutional dispensation brought about by the Constitution, the principles of common law still afford guidance as to what will be procedurally fair in a specific case.

Under section 33 of the 1996 Constitution all administrative action must be lawful, reasonable and procedurally fair. The all-or-nothing rights-based approach belongs strictly to the position before 1994.⁹⁹

As a general rule, the right to procedural fairness requires that a person who may be affected by administrative action be heard before that action is taken.

3.3.3 Application of the *audi alteram partem* rule to commissions of inquiry

Commissions of inquiry are the standard device for giving a fair hearing to individuals who are the subjects of investigation before recommendations are made to the person or body that has appointed the commission. The object of commissions is directed towards making recommendations. Commissions of inquiry are part of the procedure for ensuring that administrative power is fairly and reasonably exercised. Although the main object of commissions of inquiry is to make recommendations, their functioning has given rise to many complaints.

98 Driver 2001 *Annual Survey of South Africa* 107; 2001 3 SA 472 (SCA) 479C-F.
99 1989 4 SA 731 (A). See also 1997 3 SA 204 (A); 1999 2 SA 709 (SCA).

In *South African Football Union v President of the Republic of South Africa*, the view was expressed by the court that the Supreme Court of Appeal no longer regards the invasion of existing rights by the exercise of statutory powers as a prerequisite for the application of the *audi alteram partem* rule, and that all that is required to activate that rule is a likelihood that, in the ordinary course of events, the statutory power concerned will cause prejudice to individuals affected.¹⁰⁰

The court based its view on the ruling in *South African Roads Board v Johannesburg City Council*.¹⁰¹ In this case, it was decided that the local authority in whose area a national road was situated, and which was directly affected by a declaration that a portion of the national road was being declared a toll road, was entitled to be given a hearing by the South African Roads Board before such a decision was taken. The court drew a distinction between legislative and administrative decisions. The true distinction, the court said, is between statutory powers which, when exercised, affect equally members of the community at large and those which, while possibly also having a general impact, are calculated to cause particular prejudice to an individual or group of individuals.

This view lends support to the argument advanced elsewhere in this research that the *audi alteram partem* rule must be applied in the proceedings of commissions of inquiry before recommendations are made to the body or person who has appointed the commission of inquiry. It was stated in *Du Preez v Truth and Reconciliation Commission*¹⁰² that in recent years our law has undergone a process of evolution and development, focusing upon that principle of natural justice encapsulated in the rule of *audi alteram partem*. In this process the classification of decisions of a person or body into quasi-judicial on the one hand and administrative on the other as a criterion for

100 1998 10 BCLR 1256 (T) 1280D-E 1281E.

101 1991 4 1 (A) 10G-I 12F-G.

102 *Du Preez v Truth and Reconciliation Commission* 1997 3 SA 204 (A) 230J 231A.

determining the applicability of the rules of natural justice has in effect been abandoned.¹⁰³

In *Du Preez*' case the court referred to the English decision of *Re Pergamon Press Ltd*¹⁰⁴ where the court was concerned with procedures in an investigative inquiry, conducted in this instance by inspectors in terms of the *Companies Act*. The directors of the company concerned claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a court of law. Lord Denning MR said of this:

It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that counsel for the inspectors went too far on the other ... he did suggest that in point of law, the inspectors were not bound by the rules of natural justice ... He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply ... I cannot accept counsel for the inspectors' submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings ... They are not even quasi-judicial for they decide nothing; they determine nothing. They only investigate and report. They sit in private ...

But this should not lead us to minimise the significance of their task. They think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal proceedings or to civil actions ... Seeing that their work and their report may lead to such consequences, I am clearly of opinion that the inspectors must act fairly.

My view is that commissions of inquiry must apply the *audi alteram partem* rule to their proceedings, for the reasons set out throughout this research and as the latter quotation *inter alia* summarises so succinctly.

In *Du Preez*'s case,¹⁰⁵ the Truth and Reconciliation Commission (the Commission) was established by the *Promotion of National Unity and Reconciliation Act*.¹⁰⁶ The objectives of the Commission were to promote national unity and reconciliation. The Act also established

103 The court referred to authorities such as *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) 762F-763J; *Administrator, Cape and Another v Ikapa Town Council* 1990 2 SA 882 (A) 889I-F; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 19H-20F.

104 1970 3 All ER 535 (CA) 539A-F.

105 1997 3 SA 204 (AD) 233B-D.

