IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DF THIS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. ✓

11/4/12
DATE SIGNATURE

CASE No. 78163/2009

In the matter between:-

LAWYERS FOR HUMAN RIGHTS Applicant

and

RULES BOARD FOR COURTS OF LAW First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

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JUDGMENT

Van der Byl, AJ:-

Introduction

[1] In terms of section 7(3) of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) ("*the PAJA*"), the Rules Board for Courts of Law (cited in this matter as the First Respondent) was enjoined to make "*rules of procedure for judicial review*" before 25 February 2009.

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[2] In compliance with these provisions the First Respondent made such rules which were approved, as provided in subsections (4) and (5) of section 7, by the Minister of Justice and Constitutional Development (cited in this matter as the Second Respondent) and Parliament, and published by Government Notice R. 966 of 9 October 2009 in Government Gazette No. 32622 of that date ("*the new rules*").

[3] In terms of Rule 1(1) of the new rules the rules will apply to proceedings for judicial review in the High Court, the Labour Court or the magistrates' courts.

I may, in passing, mention that, as far as I am aware, apart from the High Court and the Labour Court, no other court currently has jurisdiction to hear and adjudicate upon applications for judicial review. This seems to be acknowledged by the Second Respondent. In the answering affidavit filed on his behalf (**record p. 157, para 12**) it is stated that one of the purposes of the new rules was "*to make provision in general for applications in <u>any Court</u> that might now or in the future have jurisdiction to deal with review of administrative action under PAJA*" (my underlining).

Apart from the magistrate's courts, it is difficult, if not impossible, to foresee on what other courts jurisdiction in this regard may in future be conferred.

It would, perhaps, be advisable to have regard to the definition of "*court*" in section 1 of the PAJA which reads as follows:

"*'court' means -*

(a) the Constitutional Court acting in terms of section 167(6)(a) of the Constitution; or

(b)(i) a High Court or another court of similar status; or

(ii) a Magistrate's Court, either generally or in respect of a specified class of administrative actions, designated by the Minister by notice in the Gazette and presided over by a magistrate or an additional magistrate designated in terms of section 9A,

within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced;".

I assume, in so far as the Second Respondent has referred to "*any Court*", that what he had in mind is, bearing in mind paragraph (b)(i) of that definition, a court having similar status as a High Court (which may, I assume, be the Labour Court as I am not aware of any other court having similar status than the High Court).

Although any word or expression defined in the PAJA bears in terms of Rule 2(1) the same meaning in the new rules, I assume, read in context, that it is not intended that the expression "*court*", wherever it is used in the new rules, is to be read to include the Constitutional Court.

As far as the magistrate's courts are concerned, I foresee a difficulty in so far as it is envisaged in Rule 1(1) of the new rules that the rules should automatically apply to magistrate's court's if and when magistrate's courts are designated as envisaged in paragraph (b)(ii) of the definition of "*court*" in section 1 of the PAJA. I am in doubt whether it is correct to foreshadow such a possibility in the new rules as it is difficult to envisage at this stage exactly the basis on, and manner in, which jurisdiction in this

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regard may, if ever, be extended to "*any Court*".

In my view it would be better to rather await the time that a magistrate's court is designated as envisaged in paragraph (b)(ii) of the definition of "*court*" in section 1 of the PAJA and then to consider in such an event the extension of these rules to the magistrate's courts and, perhaps, also an amendment to rule 65 of the rules regulating the conduct of proceedings in the magistrate's courts.

It would seem to be advisable to omit subrule (1) of Rule 1 from the new rules and to rather insert a definition of "*court*" in Rule 2 defining the expression to mean a "*High Court or the Labour Court*".

[4] Rule 1(4) of the new rules provides as follows:

> "*To the extent that these rules do not provide for any matter regulated by the rules of the court in which the proceedings are instituted, those rules apply in so far as they do not conflict with these rules, provided that -*
>
> *(a) the rules relating to applications and discovery apply subject to rules 8(2) and 12 respectively;*
>
> *(b) Rules 53 of the Uniform Rules of the High Court and Rule 7A of the Rules for the Conduct of Proceedings in the Labour Court no longer apply in proceedings for judicial review.*"

[5] Accordingly section 7(4) of the PAJA still applies which reads as follows:

> "*Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act*

must be instituted in a High Court or another court having jurisdiction.".

