THE CONSTITUTIONALITY OF SECTIONS 88 AND 90 OF THE *CUSTOMS AND EXCISE ACT* 91 OF 1964

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LIST OF ABBREVIATIONS

ASSL	Annual Survey of South African Law
CEA	*Customs and Excise Act* 91 of 1964
Constitution	*Constitution of the Republic of South Africa*, 1996
PAJA	*Promotion of Administrative Justice Act* 3 of 2000
PER	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights

Abstract

This dissertation attempts to determine to what extent sections 88 and 90 of the *Customs and Excise Act* 91 of 1964 comply with the constitutional right to just administrative action, read with the provisions of the *Promotion of Administrative Justice Act* 3 of 2000.

As international trade increases, it is increasingly important that the provisions of the *Customs and Excise Act* 91 of 1964 which regulate the industry are regarded as constitutional as potential trade between South Africa and other countries may be lost if the said provisions are not seen as promoting administrative justice.

As wide and far-reaching powers are conveyed upon an administrator acting in accordance with the provisions of sections 88 and 90 of the *Customs and Excise Act* 91 of 1964, it is important that the said provisions are regarded as constitutional. As not only goods, but also vessels, vehicles and other property used in connection with the suspected goods may be seized in terms of the aforementioned sections, the danger of potential large-scale pecuniary losses to the trader immediately becomes evident. As the current provisions do not allow an affected party to state his or her case before the action in terms of sections 88 and 90 is taken by an administrator, nor require the administrator to provide reasons for his or her action, the legality of the said provisions are tested against the provisions of the *Constitution of the Republic of South Africa,* 1996, as effected by the *Promotion of Administrative Justice Act* 3 of 2000.

The remedies available to an affected party of an action in terms of the relevant sections of the *Customs and Excise Act* 91 of 1964 are discussed in depth, together with the issue of the determination of the procedural fairness of such action. Certain practical guidelines in the exercising of powers in terms of the aforementioned sections are also given, providing an administrator with a minimum framework of responsibilities and guidelines in order to ensure that the legality of his or her action cannot be brought into dispute. As is evident from the content of this paper, the constitutionality of any action in terms of the relevant sections of the *Customs and Excise Act* 91 of 1964 will almost always depend on the circumstances of the individual case. It is therefore of the utmost importance that an administrator applies his or her mind in a reasonably

acceptable manner in order to ensure compliance with the administrative justice provisions of the *Constitution of the Republic of South Africa*, 1996.

The dissertation consists of a literary study, focusing on the latest developments regarding the promotion of justice in the international trade industry in South Africa, taking into account statutory provisions, case law, text books, journal articles as well as internet sources.

Keywords

Constitutionality – Just Administrative Action – Customs and Excise Act – International Trade

Titel van skripsie in Afrikaans

Die grondwetlikheid van artikels 88 en 90 van die *Wet op Doeane en Aksyns* 91 van 1964

Abstrak

Hierdie skripsie poog om te bepaal tot watter mate die bepalings van die *Wet op Doeane en Aksyns* 91 van 1964 voldoen aan die grondwetlike reg tot geregtiglike administratiewe optrede, saamgelees met die bepalings van die *Wet op Bevording van Administratiewe Geregtigheid* 3 van 2000.

Soos wat internasionale handel in die land toeneem, word dit al hoe belangriker dat die bepalings van die *Wet op Doeane en Aksyns* 91 of 1964 wat die industrie reguleer as grondwetlik beskou word omrede potensiële handel met ander lande verlore kan gaan as die huidige bepalings beskou word as om nie voldoening te gee aan die vereiste van administratiewe geregtigheid nie.

Omrede wye en omvangryke magte aan ‘n administrateur verleen word wat in terme van artikels 88 en 90 van die *Wet op Doeane en Aksyns* 91 van 1964 handel, is dit belangrik dat bovermelde bepalings as grondwetlik beskou word. Nie net goedere nie, maar ook skepe, voertuie en ander eiendom wat verband hou tot die verdagte goedere mag in terme van die bovermelde bepalings op beslag gelê word, en ontstaan daar dus die potensiaal vir grootskaalse finansiële verliese vir die handelaar. Omrede die huidige bepalings nie die geleentheid gun aan ‘n geaffekteerde party om sy saak te stel voor die optrede in terme van artikel 88 en 90 uitgevoer word nie, en daar nie ‘n verpligting op sodanige administrateur rus om redes vir sy aksie te verskaf nie, word die legaliteit van die bepalings gemeet aan die bepalings van die *Grondwet van Suid-Afrika,* 1996.

Die remedies beskikbaar tot die geaffekteerde party van ‘n handeling in terme van die bepalings van die *Wet op Doeane en Aksyns* 91 van 1964 word ook in diepte bespreek, tesame met die bepaling of sodanige optrede as prosedureel regverdig beskou kan word. Sekere praktiese riglyne in die uitoefening van magte in terme van die bovermelde bepalings word ook uiteengesit, wat aan ‘n

administrateur ‘n raamwerk van sy of haar verpligtinge verskaf ten einde te verseker dat die legaliteit van sodanige optrede nie in dispuut geplaas kan word nie. Soos wat uit die inhoud van die skripsie na vore kom, sal die grondwetlikheid van enige optrede in terme van die relevante bepalings van die *Wet op Doeane en Aksyns* 91 van 1964 afhang van die omstandighede van elke individuele geval. Dit is daarom van die uiterste belang dat ‘n administrateur die nodige redelike insig gebruik in die uitoefening van sy of haar magte ten einde te verseker dat die optrede gevolg gee aan die reg tot administratiewe geregtigheid soos vervat in die bepalings van die *Grondwet van die Republiek van Suid-Afrika*, 1996.

Die skripsie bestaan uit ‘n lititêre studie, wat fokus op die mees onlangse ontwikkelings wat verband hou met die bevordering van geregtigheid in die internasionale handel bedryf in Suid-Afrika. Statutêre bepalings, uitsprake van ons howe, handboeke, tydskrif artikels asook internet bronne word geraadpleeg.

Sleutelwoorde

Grondwetlikheid – Regverdige Administratiewe Optrede – Wet op Doeane en Aksyns – Internasionale Handel

1. Introduction

The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution*)* provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons for such action.[1] The *Promotion of Administrative Justice Act*[2] (hereafter referred to as PAJA) furthermore guarantees that administrative action which materially and adversely affects the rights and legitimate expectations of any person must be fair.[3]

However, the *Customs and Excise Act*[4] (hereafter referred to as the CEA) states that an officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under the CEA.[5] Furthermore, the CEA declares that whatever is seized as being liable to forfeiture under CEA, shall forthwith be delivered to the Controller at the customs and excise office nearest to the place where it was seized or it may be secured by the Controller by sealing, marking, locking, fastening or otherwise securing or impounding it on the premises where it is found or by removing it to a place of security determined by the Controller.[6] Thus not only goods, but also vessels, vehicles or other property used in connection with the suspected goods may be affected and this will influence the owner's and importer's trading and other activities. This may lead to large-scale pecuniary losses for a relevant party, often without being afforded the opportunity to state his or her case before the action is taken. Losses occur especially when the goods in question are

1 S 33(1) and (2).
2 3 of 2000.
3 S 3(1).
4 91 of 1964.
5 S 88(1)(a).
6 S 90(a).

perishable or when the detained ship or vehicle cannot be used to perform further transport contracts. In addition, CEA makes no provision for the furnishing of reasons for action taken.

If the owner of a vehicle used in the conveyance of illegal goods, for example, can establish that he or she – as opposed to the person actually in charge of the vehicle in time – either gave no consent for, or had no knowledge of the use of the vehicle in question, such a person may have the said vehicle released, as determined in the Transvaal Provincial Division judgment in *Fazenda NO v Commissioner of Customs and Excise.*[7] The relevance of this decision to the topic of this dissertation lies in the fact that it highlights the importance of the administrative process in decision-making by an administrator – ample opportunity must be provided to a person affected by such a decision to make representations before the decision is finally made.[8]

It is however important to from the outset of this dissertation indicate to the reader that the South African government is currently in the process of finalising the new *Customs Control Bill* (a process which began at the beginning of 2005) and which, in its final form, should address many of the concerns raised in this dissertation with regard to the administrative legality[9] of action in terms of sections 88 and 90 of the CEA. The focus area of this dissertation will not however be on the new *Customs Control Bill* in that the said Bill has not been passed yet. Furthermore, it is uncertain whether and in what form the Bill will eventually be passed and more importantly, when the provisions thereof will become operative. For these reasons one therefore has to consider the law currently applicable – the CEA, which

7 1999 3 SA 452 (T).
8 At par 462C-F.
9 As per the provisions of Chapters 33 and 34 of the draft *Customs Control* Bill, available on the South African Revenue Services website www.sars.gov.za.

determines the extent and nature of the actions of an administrator acting against an importer or exporter in terms of sections 88 and 90.

The focus of this dissertation will thus be to determine to what extent sections 88 and 90 of the CEA comply with the constitutional right to just administrative action, read with the provisions of the PAJA, taking into account the effects of such legislation in the South African constitutional state. As international trade increases, it is increasingly important that the provisions of the CEA which regulate the industry are constitutional as potential trade between South Africa and other countries may be lost if the provisions are seen as not promoting administrative justice. This will lead to South Africa's international competitiveness dropping, and have serious negative economic consequences for its people. This study will attempt to answer this question and provide a framework in the determination of the legality of the relevant provisions.

2. Section 33 of the Constitution and PAJA

Under the Republic of South Africa's new constitutional system, the fundamental rights of the individual are protected through a Bill of Rights. Section 33 is one the rights specifically entrenched in the Bill of Rights, and the effect thereof lies in the fact that the said right cannot be limited unless the specific requirements as outlined in section 36[10] of the Constitution have been complied with.

The constitutional system, with specific reference to the right to a just administrative system was brought under the spotlight in *inter alia* the matter between *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[11] where it was held that:

10 The so-called limitation clause.
11 2000 1 SA 1 (CC).

> ...the exercise of public power is regulated by the Constitution in different ways. There is a separation of powers between the Legislature, the Executive and the Judiciary which determines who may exercise power in particular spheres. An overarching Bill of Rights regulates and controls the exercise of public power, and specific provisions of the Constitution regulate and control the exercise of particular powers.[12]

By including section 33 in the Bill of Rights, the drafters of our Constitution have had a profound impact on the ambit, content and application of the principles of administrative law as it regulates "the exercise of administrative power by defining the parameters within which the administration must function".[13] The said provisions also enable a person to challenge the administrative action on the basis of alleged administrative unlawfulness or illegality. According to Burns and Beukes,[14] the implications of section 33 of the Constitution are the following:

1) The right to just administrative action is considered to be a fundamental right, and which is furthermore guaranteed to each and every person;
2) A duty to comply with all the requirements for valid administrative action when taking decisions or performing their functions rests upon *all* administrators;
3) The promotion of administrative openness and accountability enables just administrative action in that a requirement for written reasons for administrative action by decisions makers exists; and
4) Administrative justice is prospective – meaning that the principles of administrative justice must be applied at the time when the action is performed or the discretion is exercised.