106 Act 34 of 1995.

three committees,¹⁰⁷ namely the Committee on Human Rights Violations, the Committee on Amnesty and the Committee on Reparation and Rehabilitation. The case was concerned with the activities of the Committee on Human Rights Violations (the Committee). The powers, duties and functions of the Committee were to achieve the objects of the Commission and when the Committee had concluded its work, it was required to submit to the Commission a comprehensive report on all its activities and findings.¹⁰⁸

The court stated that the commission and the committee were under a duty to act fairly towards persons implicated to their detriment by evidence or information coming before the committee in the course of its investigation and/or hearings. The committee was charged with the duty of establishing, *inter alia*, whether violations took place and the identity of persons involved therein. The committee's findings in this regard and its report to the commission could accuse or condemn persons in the position of the appellants. Subject to the granting of amnesty, the ultimate result could be criminal or civil proceedings against such persons. Clearly the whole process was potentially prejudicial to them and their rights of personality. They had to be treated fairly. Procedural fairness meant they had to be informed of the substance of the allegations against them, with sufficient detail to know what the case was all about.¹⁰⁹

The argument that commissions of inquiry only make recommendations is

...no real safeguard, because the person or body who has the power of deciding is in no way bound by the report or the recommendations of the person who holds the inquiry, and may entirely ignore the evidence which the inquiry brought to light. He can, and in practice sometimes does, give a decision wholly inconsistent with the report, the recommendations and the evidence, which are not published or disclosed to interested individuals. In any case, as the official who decides has not heard the witnesses, he is as a rule quite incapable of estimating the value of their evidence ... the requirement of a public inquiry is in practice nugatory ... It seems absurd that one official should hold a public inquiry into the

107 S 3(2) of Act 34 of 1995.

108 1997 3 SA 204 (AD) 222F-223A-D.

109 1997 3 SA 204 (AD) 234H.

merits of a proposal, and that another official should be entitled, disregarding the report of the first, to give a decision on the merits.¹¹⁰

In *SARFU and Others v President of the RSA and Others*,¹¹¹ the question was whether the President, in appointing the commission, acted in accordance with the principles and procedures which in that particular situation or set of circumstances were right and just and fair. Accordingly, the principle of natural justice should have been enforced by the court as a matter of policy irrespective of the merits of the case.¹¹²

The commission's finding could clear or condemn SARFU. The fact that a commission is an advisory body does not, in the court's view, detract from the fact that it is likely in the ordinary course of events that the appointment of the commission in the case would cause prejudice to SARFU, and its officials.¹¹³

It is an empty attempt to justify the exclusion of the application of *audi alteram partem* rule to the proceedings of commissions of inquiry by defining its application in terms of whether the administrative act in question affects the individual's existing rights, liberties or privileges.¹¹⁴

There are two reasons why the 'existing rights, privileges and liberties' test is unsound. First, whether the affected individual has a right *to the decision* (in respect of which he claims a hearing) is quite irrelevant to the question whether he has a right *to natural justice* when the decision itself is made. The first question simply begs the second, and it is logically absurd to use it as the determinant of whether natural justice applies. Secondly, while the 'existing rights, etc' test might have some utility in an imaginary nightwatchman, regulatory state where government acts only to protect its citizens and to preserve the conditions for liberty, it is hopelessly inadequate in the modern state in which so many of our daily necessities derive from state handouts. This is true whether or not one lives in a social democratic or socialist 'welfare state'. Strictly applied, the 'existing rights, etc' test would mean that applicants for licences would not be entitled to a hearing, just as the applicant for a permit in *Laubscher's* case was not. Anticipating this intolerable conclusion, 'rights' have sometimes been defined fairly widely to cover such 'governmental largesse' as licences and renewals, and rather strained reasoning has been used to explain these 'apparent' exceptions. A further difficulty with the 'existing rights' formulation is that it leads to unjust results in the case of 'multi-staged' or 'institutional' administrative decisions. It is not surprising, therefore, that the analogous tests once resorted to in England and the United States have now been abandoned.

110 Quote from *The New Despotism* (1929) by Lord Hewart in Wade and Forsyth *Administrative Law* 945.

111 1998 10 BCLR 1256 (T) 1275I.

112 1998 10 BCLR 1256 (T) 127F-1277A.

113 1998 10 BCLR 1256 (T) 1284G-H.

114 Baxter *Administrative Law* 577-579.

Why, then, do our courts cling so tenaciously to such fallacious reasoning? The answer may perhaps lie in the possibility that they are trying to draw a boundary of justiciability, beyond which the law should not reach for fear of doing more harm than good by overburdening the administrative process.

In *President of the RSA and Others v SARFU and Others*, the Constitutional Court had to consider whether the decision of the President in terms of section 84(2) of the Constitution to appoint a commission of inquiry in order to investigate the affairs of SARFU amounted to an administrative action.¹¹⁵

The appellants appealed against the whole of the judgment and order made in the court *a quo*.