[6] The Applicant, Lawyers for Human Rights, represented by Mr Budlender, together with Ms. Steinberg, now challenges the constitutionality of the new rules on the grounds thereof, briefly stated -

(a) that, in relation to the manner in which the new rules amend Rule 53 of the Uniform Rules (and also the more or less similar provisions of Rule 7A of the Rules for the Conduct of Proceedings in the Labour Court) the new rules are inconsistent with sections 33, 34 and 23(1) of the Constitution; and

(b) that, furthermore, the new rules are fatally flawed and unlawful in a series of other respects (to which I refer below).

[7] The application is opposed by the Second Respondent whilst the First Respondent, except to state that its part in making the new rules does not amount to administrative action and is not susceptible to review, resolved to abide this Court's decision. Notwithstanding the First Respondent's indication that it, subject to that limited extent, abides the decision of this Court, Mr. Duminey SC, together with Mr. Mphahlele, appeared, obviously in opposition to all the relief claimed by the Applicant, on behalf of both Respondents.

[8] In view of the aforegoing, I am called upon to consider -

(a) **firstly**, the question whether the decisions taken by the two Respondents are susceptible to review; and

(b) if so, **secondly**, the question whether the new rules (or some of the new rules) are unconstitutional for being inconsistent with the Constitution.

Question whether the decisions of the First Respondent are susceptible to review

[9] It would appear that this question is triggered by the relief claimed by the Applicant in prayers 1.1 and 1.2 of the Notice of Motion in which the Applicant seeks the review and setting aside of "*the decision of the first respondent to make the rules*" (**prayer 1.1**) and "*the decision of the second respondent to approve*" the new rules (**prayer 1.2**).

[10] It is the Respondents' contention -

(a) that these decisions do not constitute "*administrative action*" as defined in section 1 of the PAJA, but are merely steps in a process culminating with the approval of Parliament under section 7(5) of that Act and are not in themselves the making of delegated legislation;

(b) that the decisions of the Respondents plainly did not have external legal effects, nor did they adversely affect the rights of anyone as they were in themselves ineffectual without the approval of Parliament in which the final decision-making

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power reposes whose legislative functions are in terms of section 1(dd) excluded from the definition of "*administrative action*".

[11] There was, in my view, indeed no decision, as envisaged in the definition of "*administrative action*" in section 1 of the PAJA, taken by the First Respondent to make the new rules since it is enjoined in terms of section 7(3) if the PAJA to make such rules.

[12] Similarly, in the case of the Second Respondent, no decision in the sense referred to in the definition of "*administrative action*", seems in my view to have been taken to approve the new rules since the Second Respondent is likewise enjoined in section 7(4) of the PAJA to approve the new rules.

[13] The so-called "*decision*" taken to make the new rules or to approve such rules does not in itself adversely affects the rights of any person. It is the new rules, if and when put into operation, that may or may not have such an effect. Whether or not the new rules have such an effect is in my view to be determined by considering the effect and impact of the new rules on any fundamental rights of any person affected in the application of the rules.

[14] The real question, therefore, in my view is whether the new rules, being in effect delegated legislation made by the First Respondent and eventually approved by the Second Respondent and Parliament (and, therefore, a "*law*" referred to in section 172(1)(a) of the Constitution) can be held, as provided in that section to be inconsistent with the Constitution and, therefore, to be unconstitutional, unlawful and invalid to the

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extent of such inconsistency, being a consideration which renders the new rules subject to judicial review on the doctrine of legality.

[15] I am accordingly in agreement with the submission made on behalf of the Respondents that all I need to consider in the circumstances is whether or not an order should, on the principle of legality, be granted more or less in the terms set out in prayer 3.

[16] This brings me to the disputes on the consistency or otherwise of the new rules with the Constitution as is claimed, particularly, in prayer 3 of the Notice of Motion.