For the purposes of this dissertation, the fourth implication as illustrated here above is of particular and essential importance as potential judicial review (which is retrospective in nature) of the administrative action may be circumvented if the administrative action is performed in a just manner and as outlined in the relevant provisions of the Constitution. An importer or

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12 At par 132.
13 Burnes and Beukes *Administrative Law* 5-6.
14 Burnes and Beukes *Administrative Law* 6.

exporter would prefer to have the security of a correct prospective administrative decision-making procedure, than have to face the wrath of a retrospective judicial review. The application of the provisions must, however, be consistent and in line with the norms and standards as expected in a competitive international trade environment in order to promote and invite prospective trade into South Africa.

According to Quinot,[15] a large number of other constitutional provisions also constitute sources of administrative law besides section 33. An example of such a provision would be section 195 of the Constitution,[16] which places certain general obligations on state administration. These provisions can not, however, be relied on or enforced directly as rules of administrative law, but can only inform rules such as those found in section 33 of the Constitution and in PAJA as discussed below.

PAJA was mandated by the Constitution in order to give effect to the rights entrenched in section 33. The Act has severely circumscribed the realm of administrative action by means of an elaborate statutory definition, as set out in section 1 thereof.[17] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[18] O'Regan J held that:

> ...the Court's power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The groundnorm of administrative law is now to be found in the first place not in the doctrine or parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative law review will have to be developed on a case-by-case basis as the

15 Quinot *Administrative Law* 76.
16 The so-called 'Public Administration Clause'.
17 Hoexter 2006 *Acta Juridica* 303.
18 2004 4 SA 490 (CC).

> Courts interpret and apply the provisions of PAJA and the Constitution.[19]

In view of the above, one would be well advised to determine the legal scope in which PAJA operates. According to Currie,[20] the origins of the Act lie:

> …in an entirely well-meaning attempt at law reform that was mandated by the 1996 Constitution. The Act was intended to be an organised legislative statement of the general administrative law of South Africa. The limits and the legal standards that previously had to be extracted from the bramble bush of a century of judicial precedent, would be set down in a single, definitive legislative statement for all (and particularly administrators) to see and use.

PAJA may, however, be criticised for being a response to legislation that is intended to alter the law, and is an exercise in the reformation of the underlying law.[21] The problem lies, however, in the fact that some perceive and sustain an interpretation of PAJA which makes no difference to the underlying law, and merely perceives it to be a codification of the common law.[22] It is hereby respectfully submitted by the author hereof that this view is short sighted in that it does a great deal more than just the minimum – amongst others it also gives effect to the right to procedurally fair administrative action by providing for procedures enabling a party affected by the decision of the administrator to receive notice and be provided an opportunity to be heard, or request reasons for the decision, amongst others. The brief discussion of "what PAJA does" in relation to action in terms of section 88 and 90 of the CEA in this dissertation should, however, not be construed to be an exhaustive list. PAJA has had a massive effect on our legal dispensation in South Africa and has given effect to the fundamental rights as entrenched in section 33 of the Constitution. Furthermore, PAJA has provided the most immediate source of review

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19 At par 22.
20 Currie 2006 *Acta Juridica* 325.
21 Currie *Benchbook* 43.
22 Currie 2006 *Acta Juridica* 326.

jurisdiction – an important function as direct constitutional review under section 33 of the Constitution itself is only available on an infrequent basis, as per Hoexter.[23]

Before the advent of 1994, South Africa had a common law body of general administrative law. The constitutional right to procedural fairness could, therefore, be taken to have absorbed the body of common law precedent elaborating the rules of natural justice. The Constitution has retained the fundamental constitutional basis for administrative-law review, and has simplified the formulation of rights. A further element was also added: national legislation was to be enacted to "give effect to" the constitutional rights to lawful, procedurally fair and reasonable administrative action and the right to reasons.[24] However, the disadvantage of such an Act lies in the fact that it provides no before-the-fact guidelines to the persons empowered to act by it: the administrators who are required to exercise administrative action lawfully, reasonably and procedurally fairly in a concrete case.

In the Constitutional Court decision of *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*[25] the relationship between the common law grounds of review and the Constitution was brought into the spotlight by the Court. The Court held unanimously that under the new constitutional order, the control of public power is always to be considered a constitutional matter. Furthermore, the Court was of the opinion that there are not two separate systems of law governing and regulating administrative action, but only one system of law based on the provisions of the Constitution. The transitional provisions of the Constitution[26] contained the requirement that

23 Hoexter *Administrative Law* 115.
24 S 33(3).
25 2000 2 SA 674 (CC) at par 41.
26 Schedule 6.

legislation had to be passed within a time period of three years of the Constitution coming into force:

> …in order to give effect to the right of 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…[27]

In the words of Burns and Beukes,[28] "national legislation has been promulgated in accordance with section 33(3) of the 1996 Constitution in the form of PAJA". What is, however, important to remember is that the provisions of PAJA can still be tested against the requirements of the provisions of section 33 of the Constitution. Many regard PAJA to have the same status as any other ordinary legislation enacted by Parliament, however, later legislation enacted by Parliament should as far as possible be construed in harmony with both section 33 of the Constitution as well as the provisions of PAJA.[29]

Quinot[30] is of the opinion that a "litigant may no longer rely solely on the common law where PAJA applies", while Hoexter[31] has stated that "PAJA is an important source of administrative law, if not the most important". In view and in support of the above interpretations, one can reasonably deduce that PAJA should be regarded as a blueprint for the achievement of the ideals and principles in the practice of just administrative action as outlined in section 33 of the Constitution, as the said legislation was in fact promulgated for this purpose. The writer therefore respectfully submits that in a certain sense and for the reasons as illustrated above, PAJA can be placed upon a pedestal above other pieces of legislation as a form of "super legislation". The provisions of PAJA are expressly authorised by the Constitution and give effect to section 33(3) of the Constitution.

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27 As per PAJA's long title.
28 Burnes and Beukes *Administrative Law* 6.
29 De Ville *Administrative Action* 3.
30 Quinot *Administrative Law* 98.
31 Hoexter *Administrative Law* 16.

In support of this approach and the inherent importance clinging to PAJA by virtue of its source of promulgation, De Ville[32] has argued that challenges to the validity of administrative action should not be brought in terms of section 33(1) and (2) of the Constitution instead of PAJA, even where PAJA is perceived to be narrower in its scope than the aforementioned provisions of the Constitution. The basis for this contention is that PAJA *had* to be enacted to give effect to the rights to just administrative action in terms of the Constitution.

Currie and Klaaren[33] have argued for a purposive interpretation of PAJA, which entails that it be regarded as a general administrative law, applicable to all instances of administrative action as defined. In short, such an interpretation entails that PAJA must be taken seriously as a general legislative statement of the duties of administrators when they perform administrative action in accordance with powers granted by other legislation which should give the Act a supplementary effect on that other legislation. In other words, PAJA provides legislated rules and principles with general effect aimed at ensuring the lawful, reasonable and procedurally fair exercise of particular administrative power. This would mean that the rules and principles of section 3 and section 4 supplement other powers to exercise administrative action.

In view of the fact that the Act provides generally applicable fair procedures to supplement existing legislation, it must be read as a statutory law-reform measure. Therefore, reading PAJA procedures into other legislation in this way is entirely compatible with constitutional litigation as it can be accommodated under the requirement that legislation must be interpreted

32 De Ville *Administrative Action* 5.
33 Currie 2006 *Acta Juridica* 335.

to avoid constitutional conflict before any consideration is given to striking it down as unconstitutional.[34]

In conclusion it is, therefore, essential to take cognisance of the fact that PAJA should be regarded as the primary articulation of the rights entrenched in the Constitution's section 33, and that the judicial review of administrative action always proceeds in terms of PAJA,[35] if the said administrative action falls within the definition thereof as provided for in PAJA. However, Hoexter[36] is of the opinion that if the said action does not fall within the aforementioned definition of an administrative action as according to her often does happen as a result of the fact that PAJA provides a number of technical difficulties for an affected party to overcome, other avenues for relief will need to be followed by the affected party in order to seek relief as a result of the action. Other pathways which may be considered by an affected party will be to have the decision directly reviewed in terms of either section 33 of the Constitution or even special statutory review, the common law and having the decision measured with the principle of legality. The scope of this dissertation does not, however, allow the writer hereof to enter into an elaborate discussion of the aforementioned avenues to be considered by an affected party to have the decision judicially reviewed, but will rather focus on the possible judicial review of the action in terms of section 88 and 90 based on the assumption that action will be regarded as an action of an administrative nature as per the provisions of PAJA, and for the reasons set out in paragraph 3.1 hereof.

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34 S 39(2) of the *Constitution*.
35 Quinot *Administrative Law* 98.
36 Hoexter 2006 *Acta Juridica* 303-304.

3. The application of PAJA

3.1 Administrative action

The determination of whether the action of a person acting in terms of sections 88 and 90 of the CEA can be deemed to be an administrative action, is of particular relevance. If the said action does not fall within the scope of the definition, the relevance of PAJA to this dissertation will be eliminated.

The importance of a detailed definition of administrative action for the scope of review of such an action in South Africa's current constitutional realm, was one of the most important issues to be clarified in the drafting of PAJA. The history of the definition also reflects this, as no less than ten different options were considered before a satisfactory definition was considered and finalised.[37]

In instances of a dispute between an importer or exporter and a government authority as referred to in the abovementioned provisions of the CEA, the importer or exporter must consider his or her position in light of PAJA, together with the provisions of the relevant statutory mechanisms which may or may not be applicable to the dispute. Firstly, it is important to determine if the cause of the dispute falls within the definition of an administrative action in terms of section 1 of PAJA. An administrative action in terms of PAJA is defined as follows:

> Administrative action means any decision taken, or any failure to take a decision, by
> *(a)* an organ of state, when
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation; or

37 De Ville *Administrative Action* 37.

> *(b)* a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include
> *(aa)* the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)*(a)*, *(b)*, *(c)*, *(d)*, *(f)*, *(g)*, *(h)*, *(i)* and *(k)*, 85(2)*(b)*, *(c)*, *(d)* and *(e)*, 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
> *(bb)* the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)*(d)*, *(e)* and *(f)*, 126, 127(2), 132(2), 133(3)*(b)*, 137, 138, 139 and 145(1) of the Constitution;
> *(cc)* the executive powers or functions of a municipal council;
> *(dd)* the legislative functions of Parliament, a provincial legislature or a municipal council;
> *(ee)* the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
> *(ff)* a decision to institute or continue a prosecution;
> *(gg)* a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
> *(hh)* any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
> *(ii)* any decision taken, or failure to take a decision, in terms of section 4(1). [38]

Effectively, what this quite broad and bulky definition entails is that any decision by a public body, or a private body with public powers, that affects the rights of any person will be an administrative action. This qualification was included in the provisions of PAJA during the parliamentary committee stage of the drafting process, and has to be understood in context as per the author Lewis:[39]

> The position has now been reached where the exercise of power that manifests itself in a decision that has a discernable effect on an individual is subject, in principle, to judicial review.

