

Grounds for judicial review in South African Law

Prior to the promulgation of the Constitution Act No 108 of 1996 (Constitution), judicial review took place on the common law grounds determined by the Supreme Court of Appeal by virtue of its inherent jurisdiction and through the use of the ultra vires doctrine. The common law grounds for judicial review were encapsulated in the catch-all phrase of the administrator's "failure to apply his mind to the matter".

According to Tayob Kamdar, director, dispute resolution practice at Cliffe Dekker Hofmeyr law firm, the foremost common law grounds of review are lawfulness, symptomatic unreasonableness and procedural fairness. The common law grounds for review are fairly similar to the grounds of review listed under the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA), except that the common law grounds are not as far-reaching or well-developed.

Grounds for judicial review

Section 33 (1) of the Constitution entitles everyone the right to administrative action that is lawful, reasonable and procedurally fair. PAJA was enacted to give effect to the constitutional right to lawful, reasonable and procedurally fair administrative action.

Section 6 (2)(a)-(i) of PAJA sets out the grounds for the judicial review of administrative action. They are as follows:

- Administrative action taken by an administrator when he was not authorised to do so, acted under a delegation of power not authorised by an empowering provision or was biased or reasonably suspected of bias [Section 6 (2)(a)].
- When there is non-compliance with a mandatory and material procedure or condition that was prescribed by an empowering provision [Section 6 (2)(b)].
- Where administrative action taken that was procedurally unfair [Section 6 (2)(c)].
- Where the administrative action was materially influenced by an error of law [Section 6 (2)(d)].
- Where administrative action was taken for a reason not authorised by the empowering provision, taken for an ulterior purpose or motive, if it took into account irrelevant considerations or excluded relevant considerations, because of unauthorised or unwarranted dictates of another person or body or in bad faith or arbitrarily or capriciously [Section 6 (2)(e)].
- If the administrative action contravenes a law or is not authorised by the empowering provision concerned or is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision or the information before the administrator or the reasons given for it by the administrator [Section 6 (2)(f)].
- Where the administrator failed to take a decision [Section 6 (2)(g) read with section 6 (3)].
- Where the administrative action taken is so unreasonable that no reasonable person could have so exercised the power or performed the function [Section 6 (2)(h)].
- Where the administrative action is otherwise unconstitutional or unlawful [Section 6 (2)(i)].

In *Pharmaceutical Manufacturers Association of SA & Another in re ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) at 33, the court noted that "[t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts".

From this, it can be inferred that PAJA has codified the common law grounds of review.

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