[17] In prayer 3 of the amended Notice of Motion (**record p. 2a**) the Applicant claims an order in terms of which it is declared -

(a) that Rule 4 of the new rules, read with the definition of "*relevant document*" in Rule 2, is inconsistent with the Constitution and, therefore, unlawful and invalid (**prayer 3.1**);

(b) that to remedy the defects in Rule 4 (read with the definition of "*relevant documents*") the definition of "*relevant documents*" is to be read as though it provides as follows:

> "*'relevant document' means a document that was before the administrator when the administrator took the decision sought to be reviewed;*" (**prayer 3.2**);

(c) that Rules 3(5)(e), 4(4) and (7) and 7(3)(e) and (f) of the new rules are inconsistent with the Constitution and, therefore, unlawful and invalid (**prayers 3.3, 3.4, 3.5, 3.7 and 3.8**);

(d) that Rule 7 of the new rules is inconsistent with the Constitution and, therefore, unlawful and invalid, to the extent that it fails to make provision for a requester to compel an administrator to grant access to a document specified in Part 2 of Schedule A to Form D (**prayer 3.6**);

(e) that the new rules are inconsistent with the Constitution and, therefore, unlawful and invalid, to the extent that they fail to provide for any mechanism whereby a private respondent (apparently one cited in addition to the administrator or state respondent) in an application for judicial review can obtain access to the record of, and reasons for, the decision in question (**prayer 3.9**).

[18] These prayers call for an overview of the provisions of Uniform Rule 53 and Labour Court Rule 7A and the various provisions contained in the new rules.

The provisions of Rules 53 and 7A

[19] Uniform Rule 53 provides as follows:

> " ***53.*** *(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice*

of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.

(3) The registrar shall make available to the applicant the record despatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

(4) The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.

(5) Should the presiding officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he shall-

(a) within fifteen days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometres of the office of the registrar at which he will accept notice and service of all process in such proceedings; and

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(b) within thirty days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.

(6) The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.

(7) The provisions of rule 6 as to set down of applications shall mutatis mutandis apply to the set down of review proceedings."

[20] Labour Court Rule 7A provides as follows:

" ***7A.*** *(1) A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties.*

(2) The notice of motion must -

(a) call upon the person or body to show cause why the decision or proceedings should not be reviewed and corrected or set aside;

(b) call upon the person or body to dispatch, within 10 days after receipt of the notice of motion, to the registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done; and

(c) be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside.

(3) The person or body upon whom a notice of motion in terms of subrule (2) is served must timeously comply with the direction in the notice of motion.

(4) If the person or body fails to comply with the direction or fails to apply for an extension of time to do so, any interested party may apply, on notice, for an order compelling compliance with the direction.

(5) The registrar must make available to the applicant the record which is received on such terms as the registrar thinks

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appropriate to ensure its safety. The applicant must make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct.

(6) The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.

(7) The costs of transcription of the record, copying and delivery of the record and reasons, if any, must be paid by the applicant and then become costs in the cause.

(8) The applicant must within 10 days after the registrar has made the record available either-

(a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or

(b) deliver a notice that the applicant stands by its notice of motion.

(9) Any person wishing to oppose the granting of the order prayed in the notice of motion must, within 10 days after receipt of the notice of amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant.

(10) The applicant may file a replying affidavit within 5 days after receipt of an answering affidavit.".

[21] The following, as is apparent from these two more or less similar Rules, should for purposes of this matter be highlighted, namely -

(a) any person seeking an order reviewing and setting aside a decision or proceedings of, *inter alia*, any tribunal, board or officer performing judicial, quasi judicial or administrative functions (or, in the case of Rule 7A, a person or body performing reviewable functions), being functionaries included in the definition of "*administrator*" in section 1 of the PAJA (to whom or which I will, for the sake

of convenience, wherever I refer to Rule 53 or Rule 7A, hereinafter refer to as "*an administrator*" or "*the administrator*"), shall bring an application for such an order by way of notice of motion setting out the decision or proceedings sought to be reviewed and set aside, supported by an affidavit setting out the grounds and the facts and circumstances upon which the applicant relies for the order sought;