38 S 1.
39 Lewis *Judicial Remedies* 114.

Lewis' view may, however, be criticised in view of the Supreme Court of Appeal judgement of *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others,*[40] in which Nugent JA stated that:

> While PAJA's definition purports to restrict administrative action to decisions that as, a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended...Moreover that literal construction would be inconsistent with section 3(1), which envisages that administrative action might not affect rights adversely.[41]

It is hereby respectfully submitted by the writer that the aforementioned view of Nugent JA must be praised for the fact that the qualification was in all probability intended to rather convey that the nature of an "administrative action" has the potential possibly to affect legal rights. For this reason, the writer is of the opinion that administrative action should merely be regarded as an action which has the capacity to affect legal rights in an adverse manner. This view has also been supported in the Eastern Cape Division judgement of *Kiva v Minister of Correctional Services*[42] in which Plasket J stated that the decision not to promote the applicant "certainly had the potential to affect his rights to fair labour practices".[43]

In order to determine the limitations to the field of application of the Constitution's section 33 and PAJA, the term "administrative action" will need to be clearly understood. According to Klaaren,[44] "administrative action" refers to any action taken by a body which exercises a public power. This definition is very broad and case law such as the *Jeeva v Receiver of Revenue, Port Elizabeth*[45] has gone as far as to determine that:

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40 2005 6 SA 313 (SCA).
41 At par 23.
42 2007 28 ILJ 597 (E).
43 At par 28.
44 Klaaren "Administrative Justice" 25-4.
45 1995 2 SA 433 (SE).

> …a commission of inquiry authorised by the Master of the Supreme Court and held under the machinery of the Companies Act is administrative action.[46]

Any action which is taken by a body such as a parastatal corporation with the status of an organ of state will be deemed to be an "administrative action".[47] This view is supported by Woolman in his discussion of what is understood to be an organ of state, using the government control (measuring whether the government has "direct" control over the body in question) as well as the government function (measuring whether the body pursues some or other government objective) tests.[48] In the case of *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others*[49] the learned judge was in support of coverage of the administrative justice clause beyond any adjudication of an administrative nature. It was stated that the action of making delegated and subordinate legislation is in fact an administrative action, as "the process whereby legislation is made is in substance 'administrative'".[50]

Importantly, while some courts have denied relief on the grounds that the administrative action affects no legal right (as indicated in the judgement of *Podlas v Cohen and Bryden NNO & Others*),[51] the Constitutional Court has indicated that its understanding of the concept of a right may be broader than the common law understanding thereof.[52] In terms of the pre-Constitutional common law an applicant was required to demonstrate an interest which is direct, real or present and not common to all members of the community before *locus standi* would be granted. *Locus standi* has

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46 At par 443I.
47 Klaaren "Administrative Justice" 25-5.
48 Woolman "Application" 10-35.
49 1999 2 SA 374 (CC).
50 At par 27.
51 1994 (4) SA 662 (T) 675.
52 *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 CC at par 31.

been defined by Botha JA in the case of *Jacobs v Waks*[53] to mean the following:

> …in general the requirement of *locus standi* means that someone who seeks relief must have a sufficient interest in the subject-matter of the litigation to persuade the court that his claim should be adjudicated.[54]

In light of the above determination, it would appear that an importer or exporter adversely affected by a person acting in accordance with the provisions of sections 88 and 90 of the CEA, would have *locus standi* to challenge the action on the grounds of the administrative justice thereof. However, in the administrative justice context, an interest would be defined to include an economic interest implicated by the administrative action.

As the term decision plays such an important role in the definition of an administrative action, the legislator found it necessary to also define the word "decision" in PAJA as:

> Any decision of an administrative nature made, supposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –
> a) Making, suspending, revoking or refusing to make an order, award or determination;
> b) Giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
> c) Issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
> d) Imposing a condition or restriction;
> e) Making a declaration, demand or requirement;
> f) Retaining, or refusing to deliver up an article; or
> g) Doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.[55]

53 1992 1 SA 521 (A).
54 At 533J – 534B.
55 S 1.

The phrase "of an administrative nature" should, in view of the above definition of the word "decision", be regarded as performing a similar function as do some of the explicit exclusions in the definition of administrative action, which is to exclude action which is not administrative in nature but executive, judicial or legislative.[56] It could also be construed to be fulfilling a similar function as the phrase "exercising a public power or performing a public function", which has the effect of excluding from the definition the private conduct of state organs.

Hoexter[57] states that attention must also be given to the Constitutional Court's broad criteria in the determination of whether an action is of an administrative nature or not. She states that due regard must be given to the following:

> ...the nature of the power, its source, its subject matter, whether it involves the performance of a public duty and how closely it involves the implementation of legislation – which is a characteristic of administrative action – or the making of policy in the broad sense, which is not.

These factors were all recognised by the learned judges in the *President of the Republic of South Africa v South African Rugby Football Union*[58] and are important guidelines in determining whether the actions and decisions made by a person acting in accordance with the provisions of the CEA can be deemed to be administrative actions or not. It would appear that such actions will fall straight in line with these broad factors as a person empowered by the relevant provisions of the CEA will be acting in terms of legislation promulgated by parliament and be performing a public function. Hoexter[59] is also critical of the fact that an administrative action is only deemed to be such if it amounts to be a decision. Furthermore, the

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56 De Ville *Administrative Action* 40.
57 Hoexter 2006 *Acta Juridica* 305.
58 2000 1 SA 1 (CC) at par 142.
59 Section 1(i)(b) of the PAJA.

administrative action must affect rights adversely and must have "direct, external legal effect"; and it must not be a decision specifically excluded in the list of exceptions.[60]

Importantly, and taking the aforementioned extended discussion of the term "administrative action" into account, for the purposes of this discussion an action performed in accordance with the empowering provisions of the CEA, has been determined by the Supreme Court of Appeal in *Commissioner for the South African Revenue Service v Trend Finance (Pty) Ltd & Another*[61] to be administrative actions as defined in section 1 of the PAJA, as the action is performed by a "functionary…exercising a public power…in terms of any legislation" as set out under section 239 of the Constitution.[62]

3.2 Procedural fairness

As section 33(1) of the Constitution grants everyone a right to administrative action that is procedurally fair, PAJA[63] gives effect to the right to procedurally fair administrative action by setting out procedures for ensuring that in the case of administrative action likely to effect the public an appropriate form of notice and consultation takes place – which can in other words be defined as the rules for rulemaking of an administrative nature.[64] The Act furthermore gives indirect effect to the rights to lawful, reasonable and procedurally fair administrative action by providing a list of grounds of judicial review of administrative action,[65] a set of procedures for

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60 Section 1(i)(b)(aa)–(ii) of the PAJA.
61 162/06 2007 ZASCA (23 May 2007).
62 At par 25.
63 In this regard cognisance must be given to the "Rules of Procedure for Judicial Review of Administrative Action" promulgated in accordance with s 7(3) of PAJA as promulgated in the Government Gazette of 9 October 2009, which provide the procedure to facilitate proceedings for judicial review.
64 S 4.
65 S 6.

review[66] and a set of remedial powers for courts or tribunals in judicial review proceedings.[67]

A "fair procedure" will usually refer to the manner in which the action was taken, and gives rise to the question of how the decision was reached. These questions can be summarised as whether the administrator has acted in a fair manner in reaching a decision.[68] The requirements for such fair procedure are indicated in extensive detail in the provisions of PAJA,[69] and distinguish between requirements of procedural fairness of administrative action affecting "any person" and "the public". Within the scope of this dissertation, it appears that an administrative action in terms of sections 88 and 90 of the CEA will affect a person and not the public at large, and for this reason the provisions of section 3 of PAJA will be discussed at length.

The PAJA reads that "administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair".[70] What is important to this provision is the doctrine of legitimate expectation – the enquiry whether the affected person has a legitimate expectation of a certain outcome that will entitle him to a fair hearing in the circumstances. The question of whether or not a legitimate expectation exists or not, is a factual question which must be answered and determined with reference to the circumstances and facts of each particular case, as per the *Bushbuck Ridge Border Committee and Another v Government of the Northern Province and Others* case.[71] It has also been said that a legitimate expectation gives an affected person a claim to a hearing in the light of a legitimate expectation, as per the right to procedural

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66 S 7.
67 S 8.
68 Burns and Beukes *Administrative Law* 215.
69 Ss 3 and 4.
70 S 3(1).
71 1999 2 BCLR 193 (T) at par 199.

fairness.[72] This does, however, not mean that such a person will be successful with such an application as per the judgment in the *Bushbuck Ridge Border*-case, as cited above.

In the matter of *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern* Transvaal[73] it was decided by the Court that the common law doctrine of legitimate expectations remains part and parcel of procedural fairness in post 1994 administrative law.[74] However, in the matter of *Meyer v Iscor Pension Fund*[75] Brand JA refused to adopt substantive legitimate expectations, or more appropriately called, the substantive protection of substantive legitimate expectations. In its review of the development scope of the doctrine of legitimate expectations in other legal systems, the Court decided to not extend the need for such protection in our law.[76] The latter view may, however, be criticised in that the doctrine of legitimate expectations has developed considerably in the democratic era, and is one of the most important themes relating to procedural fairness in our law.[77]

PAJA also sets out the procedures an administrator must follow when making decisions affecting any person. These provisions are regarded as mandatory procedures and represent the minimum requirements of fairness. The provision reads as follows:

> In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4) must give a person referred to in subsection (1)
> i) adequate notice of the nature and purpose of the proposed administrative action;
> ii) a reasonable opportunity to make representations;

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72 Burns and Beukes *Administrative Law* 221.
73 1999 2 SA 91 (CC).
74 At par 36.
75 2003 2 SA 715 (SCA).
76 At par 27.
77 Hoexter *Administrative Law* 357.

iii) a clear statement of the administrative action;
iv) adequate notice of any right of review or internal appeal, where applicable; and
v) adequate notice of the right to request reasons in terms of section 5.[78]

Section 3(3) of PAJA relates to the procedures the administrator may consider and follow – meaning that the said administrator has a discretionary power to allow a person affected by an administrative decision to obtain assistance and legal assistance in serious or complex cases as well as to appear in person and present and dispute information and arguments. It is, however, respectfully submitted that the obtaining of assistance and legal representation in serious or complex cases should not be left to the discretion of the administrator, since this undermines the inherent right to procedural fairness – the question whether the procedures followed are fair should depend on the circumstances, and not on administrative discretion.[79] This view is supported by the judgement of *SA National Defence Union v Minister of Defence: In re SA National Defence Union v Minister of Defence*[80] in which it was stated that as a member of the defence force has a right to procedurally fair administrative action in terms of section 33 of the Constitution, in appropriate circumstances that said member must have an opportunity to be represented by a military union.