The court held that no rights were infringed by the President's decision to appoint the commission of inquiry and vest it with powers under the commission's act, and that the *audi alteram partem* rule was not applicable. The court went further to state that the requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. Yet, it could hardly have been suggested that the commission would not have been entitled to take the decision to call the witnesses without first hearing such person.¹¹⁶

In *Van der Merwe and Others v Slabbert NO and Another*,¹¹⁷ the issues before the court were whether the commission was obliged to apply the rule of *audi alteram partem* and whether the commission had an unfettered discretion in determining the procedure to be followed. The court noted that bodies required only to investigate matters or to investigate facts and make recommendations to some other body or person with the power to act did not generally, depending on the circumstances, have to observe the rules of *audi alteram partem*.

In *Menzi Simelane and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another*,¹¹⁸ a commission and a tribunal were both established

115 1999 10 BCLR 1059 (CC) 1141F.

116 1998 10 BCLR 1059 (CC) 1149-1150 F/A.

117 1998 3 SA 613 (W) 624, 2001 4 SA 511 (SCA) 520H-521E paragraph 13.

118 2003 3 SA 64 (SCA) 69C.

under the *Competition Act*.¹¹⁹ The main underlying legal dispute was whether the Act provided for a dichotomous procedure for the resolution of a complaint. The appellants said that there were two distinct stages. The role of the commission was investigative, whereas that of the tribunal was adjudicative. The commission received a complaint, investigated it and then determined whether it should be referred to the tribunal. If it did refer it, then it appeared before the tribunal as prosecutor. The tribunal, on the other hand, conducted a trial in order to determine whether the complaint was well-founded, and if it was found to be so, the tribunal decided what steps were to be taken.

The respondents contended that referral by the commission constituted an administrative decision affecting Seven-Eleven's rights, and as such it was subject to review. The commission had to observe the *audi alteram partem* rule but had failed to do so.

To decide whether an administrative action has been taken fairly it is crucial that the decision-making process be viewed as a whole. The demands of fairness will depend on the context of the decision viewed within the procedural context in which it arises. An essential feature of the context is the empowering statute, which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.¹²⁰

It is submitted that this decision supports the argument that the administrative decision-making process should be viewed as a whole by our courts and that, as a consequence, the *audi alteram partem* rule should be applied to the proceedings of commissions of inquiry.

Administrative procedures often consist of multiple stages. A fact-finding process may take place ending at an early stage and the final decision-making process at a later stage. The problem which arises is whether one has a right to a hearing at the initial fact-finding stage, even if no final decision is then to be taken, or if one has a right to a hearing at the later decision-making stage.¹²¹ In practice, the individual is usually denied the right to state his or her case during both these stages.

119 Act 89 of 1998.

120 2003 3 SA 64 (SCA) 71F-G 73F.

121 Kriel 1999 *Annual Survey of South Africa* 84.

In *Director: Mineral Development, Gauteng v Save the Vaal Environment*,¹²² the question before the appeal court was whether interested parties, wishing to oppose an application by the holder of mineral rights for a mining licence in terms of section 9 of the *Minerals Act*,¹²³ were entitled to be heard by and raise environmental objections with the first appellant, who has delegated powers to grant or refuse the relevant licence. The first appellant had regarded such objections as premature at that stage and had refused the respondents a hearing.

The respondents argued that the *audi alteram partem* rule could have been applied by the appellant at the early stage and that the *audi alteram partem* rule was neither expressly nor by implication excluded by the act, nor was there any consideration of public policy militating against the application of the rule.¹²⁴ The court held that the *audi alteram partem* rule applied when an application for a mining licence was made to the Director in terms of section 9 of the act. It was not necessary for such a hearing to be a formal one, but parties who held an interest at least had to be notified of the application and be given an opportunity to raise their objections in writing. If necessary, more formal procedures could then be initiated and lastly, nothing in section 9 or in the act excluded the application of the *audi alteram partem* rule. The application of the *audi alteram partem* rule is indicated by virtue of the enormous damage mining can do to the environment and ecological systems.¹²⁵

The granting of the section 9 licence would set in motion

...a chain of events which can, and in the ordinary course of events might well, lead to the commencement of mining operations. It is settled law that a mere preliminary decision can have serious consequences in particular cases, inter alia where it lays '... the necessary foundation for a possible decision ...' which may have grave results. In such a case the *audi alteram partem* rule applies to the consideration of the preliminary decision...¹²⁶

122 1999 2 SA 209 (SCA) 709 713G-I and 718-719J and A-D.