(b) such person shall call upon the administrator to dispatch within 15 days to the registrar the "*record of proceedings*" sought to be reviewed and set aside, together with such reasons as the administrator is by law required to give and to notify the applicant that it has been done;

(c) the registrar shall upon receipt of the record of proceedings make it available to the applicant, whereupon, the applicant may cause copies of such portions of the record as may be necessary for purposes of the review and shall, thereupon, furnish the registrar and each of the other parties of copies of the record (the costs of which shall be borne by the applicant, but shall be costs in the cause);

(d) the applicant may, thereupon, within 10 days, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit;

(e) thereupon, the administrator or any other party affected that wishes to oppose the application may, within the periods specified in the Rule, deliver a notice of intention to oppose and affidavits in answer to the allegations made by the

applicant;

(f) thereafter the applicant shall have the right to deliver replying affidavits.

[22] I deem it expedient at this stage to refer to a few decisions in which our Courts have dealt with the purpose, need and effect of the provisions of, particularly, Rule 53.

In ***Jockey Club of SA v Forbes 1993 (1) SA 649 (A) at 662F*** Kriegler AJA (as he then was) remarked as follows on the purpose of Rule 53:

> "*The purpose of Rule 53 is not to protect the 'decision-maker' but to facilitate applications for review and to ensure their speedy and orderly presentation. Such benefits as it may confer on a respondent, in contradistinction to those ordinarily enjoyed by a respondent under Rule 6, are incidental and minor. It confers real benefits on the applicant, benefits which he may enjoy if and to the extent needed in his particular circumstances.*".

At ***660D*** he further held as follows:

> "*Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. Manifestly the procedure created by the Rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record. ....The Rule thus confers the benefit that all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court.) More important in the present context is subrule (4), which enables the applicant, as of right and without the expense and delay of an*

interlocutory application, to 'amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit'. Subrule (5) in turn regulates the procedure to be adopted by prospective opponents and the succeeding subrules import the usual procedure under Rule 6 for the filing of the applicant's reply and for set down.".

In ***Johannesburg City Council v The Administrator, Transvaal and Another (1) 1970 (2) SA 89 (T)***, the Court described a Rule 53 "*record of proceedings*" as follows at ***91G - 92A:***

"The words 'record of proceedings' cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. A record of proceedings is analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it. It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it"."

In ***Johannesburg City Council, supra,*** it was also indicated at ***93F*** that an applicant's reliance on the record of the proceedings before it finalizes its grounds of review should not be construed as a "*fishing excursion*", but as a legitimate endeavour "*to determine objectively what considerations were probably operative in the minds of the Administrator (the decision-maker) .... when they passed the resolution in question*" (see also: ***Afrisun Mpumalanga (Pty) Ltd v Kunene NO 1999 (2) SA 599 (T)*** at ***632F-G***; ***SACCAWU v President, Industrial Tribunal 2001 (2) SA 277 (SCA)*** at ***28OI***).

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[23] From these decisions it is indisputably clear that the Courts have regarded the provisions of Rule 53 as an important tool in determining, on equal footing, disputes between an applicant and, particularly, a state respondent, the lawfulness and fairness of any administrative action which is mostly taken, so to speak, behind closed doors.

The new rules

[24] Rule 3, read with Forms A and B to the new rules, provides -

(a) for the rights of any person (described, apparently, in accordance with the provisions of the Promotion of Access to Information Act, 2000 (Act 2 of 2000), as a "*requester*") whose rights have materially and adversely been affected by administrative action, to request an administrator to furnish written reasons for the action taken (**subrule (1)**);

(b) the procedure to be followed by a requester to obtain, and the administrator to furnish, such reasons (**subrules (2), (3) and (4)**;

(c) the grounds on which an administrator may refuse a request for reasons (**subrule (5)**).