Finally, the approach to the application of the rules of procedural fairness under the provisions of PAJA was developed in both the *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*[81] and *Walele v City of Cape Town*[82] (hereafter referred to as Walele) judgments. Nugent JA adopted an interpretation of a broad nature in the definition of an administrative action in terms of section 1 of PAJA, but a more strict interpretation of the impact requirement in section 3(1) of the same Act in respect of the application of

78 S 3(2)(b).
79 Burns and Beukes *Administrative Law* 231.
80 2003 9 BCLR 1054 at par 41-42.
81 2005 6 SA 313 (SCA) at par 29-33 .
82 2008 ZACC 11 at par 30-32.

the rules of procedural fairness in relation to individuals in the former matter. This approach was followed and approved in the Walele judgment by Jafta AJ in the Constitutional Court. In Walele the Court addressed the apparent conflicting requirements regarding impact in sections 1 and 3(1) of PAJA, specifically focusing on legitimate expections.[83] The Court indicated that there should be different interpretations of the application requirements in both the aforementioned sections as the term legitimate expectation is not defined in section 3, but that administrative action in terms of PAJA is defined in section 1 as a decision which affects the rights of another person. Furthermore, no reference is made to a decision reflecting affecting legitimate expectations. For this reason, it was held by Jafta AJ that the definition of administrative action in terms of PAJA should not be given its literal meaning.

The above view may, however, be criticised in that it was clearly the legislator's intent to provide a remedy to those whose legitimate expectations are materially and adversely affected. For this reason, the writer hereby concurs with O'Regan ADCJ in stating that the "narrow definition" of administrative action as indicated in section 1 of PAJA should be read in a manner in order to be impliedly supplemented by the provisions of section 3(1).[84]

3.3 Departures from the requirements of fair procedure

The PAJA also contains provisions regulating the possible departures from the requirements of fairness.[85] Such a departure will only be permissible once an administrator has evaluated the specific circumstances and is able to justify a departure from the requirement of fair procedure in view of the

83 At par 37.
84 At par 125.
85 S 3(4).

said circumstances.[86] It is, however, important to realise that PAJA makes a distinction between a departure, and the use of fair but different empowering provisions.[87] It is hereby respectfully submitted that which one of the two distinctions might be applicable to the action taken by an administrator in terms of sections 88 and 90 of the CEA will once again depend on the circumstances of the case in that what will be fair and constitute just administrative action will almost always be determined in view of the specific factors at hand.

In terms of section 3(4) of PAJA an administrator may, if it is reasonable and justifiable in the relevant circumstances, depart from any of the requirements for procedural fairness as contained in section 3(2). What the effects of this section entail is that an administrator has the inherent discretionary power to deviate from the peremptory requirements of fair procedure – this provision can thus be regarded as a limitation of the right to fair procedure, similar to the manner in which section 36 of the Constitution authorises a limitation of a right in the Bill of Rights in terms of law of general application.[88] The determination of whether a departure as contemplated here above is indeed reasonable and justifiable is determined by the provisions of section 3(4)(b), stating that an administrator must take into account all relevant factors including:

1) The objects of the empowering provision;
2) The nature and purpose of, and the need to take, the administrative action;
3) The likely effect of the administrative action;
4) The urgency of taking the administrative action or the urgency of the matter; and
5) The need to promote an efficient administration and good governance.[89]

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86 Burns and Beukes *Administrative Law* 233.
87 S 3(5).
88 Burns and Beukes *Administrative Law* 234.
89 S 3(4)(b)(i)-(v).

Hoexter[90] is of the opinion that "since it continues the project of requiring administrators to apply their minds to the whole question of what is appropriate in the circumstances", the listing of the relevant factors to be considered by an administrator is a sound idea. However, what may be questionable is the fact that such a long list of potential "loopholes" may allow an administrator to deviate from the rules of procedural fairness more and easier than one would like an administrator be empowered to be. The list must, however, be considered to be merely factors which are to assist the administrator in his or her determination of whether the departure from the right to procedural fairness is in fact reasonable and justifiable. One may also ask the question of whether the infringement of the right to fair procedure constitutes a legitimate limitation of the right. As Currie and De Waal[91] have so eloquently stated, rights may be infringed "but only when the infringement is for a compelling good reason". A compellingly good reason is that the infringement serves a purpose that is considered legitimate by all reasonable persons in the country that values human dignity, equality and freedom above all considerations. However, such an infringement will not be considered reasonable if it imposes costs that are disproportionate to the benefits that it obtains.[92]

An example of such disproportionality will be the case where a law infringes the rights of a person that are of great importance in the constitutional scheme in the name of achieving benefits that are of comparatively less importance. According to the Transvaal Provincial Division (as it was then) decision of *Swarts v Swarts,*[93] in all probability the factor which will weigh most heavily in favour of a departure from a person's right to fair procedure, is the urgency of taking the administrative action or the urgency of the matter. In view of the aforementioned judgment, one may then argue that

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90 Hoexter *Administrative Law* 238.
91 De Waal, Currie and Erasmus *Bill of Rights* 185.
92 Burns and Beukes *Administrative Law* 235.
93 2002 3 SA 451 (T) at par 466-467.

the potential prejudice to the state in cases where an administrator does not act in terms of sections 88 and 90 where said administrator would be entitled to do so for any reason whatsoever, may be regarded as a factor in support of the "urgency" of taking the administrative action. Once again, it is hereby respectfully submitted that an administrator acting in terms of the said provisions will need to evaluate the situation at hand on a case-by-case basis, as no hard and fast rules exist in the determination of the reasonableness of the decision to be taken.

The essence of the doctrine of procedural fairness is that the affected party has to be heard prior to the decision actually being made.[94] The process of the aforementioned right has also been illustrated on a number of occasions by our courts, in particular the judgement of Cleaver J in *South African Heritage Resource Agency v Arniston Hotel Property (Pty) Ltd and Another,*[95] in which it was stated that to act before a party is heard should be considered unsound.[96] Davis J further stated in the matter between *Stock and Another v Minister of Housing & Others*[97] that the applicants had been entitled to be heard prior to the decision actually being made, as the administrative action made by the administrator had the potential to affect the land owners' property rights.[98] In view of the above, the question may be raised whether an administrator can act in terms of the relevant provisions of sections 88 and 90 of the CEA on an "act now hear later" basis.

An example of such action may of course occur when, as a result of the urgent nature of the decision to be made, an administrator needs to act promptly in order to avoid illicit goods entering or leaving the country. As

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94 Plasket 2007 *ASSL* 42.
95 2007 2 SA 461.
96 At par 23.
97 2007 2 SA 9.
98 At par 16 E-G.

PAJA characterises the right to be heard as a discretionary ingredient[99] it would appear that the ability of an administrator to act on an "act now hear later" basis may once again depend on the specific circumstances of the case.[100] However, it is hereby respectfully submitted that an administrator will need to provide significantly good reasons for the departure from the right to be heard before the decision is taken, as Baxter[101] describes the said right as "the essence of a fair hearing" and in addition that courts will ordinarily always insist upon it. This view must be praised, as it is evident that the rights, liberties and privileges of the affected person of the action in terms of section 88 and 90 of the CEA are at stake. As the right to be heard exists not in a vacuum only applicable to formal hearings, but also to where the said rights, liberties and privileges of an affected party are at issue,[102] it is clear that an administrator would be well advised to ensure that the affected party is first heard *before* the administrator acts in terms of section 88 and 90 of the CEA. However, it is also hereby respectfully submitted that as it is not necessary that a formal hearing take place in order to give effect to the right to be heard,[103] it will of course be possible that the administrator obtains the affected party's representations on an informal basis, and then makes the decision and acts upon these representations. What is clear however, is that the courts will not justify the decision if it was taken solely based on the view of the administrator, without allowing the affected party to at least make informal representations in order to state his or her case.

A further important court case in this regard and which is particularly relevant, is the matter of *Janse van Rensburg NO and Another v Minister of*

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99 Hoexter *Administrative Law* 340.

100 The right to be heard does not however stretch so far as to mean that the affected party must be heard in person. Written submissions, or any other form of representation should thus suffice for purposes of being heard before the action is taken in terms of the provisions of PAJA.

101 Baxter *Administrative Law* 553.

102 Burns and Beukes *Administrative Law* 321.

103 Burns and Beukes *Administrative Law* 321.

Trade and Industry NO and Another.[104] In this pre-PAJA case, the constitutionality of section 8(5)(a) of the *Consumer Affairs (Unfair Business Practices) Act*[105] was the issue in dispute between the parties. The relevant provision allowed the Minister of Trade and Industry to take all necessary steps to prevent the ongoing of business activities which are subject to an investigation at a stage when the investigation was not yet completed, and to attach and freeze assets (provisions which can be regarded as particularly similar to the empowering provisions of sections 88 and 90 of the CEA). As the powers of the Minister were determined, after examination, to be sweeping and drastic and could be taken without prior warning to the persons affected by them, the provisions were determined to be unconstitutional. The court also highlighted the fact that no guidance was given in the legislative provisions for the exercise of the wide powers conferred upon the Minister. It also goes without saying that the exercise of the aforementioned powers may have caused further irreparable harm to parties in the future.[106]

With regard to sections 88 and 90 of the CEA and the wide powers conferred upon an administrator acting in accordance therewith, it is important to remind oneself that a constitutional obligation rests on the legislator to:

> …promote, protect and fulfill the entrenched rights fundamental rights, which means that the conferral of a wide discretion requires guidance to be provided as to the manner in which those powers are to be exercised.[107]

It is hereby respectfully submitted that the absence of such guidelines in the relevant provisions of the CEA may leave the procedure in which an administrator acts in terms of section 88 and 90 of the said Act open to

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104 2001 1 SA 29 (CC) at par 24.
105 71 of 1988.
106 Burns and Beukes *Administrative Law* 235-236.
107 Burns and Beukes *Administrative Law* 236.

accusations of being unfair and leading to a violation of the administrative justice guarantee as contained in section 33(1) of the Constitution specifically, but not limited to, the requirement of the decision being taken being reasonable.