123 Act 50 of 1991.

124 1999 2 SA 709 (SCA) 716D-F.

125 1999 2 SA 709 (SCA) 719A-B.

126 1999 2 SA 709 (SCA) 718C-E.

The *Promotion of Administrative Justice Act* is not clear on the application of the *audi alteram partem* rule to commissions of inquiry. To give effect to the constitutional right to procedural fairness, PAJA requires a minimum set of procedures to be followed in every case of administrative action materially and adversely affecting the rights or legitimate expectations of any person. Section 3(4) of PAJA requires that a departure from the prior hearing rule might be argued to be necessary and justifiable. This requirement has not yet been dealt with by our courts.

PAJA, by giving a narrow definition of an administrative act, has not entirely solved the problem of what constitutes administrative action. Therefore, administrative action is restricted to decisions of an administrative nature as defined in PAJA.¹²⁷ According to section 33 of the Constitution, there is a duty to ensure procedural fairness in respect of administrative action. Once conduct is identified as administrative action, it must follow the prescribed procedures.¹²⁸ This application of section 1 and 3 of PAJA excludes the application of the *audi alteram partem* rule to commissions of inquiry, in the sense that rights of individuals who are subjects of an investigation must be affected and that the action must have a direct, external legal effect. However, recommendations of commissions of inquiry are not regarded as affecting the rights of an individual who is subjected to their investigations. According to Currie and Klaaren, the term "direct, external legal effect" means that administrative action must have a real impact on a person's rights. This means that a decision must be final and binding.¹²⁹ Because commissions of inquiry only make recommendations its "decisions" cannot be classified as such.

127 Hoexter and Lyster *Constitutional and Administrative Law* 100.

128 Currie and Klaaren *Promotion of Administrative Justice Act* 92.

129 Currie and Klaaren *Promotion of Administrative Justice Act* 80-81.

4 Conclusion

Since the decision in the case of *Administrator Transvaal v Traub*,¹³⁰ the enactment of the interim Constitution,¹³¹ the 1996 Constitution¹³² and PAJA,¹³³ South African administrative law has seen tremendous development. What can be regarded as a positive aspect of this development is that it is no longer expected from the courts to apply the *audi alteram partem* rule only when existing rights are affected.

One of the characteristics of the new dispensation is the extensive utilisation of commissions of inquiry to investigate a wide variety of issues. Commissions of inquiry produce results which in different ways may prejudice the legal positions of individuals who are the subjects of such investigations.¹³⁴

Therefore, it cannot be said with conviction that the rules of natural justice should not be made applicable to commissions of inquiry because, as the argument goes, these institutions only make recommendations and do not take final decisions that may negatively impact on the rights of individuals. The administrative decision-making process should be viewed as a single process, even in those instances where a commission of inquiry is utilised to make recommendations before a final decision is taken. This implies that a commission must adhere to the *audi alteram partem* rule since the person or body taking the final decision, for example a minister of state, would normally not be in a position, practically speaking, to present the individual with the opportunity to state his or her case at that stage of the decision-making process.

In general, after the promulgation of the interim and later the 1996 Constitution, our courts have shown at times that they are not

130 1989 4 SA 731 (A) 762B-C.

131 S 24(b) of Act 200 of 1993.

132 S 33(1) of Act 108 of 1996.

133 Ss 1 and 3 of PAJA.

134 Wade and Forsyth *Administrative Law* 540.

necessarily opposed to the application of the *audi alteram partem* rule to the proceedings of commissions of inquiry. However, these cases do not constitute direct authority for the application of the *audi alteram partem* rule to the proceedings of commissions of inquiry.¹³⁵

In some interpretations of the application of the *audi alteram partem* rule to commissions of inquiry, an individual would never be entitled to a hearing because it is perceived that none of his or her rights would be affected by the recommendations of the commission. However, it can be argued that individuals' rights are affected by their not being allowed to contradict any evidence which might be prejudicial to their case. Surely they have a legitimate expectation to be afforded a fair opportunity to state their case? Even God himself did not pass sentence upon Adam until he had first been called upon to defend himself. "Adam", says God, "where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thee should'st not eat?" And the same question was put to Eve too.¹³⁶

Section 33(1) of the 1996 Constitution should be interpreted to allow the application of the *audi alteram partem* rule to the proceedings of commissions of inquiry and both *PAJA* and the *Commissions Act* should be amended to explicitly place a duty on commissions to comply with the rule. Proceedings of commissions of inquiry cannot be procedurally fair if the *audi alteram partem* rule is not adhered to.

135 2000 *THRHR* 110.

136 Wade and Forsyth *Administrative Law* 470.

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