In passing, I may mention that Rule 3 seems to me to be in many ways an unnecessary (and, on the risk of creating ambiguities between the provisions of the Act and the rules, perhaps, wrong or an unauthorized) re-enactment of the provisions of sections 5 and

9 of the PAJA and, furthermore, seems to overlap with the provisions of regulations 26, 27 and 28 of the regulations made under section 10 of the PAJA. In terms of section 5(1) of the PAJA, as is provided in Rule 3(1)(a) of the new rules, any "*person whose rights have been materially and adversely affected by administrative action*" may request that an administrator furnish written reasons for the action, whereupon, the administrator must, as provided in section 5(2) of the PAJA, within 90 days give that person adequate reasons in writing for the administrative action. In terms of section 9 of the PAJA, as provided in Rule 3(1)(b), the period of 90 days may by agreement between the parties be reduced.

In terms of Rule 3(2) an administrator is required to respond within 10 days as from the date of receipt of the request by informing such person whether the request is acceded to or declined. It would seem that this is a provision which is in effect aimed at adding an additional obligation on an administrator in addition to the obligations placed on an administrator in terms of section 5 of the PAJA. It is highly doubtful whether the First Respondent is empowered to effect such an amendment to the PAJA and in any event seems to be a provision which has no legal effect.

Rule 3(5) deals with the grounds on which an administrator can refuse to furnish any reasons which is a departure as is contemplated in section 5(4) of the PAJA which provides that an administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.

However, Rule 5 purports to set out grounds on which an administrator may refuse a request for reasons. The question that can be asked is whether such a provision is strictly necessary. Paragraph (a) of subrule (5) in so far as it authorizes an administrator to refuse a request for reasons if written reasons had already been furnish, actually speaks for itself. It is not clear under what circumstances written reasons may be publicly available as envisaged in paragraph (b) of that subrule and in any event even if reasons are so available, I fail to see why such reasons cannot any way be made available by the administrator to an applicant. Paragraph (c), in so far as it authorizes an administrator to refuse a request for reasons if the applicant is not a person whose rights are materially and adversely affected, also speaks for itself since it is indeed a prerequisite laid down in section 5(1) of the PAJA for the right to reasons. Likewise paragraph (d) providing that an administrator may refuse if it is reasonably or justifiable to depart from the requirement to give reasons, is an unnecessary provision as section 5(4) of the PAJA contains a similar provision.

For these reasons it seems to me that generally the provisions of Rule 3 is, in view of the similar nature of section 5 of the PAJA, an unnecessary provision which need not (and, perhaps, should not) be contained in rules providing for judicial review.

[25] Rule 4, read with Forms C and D to the new rules, provides for a pre-litigation procedure in terms of which -

(a) a person intending to institute an application for judicial review may request an administrator to furnish a list of "*relevant documents*" as defined in Rule 2 and

to agree to certain actions to either resolve the matter or to proceed with the intended application (**subrule (1)**);

(b) it is prescribed that such a request should be made in accordance with Form C to the new rules within the period specified therein (**subrules (2) and (3)**);

(c) an administrator is authorized to refuse to furnish a list of relevant documents if there are "*valid grounds for the refusal*" (**subrule (4)**);

(d) an administrator is called upon to furnish such list within 30 days of receipt of the request in accordance with Form D to the new rules or to notify the requester of his refusal to do so, together with reasons in accordance with Form E to the new rules (**subrule (5)**);

(e) an administrator is called upon to allow a requester to inspect the documents specified in Part 1 (and not Part 2) of Schedule A to Form D and to make copies of such documents at the fee prescribed under the Promotion of Access to Information Act, 2000 (**subrule (6)**);

(f) an administrator is authorized to refuse to allow a requester to inspect and copy documents specified in Part 2 of Schedule A to Form D (**subrule (7)**).

I may, again in passing. at this stage in relation to the overall effect of this Rule, mention that, as was pointed out to me in argument on behalf of the Applicant, that any person,

whether he, she or it has an interest in any information held by the State, has, in terms of the provisions of the Promotion of Access to Information Act, 2000, subject to a few limitations, the right of access to "*a record of a public body*" or, in, perhaps, the case of an application instituted in the Labour Court, a "*private body*" (see: ***inter alia*, sections 11 and 50**).

In so far as a "*requester* may in terms of Rule 4 for any reason other than a reason provided for in Chapter 4 of that Act be refused access to any document or information, the Rule seems to be in conflict with the provisions of the Promotion of Access to Information Act, 2000.