3.4 Procedural fairness and the CEA

It is clear that the abovementioned provisions of the CEA empower an administrative action in a broad manner which could potentially have far-reaching effects for an importer or an exporter in the country. Section 88(1)(a) allows an officer, magistrate or member of the police force to detain a ship, vehicle, plant, material or goods with the objective of establishing whether the ship, vehicle, plant, material or goods are liable for forfeiture under the CEA. Although the provisions of the CEA determine that the abovementioned ship, vehicle, plant, material or goods may only be detained at the place that they are found or stored at a place of security as determined by the officer, magistrate or member of the police force, it is worrying that the abovementioned detainment takes place at the cost of the owner, importer, exporter, manufacturer or person in possession or on whose premises they are found.[108]

Furthermore, no guidelines are prevalent in the relevant section indicating which factors and circumstances must be identifiable for the possible detainment of a ship, vehicle, plant, material or goods, as indicated in the aforementioned discussion of the ability of an administrator to depart from the requirement of acting in a procedurally fair manner.

The question must, therefore, be asked as to how the officer, magistrate or member of the police force determines whether a ship, vehicle, plant, material or goods are liable for forfeiture. The answer to this question

108 S 88(1)(b).

seems to be that the test is a purely subjective one, with the officer, magistrate or member of the police force having the ability to detain if he or she merely suspects that the ship, vehicle, plant, material or goods are liable for detainment. As no objective factors and circumstances are listed in section 88 regarding the requirements for a detainment, it is impossible to determine if a detainment is justified in terms of the CEA, if the above guidelines as set out in the Constitution or PAJA with regards to procedural fairness are not followed.

At its most general level, powers must always be exercised in the public interest and not for the personal benefit of the official taking the administrative decision. Over and above this requirement, the purposes as envisaged in the CEA (and of course any other enabling legislation) will be binding on an administrator acting in accordance with the empowering provision. It may of course happen that the purpose of the legislation may not always be clear, and in such a case it will be required of the court to work out the specific purposes of the legislation by a process of interpretation.[109] The effect of a decision being taken for an unauthorised subjective purpose, or purposes which were not contemplated at the time when the powers were conferred upon the administrator, will be that the decision or action will be regarded as unlawful, as per De Ville.[110]

Furthermore, the CEA allows that whatever is seized as being liable to forfeiture under this Act, shall forthwith be delivered to the Controller at the customs and excise office nearest to the place where it was seized, or it may be secured by the Controller by sealing, marking, locking, fastening or otherwise securing or impounding it on the premises where it is found, or by removing it to a place of security determined by the Controller.[111] In both of the abovementioned cases no statutory duty rests upon the Controller to

109 Hoexter *Administrative Action* 276.
110 De Ville *Administrative Action* 103-104.
111 S 90(a).

provide an opportunity to the importer or exporter to present evidence as to why the goods are not liable to detainment or forfeiture.

According to Van Niekerk and Schulze,[112]

> …in exercising administrative powers in seizing goods and declaring them forfeited, the Controller concerned must have due regard to and follow both substantial and procedural fairness and the rules of natural justice as embodied in section 33 of the Constitution.

The owner of goods must, therefore, for example, be given the opportunity to be heard and make representations. The important case of *Deacon v Controller of Customs and Excise*[113] has highlighted this principle, and a short discussion of the said case follows hereunder in order to provide the reader with the basic approach our courts have taken to the process of administrative justice when acting in terms of the above provisions of the CEA.

3.5 Reasonableness

Very importantly, a further factor to which due regard must be given is the determination of the reasonableness of the decision. This is usually determined with the assistance of past precedents, and not only the outcome of the decision is important in this regard. The manner in which any decision was taken is one of the overriding factors in the determination of the reasonableness of an administrative action. PAJA determines that an administrative action may be judicially reviewed if and when the exercise of the power authorised by the empowering provision in pursuance of which the administrative action was taken, is so unreasonable that no reasonable person could have so exercised the said power.[114]

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112 Van Niekerk and Schulze *International Trade* 12-13.
113 1999 2 SA 905 (SE).
114 S 6(2)(h).

It can easily be stated that no one confined definition can be given to the meaning of reasonableness in this context. However, proportionality and rationality can be construed to be two of the effective elements of reasonableness in this regard.[115] The former element refers to the essence that any decision must be backed up by sufficient evidence, together with the information as before the administrator, as well as any reasons given for the said decision. The case of *Carephone (Pty) Ltd v Marcus NO*[116] illustrated the abovementioned principle by posing the question as:

> …is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?[117]

This formulation of the abovementioned determination of the rationality of a decision has further been used and found application in the judgments of *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa,*[118] as well as *Rustenburg Platinum Mines v CCMA,*[119] both being judgments of the Supreme Court of Appeal. Most importantly, Hoexter[120] states that "a crucial feature is that it demands merely a rational connection – not perfect or ideal rationality".

However, it is important to realise that rationality is not the be all and end all in the determination of the reasonableness of a particular decision. In the case of *S v Manamela*[121] it was stated that the definition of proportionality may be that one should not make use of a sledgehammer, merely for the objective of opening a nut. The main objective of such an element to the

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115 Hoexter *Administrative Law* 306.
116 1999 3 SA 304 (LAC).
117 At par 37.
118 2004 3 SA 346 (SA) at par 21.
119 2007 1 SA 576 (SA) at par 23.
120 Hoexter *Administrative Law* 309.
121 2000 3 SA 1 (CC) at par 34.

determination of the reasonableness of a decision is to avoid an imbalance between the beneficial and the adverse effects of an action. An administrator should, therefore, then always consider both the dire need for the action, as well as the possible use of less far-reaching methods of accomplishing the desired result.[122]

In the Constitutional Court judgment of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[123] a decision made by the Chief Director in the Department of Environmental Affairs and Tourism was alleged to be a decision which was "so unreasonable that no reasonable person" could have reached it.[124] It was indicated by O'Regan J that what will constitute a reasonable decision will depend on the circumstances of each case, and that the factors relevant to the determination of whether the decision was reasonable or not will include the decision's nature; the expertise of the person making the decision; the factors relevant to the decision; the reasons given by the decision-maker in coming to the decision; the nature of the competing interests and the eventual impact of the decision on those affected by it.[125] The implication of this judgement lies in the fact that the Constitutional Court has now given effect to the requirement of reasonableness as set out in section 33(1) of the Constitution. By stressing the importance of judicial deference to the legitimate decision-making sphere of the executive, this standard will require a justification beyond a mere rational connection[126] which has to be commended. It is, however, important to remember that each case will once again be evaluated on its own merits and circumstances, and that what may be regarded as reasonable in one matter, may not be regarded as reasonable in the next. The judgment may, however, be criticised on the basis that by listing the

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122 Hoexter *Administrative Law* 309.
123 2004 4 SA 490 (CC).
124 PAJA s 6(2)(h).
125 At par 45.
126 Quinot *Administrative Law* 428.

criteria against which reasonableness may be measured, one may detract from the evaluation of reasonableness on a case-by-case basis as each case is now measured against more or less the same criteria. However, as O'Regan J expressly stated that the determination of reasonableness will depend on the individual circumstances of each matter, the listing of the criteria should not be considered in a negative light, but rather as a guideline in the determination of the reasonableness of the decision taken by the administrator.

It is hereby respectfully submitted that an administrator acting in terms of the CEA (especially when empowered by the far-reaching provisions of sections 88 and 90) should, therefore, always determine if another, less drastic form of recourse exists in which to achieve the same result as acting in terms of the relevant sections would have. The determination of the reasonableness of the administrative action is, therefore, essential in ascertaining the legality thereof. The reasonableness of any decision taken in accordance with sections 88 and 90 of the CEA will of course differ on a case-to-case basis and, therefore, due diligence must be given by the administrator to the application of his mind to the prevailing circumstances of the case before him.

3.6 The right to reasons

The requirement of the furnishing of reasons refers to the reasons an official or administrative body must provide after it has come to a decision, in order to justify the said decision. The furnishing of reasons serves an important function in the achievement of administrative justice in that it promotes rational decision-making and assists in the elimination of bias in the eventual making of the decision.[127]

127 De Ville *Administrative Action* 287.

It is clear, after a thorough perusal of sections 88 and 90 of the CEA that no internal checks exist in the prevention of bias[128] by an administrator acting in accordance with the said empowering provisions. South African courts employ the reasonable suspicion test and the reasonable apprehension test in the determination of administrative basis, according to Nwauche.[129] Although it is not necessary at this stage to discuss at length the effect of these tests in our current legal dispensation, it is, however, important to indicate that these provisions might well be applicable in the cases where an administrator, acting in accordance with the provisions of sections 88 and 90 of the CEA is suspected of bias. A party thus adversely affected by administrative action who believes that the administrator was biased in his decision may seek assistance from this provision of the PAJA as the CEA does not appear to contain provisions providing relief from such suspicion.

Over and above the prevention of bias, the furnishing of reasons illustrate to the affected party how the administrator functioned when it took the decision and in particular, how the administrator performed the action.[130] According to De Ville,[131] the furnishing of reasons can be regarded as one of the essential elements of good administration which leads to the encouragement thereof. Furthermore, once reasons have been furnished an affected person will know why a decision was made which serves an educational purpose. It is furthermore hereby respectfully submitted that the furnishing of reasons in terms of section 5 of PAJA leads to the achievement of government accountability, and stimulates the transparency of a decision made by an administrator. Once an affected party has been provided with reasons, such a party will also have the ability to determine

128 As well as other undesirable consequences as set out hereunder.
129 Nwauche 2005 *PER* 3.
130 Burns and Beukes *Administrative Law* 254.
131 Burns and Beukes *Administrative Law* 287.

whether to exercise his or her rights of appeal or review in terms of PAJA.[132]

In the pre-democratic era, no duty rested upon the makers of administrative decisions to provide oral or written reasons for any decisions that they made. These days, however, the provision of reasons is essentially regarded as one of the most basic of all the requirements of administrative justice.[133] The Constitution contains a very generous right to written reasons for any administrative action[134] - which has of course given effect to the provisions of the PAJA. PAJA places a duty on administrators to provide reasons for administrative action on request and sets out procedures for making such requests and for responding to them.[135] However, to the extent that the duty is only triggered by a request and is not automatic and to the extent that PAJA envisages administrators not providing reasons in some cases, the Act is in fact a limitation of the constitutional rights.

Reasons cannot be deemed to be such unless they can be considered to be properly informative. Explanations as to why a particular decision was made are therefore essential. In other words, a justification must be given for that particular decision. Furthermore, a reason must be formulated as such, as indicated in the *Rean International Supply Company (Pty) Ltd v Mpumalanga Gaming Board*:[136]

> On the one hand it is not necessary for an administrative body to spoonfeed an aggrieved party seeking reasons; on the other hand

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132 See Chapter 4 of the "Regulations on Fair Administrative Procedures" published under Government Notice R1022 in Government Gazette 23674 on 31 July 2002, and as amended by Government Gazette R614 in Government Gazette 27719 on 27 June 2005 for specific reference to the formal requirements to be complied with in the furnishing of reasons.

