

Clerical Acts and administrative action

The Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) makes it clear that administrative action entails a decision, or a failure to make a decision, by an administrator who has a direct, external legal effect on a party.

 ByDeshni Naidoo 14 Nov 2013



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As Nugent JA stated in *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005(6) SA 313(SCA) "whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so...".

The Supreme Court of Appeal (SCA) recently decided the case of *Nedbank Limited v Mendelow* NO [2014] ZASCA 98 which affirmed the principle that mere clerical acts performed by an administrator do not constitute administrative action under PAJA and therefore cannot be judicially reviewed in terms of PAJA.

The case dealt with a transfer of property that was vitiated by a fraud as the signature of the seller on the deed of sale had been forged. The seller died a week after the deed of sale was forged and the executor applied to the Master of the High Court to certify in terms of s42(2) of the Administration of Estates Act, No 66 of 1965 that no objection to the transfer existed. The property was subsequently transferred after the Master signed a certificate that permitted the transfer of the property as a result of a fraudulent misrepresentation that the deed of sale was genuine.

Appeal dismissed

The executors then applied, among other things, to review and set aside the certificate issued by the Master. The trial court held that the decision of the Master in signing a certificate that authorised the transfer and the ensuing act by the Registrar of Deeds in registering the property in the name of the purchaser, constituted administrative action which was reviewable under PAJA. While the appeal was dismissed and the SCA ordered that the property be reregistered in the name of the estate, on the issue of whether the conduct by the Master in signing the certificate constituted administrative action within the definition of PAJA, the SCA found that it did not.

Lewis JA quoted *Kuzwayo v Estate Late Masilela* 2011(2) A11 SA S99 (SCA), which stated that not "every act of an official amounts to administrative action that is reviewable under PAJA or otherwise". A decision therefore must entail some form of choice or evaluation and while the Master may perform administrative acts in the course of their statutory duties, where they have no decision-making function but perform acts that are purely clerical and that they are empowered to do so in terms of the statute that so empowers them, they are not performing administrative acts within the definition of PAJA or even under the common law. The

distinction must be made between mechanical powers and discretionary powers, with only discretionary powers constituting administrative action.

It is therefore clear that administrative acts do not automatically translate to administrative action and that it is the nature of the power being exercised which makes a decision administrative action and not the identity of the decision maker.

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