In view of the provisions of the Promotion of Access to Information Act, 2000, it is uncertain whether a provision such as Rule 4 is in any event necessary to be included in the new rules. It would appear that there are sufficient provision in the PAJA and the Promotion of Access to Information Act, 2000, to obtain an administrator's reasons for a decision taken and to obtain access to documents and information held by an administrator in relation to a decision taken which may be the subject matter of an application for judicial review. In this regard reference should be made to the following extract from a recent judgment in ***Industrial Development Corporation of South Africa Limited v PFE International Inc (BVI), [2011] ZASCA 245 at para [15]***:

> "*The contention advanced on behalf of the respondents that PAIA was intended to supplement the rules of court, cannot be sustained. First, s 7 does not express such an intention. In fact, the section says the opposite. Second, and as has already been mentioned, and on this court's interpretation of s 7, it was the intention of the Legislature that requests for access to information made for the purpose of*

> *litigation, and after litigation has commenced, should be regulated by the applicable court rules. Third, to create a dual system of access to information, in terms of both PAIA and the particular court rules, has the potential to be extremely disruptive to court proceedings, as is evidenced by this matter.*" (My underlining).

[26] In terms of Rule 5 a requester may apply to court by way of notice of motion for the variation of the time periods specified in the new rules in cases where the administrator failed to respond, or refused to agree, to a request in terms of Rule 4(1)(b) for the variation of the time periods.

[27] Rule 6 provides for applications by a requesters by way of notice of motion for orders to compel an administrator to furnish reasons for actions taken by him, her or it in cases where the administrator fails to respond to a request for reasons or refused to give reasons.

[28] Rule 7 -

(a) provides for applications by way of notice of motion to compel, in cases where the administrator failed to respond to a request to furnish a list of "*relevant documents*" or refused to furnish such a list or failed or refused to grant access to a document specified in Part 1 of Schedule A to Form D (**subrules (1) and (2)**);

(b) deals with the grounds on which a court may grant any such application, namely, where it is satisfied -

(i) that the applicant has legal standing (**subrule (3)(a)**);

(ii) that the applicant has exhausted his, her or its internal remedies (**subrule (3)(b)**);

(iii) that he, she or it has made a request in terms of Rule 4(1) (**subrule (3)(c)**);

(iv) that the application has been made within 15 days of the notification or refusal (**subrule (3)(d)**);

(v) that there are *prima facie* grounds for the intended review (**subrule (3)(e)**);

(vi) that the documents are necessary for the intended review (**subrule (3)(f)**).

I may, once again in passing, in relation to the application of this Rule, read with Rules 4 and 8, mention the following which, in comparison with Rule 53 (and Rule 7A), occurred to me in the course of argument.

On the one hand Rule 53 (and Rule 7A) provide for the disclosure or dispatching by an administrator of the "*record of proceedings*" and the furnishing of reasons within 15 days (or, in the case of Rule 7A, 10 days) after receipt of the notice of motion.

On the other hand, Rules 4 and 7 of the new rules, being the Rules which are the subject of the Applicant's main attack, deal with the disclosure of so-called "*relevant documents*" at a pre-litigation stage. It is actually Rule 8 which deals with the stage when judicial review proceedings are actually initiated which contains no reference to "*relevant documents*". The provisions of Rules 4 and 7 (and Rule 3) make it in most cases virtually impossible for an applicant to bring an application under Rule 8, before he, she or it invoked the provisions of those Rules -

(a) by first requesting in accordance with Rule 3 an administrator's reasons for the administrative action taken;

(b) thereafter or, perhaps, simultaneously in accordance with Rule 4 requesting (setting out any grounds on which he, she or it intends to bring an application for judicial review) the administrator to furnish him, her or it with a list of documents that "*relate directly*" to any ground of review upon which he, she or it intends to rely in proceedings for judicial review (which may be instituted in terms of Rule 8); and

(c) then to request an opportunity to inspect and copy the documents contained in the list, limited to the documents specified in Part 1 of Form D.