133 Hoexter *Administrative Law* 413.

134 S 33(2).

135 S 5.

136 1999 8 BCLR 918 (T).

> the administrative body cannot expect an aggrieved party to seek reasons from a myriad of documents where such reasons cannot be reasonably determined.[137]

The reasons for an administrative decision are deemed to be part of the administrative process – it is, therefore, in the interests of fairness that any affected individual must be provided with reasons for an action which has been taken against them. Furthermore, the provision of reasons ensures that a person making an administrative decision will ask the right questions; force the decision-maker to illustrate to the affected party that this is in fact so; ensure that all the relevant issues have been effectively addressed or alert an affected party to a flaw in the process.[138] However, it is also possible that an administrator may fabricate reasons and place an undue burden upon such decision-maker. Together with the main disadvantage of the provision of reasons (that being the inconvenience thereof),[139] many persons affected by an administrative decision will see the lack of provision of reasons as an invitation to challenge the decision.

There is a major difference between the provisions of sections 33(1) and 33(2) of the Constitution. The right to lawful, reasonable and procedurally fair administrative action[140] is not in any way subject to an internal qualification. It is, therefore, not necessary that a person, relying on the provisions of section 33(1), needs to indicate that an interest, never mind a right, has been affected by the administrative decision. However, with regards to the provision of reasons, one is only entitled to same where a right has been affected in an adverse manner.[141]

The PAJA is of essential importance in this regard, as it gives effect to the right entrenched in section 33(2) of the Constitution and provides that:

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137 At par 927H-I.
138 Hoexter *Administrative Law* 417.
139 Hoexter *Administrative Law* 418.
140 S 33(1).
141 Hoexter *Administrative Law* 424.

> Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.[142]

As the provisions of PAJA state expressly that written reasons have to be provided, oral decisions which may have been provided at the time of the decision being made will not suffice. According to Hoexter,[143] a person who receives oral reasons will still have the right to request adequate written reasons from the administrator making the decision.

From the abovementioned provision, it is thus clear that certain qualifications are placed on the right to reasons, including that a person's right must be affected in an adverse manner in the material sense of the word.[144] However, it appears that the aforementioned restriction is not one of particularly significant nature – it appears only to confirm the application of the principle of *de minimus non curat lex*.[145] Any person who is, therefore, affected by a decision in a materially adverse manner by the administrative action taken by an administrator, may request the reasons for the decision taken if such a person has complied with the procedural requirements as contained in the relevant provisions of PAJA to do so.

The question may further be asked as to what will constitute *adequate* reasons. Most authors, however, agree that the adequacy of reasons given for a decision, will usually depend on the circumstances of each case, as per the *Rean International Supply Company (Pty) Ltd and Others v*

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142 S 5(1).
143 Hoexter *Administrative Law* 253.
144 Hoexter *Administrative Law* 429.
145 De Ville *Administrative Law* 290.

Mpumalanga Gaming Board[146] matter as cited here above. *In casu*, it was held by Kirk-Cohen ADJP that no duty rests upon an administrative body to spoon-feed an aggrieved party seeking reasons, and that the adequacy of the reasons being given will be determined by the context in which the decision was taken. A rather large number of factors will, therefore, need to be considered by the court when determining whether the reasons given by an administrator are adequate or not.

One may be well advised to take cognisance of the dictum of Hancke J in the case of *Moletsane v Premier of the Free State and Another*[147] who stated that:

> ...the more drastic the action taken, the more detailed the reasons which are advanced should be. The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished.[148]

PAJA also determines that should an administrator fail to furnish adequate reasons in circumstances where a duty exists for the administrator to do so, a presumption of a factual nature will arise that the action was taken without good reason.[149] The result of the existence of such a presumption, therefore, has the effect of not invalidating the administrative action when an administrator fails to provide reasons when requiring to do so.[150] It will, however, require of the administrator to prove that its actions complied with the requirements of legality – and if the administrator refuses to furnish reasons, reasons as to why the request was refused have to be provided in writing to the requester.

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146 *Ibid* at par 926F.
147 1996 2 SA 95 (O).
148 At par 98G-H.
149 S 5(3).
150 De Ville *Administrative Action* 295.

The right to request reasons affords an affected importer or exporter the ability to be furnished with reasons for the drastic action taken by an administrator acting in terms of sections 88 and 90 of the CEA. Bias, a hazy administration as well as the feeling of an unaccountable government, amongst others, will be circumvented in this manner, leading to justifiable decisions being made and eradicating irrational decision-making. It is, however, questionable of what use such right will be to a party conducting international trade in South Africa if the said party is trading in perishables, for example apples or fish. By the time, in terms of PAJA, the party has been provided with the reasons for the decision being made, the rationality or irrationality thereof (as the case may be) will be of no significance to the said party as the goods will already have rendered unsuitable for trade, leading to large scale pecuniary losses for the international trade party.

4. The constitutionality of action in terms of sections 88 and 90 of the CEA

In this section the specific provisions of the CEA relevant to this discussion will be dissected and critically evaluated taking into account the entrenched rights to procedural fairness as indicated in the above discussion. One must, however, take cognisance of the fact that the facts and circumstances of each case shall determine whether these entrenched rights have in fact been breached.

In the unreported case of *Commissioner for the South African Revenue Service v Saleem,*[151] the Supreme Court of Appeal held that the seizure of goods is an administrative act (as indicated in Chapter 3.1 of this dissertation) which must be exercised in conformity with the requirements of the Constitution, as spelt out in PAJA.[152] Importantly, in giving judgment

151 21/2007 2008 ZASCA 19 (27 March 2008).
152 At par 7.

Combrink JA stated that he had consciously not attempted to lay down any set guidelines for the future conduct of the officials of the South African Revenue Service when acting in terms of an empowering provision of the CEA, as the facts and circumstances of each detention and seizure would be different. The learned Appeal Judge did, however, indicate that the said powers, as well as any other administrative powers, must be exercised fairly and reasonably and in accordance with the purpose and spirit of the Constitution and with due regard to the rights of the individual affected by such powers.[153]

In the *Deacon v Controller of Customs and Excise*[154] case (hereafter referred to as Deacon), the South Eastern Cape Local Division was of the opinion that section 88 did not expressly or impliedly exclude the right to be heard or the applicability of the rules of natural justice.[155] However, the court further held that in situations where an Act of Parliament or conduct in terms thereof would not, by reason of the nature of the Act, be subject to the rules of natural justice and that in those circumstances, public policy and public interest would sway over the rights of individuals in order to ensure effective governance.[156]

In order to determine whether the rules of natural justice were applicable to a decision taken by an organ or official of government in terms of a statute, regard had to be held to the objects of the statute:

1) the nature of the discretionary powers conferred on the authority;
2) the conduct controlled by the statute;
3) the potential prejudice for the individual concerned; and
4) the prejudice to the organ of state concerned.[157]

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153 At par 14.
154 1999 2 SA 905 (SE).
155 At par 916H/I.
156 At par 914H-H/I and I-I/J.
157 At par 917B-D.

Importantly, the Honourable Court determined that where a functionary exercised a discretionary power of an administrative nature in terms of an Act of Parliament, as the Controller had in acting in terms of section 88 of the CEA, he could not do so without having regard to the spirit and objects contemplated in section 33 of the Constitution. These provisions, it was determined, should at all times be uppermost in the mind of the Controller as the Controller could no longer act in disregard for the rights of any individual.[158] Even more importantly, the exercise of such a discretion in terms of section 88 of the CEA was determined to be administrative in nature and for that reason fell within the ambit of the provisions of section 33 of the Constitution.[159] In view of the above, the applicant's situation was such that it called for a proper investigation by the Controller of Customs and Excise, as well as a full ventilation by the parties of all the relevant facts before the above Controller took the decision to seize the goods.

It was further held by the court that the Controller had acted on the misplaced conviction that the applicant had no rights as far as the goods were concerned and that the seizure provisions of the CEA took precedence. The Controller had been impervious to the applicant's right to expect fair administrative procedure and his right to protection in terms of the Constitution. The Controller, it was determined, had acted without taking into account the relevant factors and had ignored the applicant's right to be given full details of the Controller's findings and the opportunity to be heard.

Furthermore, notwithstanding that all the evidence had pointed to the applicant's innocence, the Controller had refused to accept this. In view of the above, the matter was accordingly sent back to the Controller of

158 At par 915F-G.
159 At par 916E-F.

Customs and Excise to be dealt with in accordance with the principles as outlined above by the Court.[160]

Notwithstanding the above principles, Van Niekerk and Schulze[161] are also of the opinion that it may be possible in appropriate circumstances to claim delictual damages based on the *actio iniuria* from the Commissioner of Customs and Excise for the unlawful seizure and detention of goods, although the claimant will have to prove the elements of delict, including fault in the form of intent on the part of the Commissioner.[162] This opinion appears to be based on the Natal Provincial Division decision in *Minister of Finance & Others v EBN Trading (Pty) Ltd,*[163] in which it was held by the Court that the plaintiff had to establish that it was not liable to the Commissioner for the payment of any customs duty or VAT, the element of causation and that its damages were not too remote.[164]

A further development by the courts in their approach to just administrative process when a relevant person acts in accordance with the provisions of section 88 or 90 of the CEA, is illustrated in the *Henbase 3392 (Pty) Ltd v Commissioner for South African Revenue Services and Another*[165] matter (hereafter referred to as Henbase). This case will also be evaluated and discussed below.

In casu, the applicant was a company carrying on business as an importer, supplier and distributor to retailers of new clothing who imported garments manufactured in Malawi to South Africa for sale to a group of retailers. The applicant brought an urgent application in the Transvaal Provincial Division

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160 At par 924E-G/H.
161 See the discussion of the possibility of claiming delictual damages for unlawful action in terms of section 88 and 90 of the CEA under the section "Remedies" of this dissertation.
162 Van Niekerk and Schulze *International Trade* 13.
163 1998 2 SA 319 (N).
164 At par 329F-G/H.
165 2002 2 SA 180 (T).

seeking interim relief by requesting the court to direct the Commissioner of the South African Revenue Services to release goods which the Commissioner's officials had stopped and detained.

In its application the applicant contented that the officials at the border post had unlawfully detained the goods, resulting in the applicant's peaceful and undisturbed possession of the goods being violated. Furthermore, the applicant was of the opinion that the conduct of the Commissioner constituted administrative action which was unfair, unjustifiable and unreasonable under the provisions of section 33 of the Constitution.

The court held, however, in judgment that the conduct of the Commissioner in terms of section 88 of the CEA is in general not exempt from the constitutional requirements of just administrative action and the common law principles of natural justice. It was further determined that the case was distinguishable from the abovementioned Deacon-case in that the Deacon matter dealt with seizure in terms section 88(1)(c) of the CEA, while *in casu* the seizure was performed in accordance with the provisions of section 88(1)(a) of the said CEA. As a result of the above, the court held that the *audi alterem partem* principle may or has to be applicable to seizure of forfeiture of goods, but not necessarily to the mere detention of goods as detention is the first step which takes place in order to set in motion a process of establishing whether forfeiture should follow; and that to require a hearing before detention can take place would make little sense from a practical perspective.[166]

The constitutional right to administrative action was further held, like all rights, to be subject to the limitation provided in terms of section 36 of the Constitution. Furthermore, to require a hearing prior to the detention of goods as opposed to forfeiture or seizure in terms of the CEA, would

166 At par 192C-198B.

impose a procedure so cumbersome on customs officials that it would be totally unpractical and could render the clause that authorises detention meaningless. For these, and other reasons not relevant to the subject of this dissertation, the Court held that the balance of convenience did not favour the applicant and the application was, therefore, dismissed with costs.[167]

The judgment in *Henbase* may be criticised in that it does not specifically refer to what the position would be if the goods were, for example, of a perishable nature. It is respectfully submitted that the effect of a detention would be similar to that of a seizure if the goods being detained are of a perishable nature in that the affected party will in both cases lose possession and control of the goods which will potentially lead to pecuniary and other losses. For this reason, the nature of the goods entering or leaving the country plays a huge role in determining if a detention can be justified without holding a hearing prior to the said decision being taken in terms of 88(1)(a). Once again, therefore, due diligence must be given to the particular circumstances of the case in which the action is taken. The effect of the detention needs to be considered, as well as if the said detention can be justified before hearing the affected party.
Another question which arises in the interpretation and constitutionality of sections 88 and 90, is whether the person affected by such legal action has the right to legal representation in order to comply with the *audi alteram partem* rule.

Notwithstanding speculations and proposals that the right to legal representation forms part of a just administrative process, the judiciary has not followed this line of thought. In general, PAJA has not altered or broadened the individuals right to legal representations with regard to administrative decisions. However, the fact that a fair procedure is

167 At par 188E-G.

dependant on the circumstances of a particular case, is highlighted. In terms of the provisions of section 3(3) an administrator has a discretion to allow a person to acquire legal representation in complicated or serious cases. Authors have also stated that the right to legal representation is one of the non-essential elements of procedural fairness that must, however, at least be considered before the administrative action is taken.[168] This view was supported by Marais JA in the Supreme Court of Appeal judgement of *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others*[169] (hereafter referred to as Hamata) in which the aforementioned learned judge stated that the opportunity of obtaining legal assistance is fully within the discretion of the administrator, and that the right thereto is not cast in stone. The test is, therefore, whether in light of the circumstances it would be reasonable and justifiable in the circumstances of the matter to deny the person affected the right to obtain legal assistance.

The administrator must, therefore, consider this non-essential element, but no obligation, however, rests upon the said administrator to allow an individual to make use of legal representation. However, the fact that the exercise of the discretion must be reasonable and fair and may be reviewed in the case of, for example *mala fides* or irrelevant factors being taken into account, is an indication that a person adversely affected by an administrator acting in accordance with the provisions of sections 88 and 90 of the CEA should have the right to legal representation before said administrative action is taken.

If sufficient attention and consideration is not given by an administrator to the right of an individual to make use of legal representation, and no such legal representation is allowed, the requirements for procedural fairness will

168 De Waal, Currie en Erasmus *Bill of Rights* 512.
169 2002 5 SA 449 (SCA) at par 10.

not have been met. It is also, however, of the utmost importance to realise that the definition of administrative action, just as the provisions of the said section 3, do not distinguish between different types of administrative proceedings.[170] Importantly, it is not essential that the matter has to be both of a serious nature *and* be complicated in order to require legal representation – the fact that a matter is either serious or complicated should entice an administrator to allow an individual to make use of legal representation.

In this regard the important decision in *Hamata* must be considered. In the said case, and as set out in the preceding paragraphs, the Supreme Court of Appeal followed the guidelines as set out here above and once again confirmed that it is trite law that a fair process depends on the circumstances of each and every particular case. The constitutional and statutory position reflects the hesitance to allow an absolute right to legal representation, but acknowledges that in certain circumstances such a right would be applicable. The type of administrative action as well as the type of administrative organ making the decision will be decisive in the determination whether a right to legal representation exists in each particular case. Marais JA pointed out *in casu* that factors such as the nature of the charges brought, the degree of legal or factual complexity involved in the administrative decision being taken, the potential seriousness of the effect of the adverse decision being made, the availability of suitably qualified lawyers being able to assist the affected party, and any further factor relevant to the fairness of the decision will assist the administrator in exercising its discretion to allow a party to obtain legal assistance or not.

An administrator will then be well advised to ensure that a party affected by an administrative action empowered in terms of sections 88 and 90 of the

170 Roos 2004 *PER* 9.

CEA has access to legal representation in cases where the circumstances justify that the affected party obtain legal assistance and has the opportunity to make submissions before the administrative decision has been made. It is hereby respectfully submitted that the potential losses suffered by a party as a result of the aforementioned action in terms of section 88 and 90 of the CEA will in most cases be the defining factor in the determination in the exercising of the administrator's discretion as discussed above. Also, the legal complexity of the decision made with specific reference to the consequences of the decision will be an important factor for the administrator to consider before the exercising of the said discretion. This must, however, not be regarded as an exhaustive list of relevant factors, but as stated above, will always be dependant on the circumstances of each and every individual case.

5. Remedies

From the aforementioned discussion it would appear that in certain cases, an aggrieved party may challenge the legitimacy of the administrative action taken by an administrator acting in accordance with the empowering provisions of section 88 and 90 of the CEA on constitutional, and other grounds. The question then of course arises as to what remedies are available to such a party – and in which forum such remedies may be sought.

The PAJA affords a court of review or a tribunal the discretion to grant an order that is just and equitable as well as the power to grant any of the remedies listed in the relevant section.[171] As the Constitution empowers courts and tribunals to grant "appropriate relief" when a fundamental right is infringed[172] (such as the right to just administrative action as contained in

171 S 8(1).
172 S 38.

section 33 thereof), it has been held by our courts that *any* form of relief may be sought by an aggrieved party – "be it a declaration of rights, an interdict, a mandamus or any other such relief as may be required".[173] What is constituted to be "appropriate relief" will then naturally depend on the circumstances of each particular case, as stated by the Constitutional Court in the matter of *Hoffman v South African Airways.*[174]

Amongst a large number of available remedies to an aggrieved party, section 8(1)(c)(ii)(bb) of PAJA allows a court or tribunal to grant an order, in exceptional circumstances, directing the administrator (or any other party to the proceedings) to pay compensation. This provision would, therefore, allow an aggrieved person who suffers damages to recoup any of the financial losses sustained as a result of unlawful administrative action (such as the perishable goods of an importer being brought into the country rotting as result of the unlawful administrative action in terms of sections 88 and 90 of the CEA). Burns and Beukes[175] are further of the opinion that as:

> …this remedy falls within the ambit of the remedy of appropriate relief provided for in section 38 of the Constitution, the approach of the Constitutional Court in relation to section 38 should apply equally to a determination of an award of compensation under section 8 of PAJA.

Just two of the reasons as to why it is important that the rules governing administrative justice should make provision for the payment of compensation, are to deter future violations of rights and to punish officials in the public sphere for their ignorance of the very rights they have violated, as per the judgment in *Fose v Minister of Safety and Security.*[176]

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173 Burns and Beukes *Administrative Law* 508.
174 2001 1 SA 1 (CC) at par 55.
175 Burns and Beukes *Administrative Law* 517.
176 1997 3 SA 786 (CC) at par 60.

The question now, however, arises when the circumstances will be "exceptional" as envisaged by the aforementioned provisions of PAJA regarding the payment of compensation for an administrative decision made by an administrator. De Ville[177] has suggested that "exceptional circumstances" can be construed where:

> ...an applicant suffers loss as the result of the actions of an authority to not grant a favourable decision (where this was applied for) or an unfavourable decision (from the perspective of the affected party) was taken (depriving him of some right or benefit) allegedly without complying with the requirements of legality.

It is hereby once again respectfully submitted that a party affected by an action taken in terms of section 88 and 90 will be able to construe "exceptional circumstances" as indicated above, as the said action is of a debilitating nature with regards to the rights of the affected person especially when the said person is trading in perishables or when the goods are to be delivered to the buyer within a specific period of time as per the provisions of a sale of goods contract. One will, however, need to take cognisance of the fact that "exceptional circumstances" will be founded on the specific variables subject to each individual case, and that what will be construed to be "exceptional circumstances" can differ on a case-by-case basis.

A further potential remedy available to an aggrieved party as a result of the wrath of the empowering provisions of sections 88 and 90 of the CEA, is an order for the granting of an interdict. Even though section 8 of PAJA does not refer directly to final interdicts, it has been held that courts are empowered to grant such a remedy in circumstances of an appropriate nature.[178] Furthermore, the provisions of PAJA[179] with regard to the granting of temporary interdicts are regarded as having a wide enough

177 De Ville *Administrative Action* 355.
178 Burns and Beukes *Administrative Law* 524.
179 S (8)(1)(a)(ii) and 8(1)(b).

scope to make provision for the granting of final interdicts. An importer or exporter who feels that his or her fundamental rights as contained in section 33 of the Constitution have been infringed by the illegal act of the administrator acting in accordance with the relevant provisions of the CEA, may apply to the court for a prohibitory interdict to require the administrator to desist from acting in the said manner. The effect of the granting of such a remedy will be that a permanent cessation of the unlawful conduct will take place, with no limit of time applicable. However, in order to grant such a remedy the court will have to satisfy itself of the following factors:

1) The applicant has a clear right which can be established from the facts and surrounding circumstances of the case;
2) The right has been infringed, or, there is a reasonable possibility that the right may be infringed;
3) There is no other appropriate remedy that is available to the applicant; and
4) The applicant will suffer irreparable harm if the interdict is refused.[180]

It must, however, of course be remembered that a number of further remedies are available to the aggrieved party in terms of the PAJA including an order directing the administrator to give reasons,[181] an order directing the administrator to act in the manner the court or tribunal requires,[182] an order prohibiting the administrator from acting in a particular manner,[183] the setting aside of the administrative action[184] and an order declaring the rights of the parties,[185] amongst others. The remedy sought by the aggrieved party will be determined, as always, by the circumstances of the case. The reason for the focus on the aforementioned remedies is that one would usually assume that a party would suffer losses as result of

180 Erasmus and Van Loggerenberg *Civil Practice* 67.
181 S 8(1)(a)(i).
182 S 8(1)(a)(ii).
183 S 8(1)(b).
184 S 8(1)(c)(ii)(bb).
185 S 8(1)(d).

the administrative action empowered by sections 88 and 90 of the CEA, and that such a party would suffer extensive harm as a result thereof if such a person is not pro-active in his desisting of the unlawful administrative action.

For this reason, the remedy of being able to claim compensation from such an administrator if the losses have already been suffered (for example the perishable goods already being rotten), and the remedy of being able to apply to court for an interdict restricting the administrator from actually performing the action if losses have as yet not been suffered, may be of particular importance to an importer or exporter. These must, however, not be considered to be the only options available to an aggrieved importer or exporter, and the relevant remedy to be sought will of course always depend on the nature of the case.

Of course, an affected party may also decide to institute action against the state on the basis of the administrative action in terms of sections 88 and 90 of the CEA constituting a delict. However, to be successful with such a claim, the affected party will need to (besides from the requirements of wrongfulness and damage) prove that the administrator acted intentionally, negligently or unreasonably without exercising its statutory duty.[186] It is important to note that the Commissioner of the South Africa Revenue Services will usually need to be cited as the defendant in the matter as per the principle of vicarious liability, whereby an employer[187] is held liable for the acts of its employee if the said person acts in the scope of his or her employment and is engaged with the affairs of the said employer when the decision was made. As the affected party will need to

186 Burns and Beukes *Administrative Law* 433.
187 The administrator acting in terms of section 88 and 90 being an employee of SARS.

prove each and every element of delict, this remedy may not always be the chosen elective between the possible remedies available to an affected party as the burden of proof may just be a little too heavy to carry, in the given circumstances. Once again, the possibility of instituting action based on delict will always depend on the circumstances of the case, and should be considered on a case-by-case basis. A further subjective consideration will also be the financial position of the affected party and if the said party has the necessary funds to approach the courts to resolve its dispute with the administrator.

6. Practical guidelines in the exercising of powers in terms of sections 88 and 90 of the CEA

In view of the above discussion regarding the constitutionality of the empowering provisions of sections 88 and 90 of the CEA, it appears that the said action will not be regarded as unconstitutional if the relevant provisions of PAJA are followed in the exercising of the administrative action. As the provisions of the CEA do not contain any internal checks in order to ensure that an affected party's right to procedural fairness is given due regard, a person acting in terms thereof will be advised to take cognisance of the obligations resting upon it in terms of the relevant provisions of PAJA as well as the Constitution's section 33. For this reason, the writer will attempt to provide the reader with practical guidelines when action in terms of sections 88 and 90 of the CEA in order to ensure that the affected party's right to procedural fairness is not infringed upon. It must however be recorded that this attempt to provide practical guidelines when acting in terms of the said provisions must merely be regarded as exactly that, a guideline. The obligations resting upon the administrator will of course depend on the individual circumstances of the case, although the

basic principles in the recognition of the affected party's right to procedural fairness will be touched upon.

Firstly, the administrator must ensure that a fair procedure is followed when the action is taken. This means that a rational connection must exist between the reasons for the action being taken, as well as the action itself. Although one may feel that this is a mere oversimplification of the principle of a fair procedure, it is in essence the basis on which the right to fair administrative procedure exists. Furthermore, as the affected party will usually have a legitimate expectation of an outcome which will entitle him or her to a fair hearing, the administrator should not, in normal circumstances, allow the affected party to make representations before the administrative action is taken.[188] Furthermore, if the decision to be taken by the administrator is of a particularly serious or complex nature the administrator may be well advised to ensure that the affected party is able to obtain legal assistance and appear in person. It is, however, important to realise that the right to obtain such assistance will lie in the discretion of the administrator itself, and that to be rather safe than sorry administrators should, when in doubt, enable the affected party to obtain legal representation before acting.

Furthermore, an administrator acting in terms of the relevant empowering provisions of the CEA must ensure that it applies its mind in order to determine if another, less drastic form of recourse exists in which to achieve the same result as acting in terms of the relevant sections. The decision must be rational – meaning that sufficient evidence must exist for the necessity of the decision being taken. It must also conduct a thorough investigation of the material facts before it before making the decision, as

188 See the discussion of the "act now hear later" principle in the section "Departures from the requirements of fair procedure" of this dissertation.

the said administrator does not want to be caught with its pants down if new facts come to light which indicate that the wrong decision was made.

A departure from the requirements of fair procedure will also only be permissible in terms of the provisions of PAJA as discussed here above, and also only after the administrator has evaluated the specific circumstances of the case before it and is able to justify the said departure on a rational basis. As the powers entrusted to an administrator in terms of sections 88 and 90 of the CEA are of a particularly broad nature, the administrator should also ensure that it always gives effect to the promotion, protection and fulfilment of the entrenched fundamental rights as contained in section 33 of the Constitution when acting in terms of the said provisions.

With regard to the furnishing of reasons for an action in terms of sections 88 and 90 of the CEA, the administrator should always ensure that the reasons provided for the administrative action are of a properly informative nature when a party's rights are affected in an adverse manner in the material sense of the word. A justification must be provided for the decision being taken, and be formulated in such a manner as to determine the reasons for the decision being taken easily and reasonably. Written reasons must be given, as PAJA does not make provision for the furnishing of oral reasons. The provisions of PAJA regarding the furnishing of reasons for an administrative decision should always be regarded as the framework in which the administrator operates when providing reasons to an affected party, in order to comply with the relevant provisions of section 33(2) of the Constitution.

Finally, it is once again important to highlight that the effecting of the right to procedural fairness will depend on the circumstances before the administrator. For this reason, an administrator must always apply its mind

in a satisfactory manner to all facets of the right to procedural fairness in order to ensure that due regard is given to this fundamental right as entrenched in the Constitution's Bill of Rights. As the consequences of an incorrect decision being taken are of a potentially serious and damaging nature, the administrator should always realise that its position of power must always be exercised with a great sense of responsibility. The perception of our country's international trade environment is potentially on the line every time a decision in terms of section 88 and 90 of the CEA is made – and for this reason, an administrator should always ensure that a decision is made in accordance with these guidelines, read with the relevant provision of PAJA as well as the fundamental right to procedural fairness as contained in the Constitution's section 33.

7. Conclusion

In view of the above it is respectfully submitted by the writer that an administrative action performed in accordance with the empowering provisions of sections 88 and 90 of the CEA is of a particularly serious and potentially complicated nature. The value of goods entering and leaving the country on a daily basis is of a potentially staggering value. The fact that goods seized in terms of the relevant provisions of CEA may be of a perishable nature is only one of the examples highlighting the importance of the decisions involved.

As not only goods, but also vessels, vehicles or other property used in connection with the suspected goods may be affected by an administrator acting in terms of the relevant sections of the CEA, an administrator must ensure that it acts in terms of the provisions of PAJA which, as indicated here above, gives effect to the rights entrenched in terms of section 33 of the Constitution. It is, therefore, further submitted that the administrator should ensure that each matter before it is evaluated in light of the

particular circumstances and factors prevalent to the said individual case. Reasons should be able to be given for the decision which are reasonable, and in light of the circumstances, justifiable.

Also, the manner in which South Africa's legal framework with regard to international trade is perceived by our trade counterparts in other parts of the world is potentially on the line each time an administrator makes such a decision. The absence of guidelines to be considered by an administrator before a decision in terms of sections 88 and 90 of the CEA is made may leave the procedure in which an administrator acts in terms of said sections open to accusations of being unfair and leading to a violation of the administrative justice guarantee as contained in section 33(1) of the Constitution.

For this reason, an administrator acting in terms of the CEA will be well advised to ensure that it acts in accordance with the relevant provisions of PAJA as the CEA appears not to give effect to the constitutional right to administrative justice as entrenched in section 33 of the Constitution, especially in view of the potentially large scale pecuniary losses which may be suffered by a party, as well as the fact that no objective factors are listed in the determination of whether a detainment will be authorised or not. As the test appears to be subjective, an administrator should always act in accordance with the rights afforded to an individual with regard to just and fair administrative procedure. The degree, scope and specific requirements with which the administrator will need to conform will of course always depend on the specific matter before it, as always.

From the perspective of the affected party of an action in terms of section 88 and 90 of the CEA, it has been illustrated in the paragraphs here above that a number of remedies are available to it if no effect is given to its rights

to procedural fairness in terms of PAJA. The form of relief available to the affected party will be determined by the individual matter at hand.

Although our courts have distinguished between the effects of a seizure and a detention with regard to the right to be heard before such an action is taken in terms of the relevant provisions of the CEA in the *Henbase* matter, such distinction may be flawed in as much as due cognisance was not given to the eventual effects of a detainment before providing the affected the right to make representations and to state its case. As stated above, a decision made on an "act first hear later" basis may be criticised on the basis that an administrator will need to provide significantly good reasons for the departure from the right to be heard before the decision is taken, an onus which may be just a little too heavy to carry.

It is important to highlight that if the relevant provisions of PAJA are followed by an administrator in the execution of its powers in terms of the relevant provisions of CEA, the constitutionality of the said provisions will not easily be brought into dispute on such grounds. However, as the CEA does not make specific reference to any requirements with which the administrator must comply, an administrator may believe that it has free reign in the enforcement of the said provisions.

For this reason the writer hereof has attempted to provide the reader with a practical guideline when acting in terms of section 88 and 90 of the CEA in order to give effect to the provisions of sections 88 and 90 of the Constitution. Although these guidelines should not be considered to be an exhaustive list, they should assist the reader in his or her determination of whether the action in terms of section 88 and 90 can be regarded as constitutional.

In conclusion, it appears that the new *Customs Control Bill* referred to in the introductory chapter to this dissertation addresses many of the abovementioned problems with regards to the administrative legality of an action by an administrator in terms of sections 88 and 90 of the CEA in that it places an obligation on an administrator to act in accordance with the constitutional right to fair and just administrative justice in a substantive manner. Examples of such provisions are the obligation of the administrator to issue a detention notice on detention of the goods setting out, *inter alia*, the reasons for the detention;[189] requiring the person affected by the detention to be present during the actual inspection of the detained goods;[190] and declaring that goods may only be detained for a reasonable period of time,[191] amongst many others. It would therefore appear that the legislator is in the process of taking the necessary steps in order to ensure that the seizure and detainment of goods in the international trade sphere in South Africa complies with constitutional right to just administrative action as enshrined in the constitution. It is however impossible to establish whether the said provisions of the Bill will comply with the requirements of the right until the form thereof has been finalised and approved by the legislator.

189 S 725(3).
190 S 726(1)(b).
191 S 728.

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