Apart from the delays in following this procedure and, in so far as the administrator may fail or refuse to comply, to first bring an application to compel, it is unimaginable as to how an applicant will ever be able to bring, as so often happens, an application for

judicial review as a matter of urgency.

As opposed to this cumbersome procedure, the procedure provided by Rule 53 (or Rule 7A) has over the years rendered no difficulties in this regard in that an applicant may approach the Court by way of a Rule *nisi* with interim relief calling upon the administrator to dispatch in due course the record of the proceedings and to furnish his, her or its reasons for the decisions subjected to review.

[29] Rules 8 and 9, read with Form F to the new rules, provide for a procedure in terms of which an applicant may bring by way of notice of motion in accordance with the said Form F an application for judicial review of an administrative action and the opposition to any such application and the filing of opposing and replying affidavits.

[30] Rule 10 provides for the form in which affidavits should be drafted.

[31] Rule 11 provides for the attendance of conferences in chambers of judicial officers.

[32] Rule 12 provides for the discovery of documents during proceedings in accordance with the rules of court.

[33] Rule 13 provides for the preparation of bundles of documents.

[34] Rule 14 provides for directions which may be given by the court.

[35] Rule 15 provides for the commencement of the new rules on a date to be fixed by the Second Respondent by notice in the *Gazette.*

(I may mention that no such date has, as yet, been fixed and that it would appear that the Second Respondent agreed not to fix such a date until such time as this matter is finally disposed of)

[36] As far as the general impact of the new rules is concerned, it seems to me that the new rules seem to have lost sight of the fact that judicial review applications are limited to applications under the PAJA.

[37] As is apparent from the definition of "*administrative action*" in section 1 of the Act the new rules will obviously not apply in relation to -

(a) 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;

(b) 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;

(c) the executive powers or functions of a municipal council;

(d) the legislative functions of Parliament, a provincial legislature or a municipal council;

(e) 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 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(f) a decision to institute or continue a prosecution;

(g) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

(h) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(i) any decision taken, or failure to take a decision, in terms of section 4 (1).

[38] The fact that these actions do not constitute "*administrative action*" in the defined meaning of the expression, does not mean that such actions are not reviewable.

They may still be reviewable under the rule of law or the principle of legality where the functionary, *inter alia*, acts in bad faith, misconstrues the nature of its powers or acts arbitrarily or irrationally (***President of the RSA v Hugo 1997 (4) SA 1 (CC) at 17G, para [29]***).

[39] Rule 53 (and, perhaps, Rule 7A) was at all times applicable to the review of "*administrative action*" as defined as well as the review of the actions excluded by the definition under the rule of law or the principle of legality.

[40] I fail to understand the need for the differentiation created by the new rules in respect of the review of "*administrative action*" as provided in the PAJA, on the one hand, and the review of the actions excluded from the definition on te principle of legality, on the other.

[41] In an article by ***Geo Quinot entitled "New procedures for the judicial review of administrative action" published in (2010) 25 South African Public Law, 646 at 651*** the learned author said the following in this regard:

> *"For PAJA reviews an applicant will be obliged to follow the PAJA procedure and Rule 53 will not be available, while for non-PAJA reviews Rule 53 will still be available and the PAJA rules obviously not. The Rule 53 route will ostensibly be the one to follow in reviews based on legality as opposed to strict PAJA reviews, eg when reviewing policy conduct of high executive official that do not qualify as 'administrative action' under the PAJA.*
>
> *This state of affairs may create some practical problems. It is now fairly common to find applicants relying on constitutional legality and the PAJA in the alternative when bringing review applications. This is especially the case when it is not clear at the outset whether the action under the*

.../...

action under scrutiny amounts to administrative action or where a range of public actions are challenged some of which may qualify as administrative action as defined while others may not. Applicants can hardly be faulted for such an approach given the complexities and uncertainty surrounding the definition of administrative action. Legality has as a result been described as a kind of 'safety net' that captures exercises of public power, which do not qualify as administrative action, but are nevertheless subject to judicial review. In a number of judgments, judges have also adopted such an approach. The problem that now emerges from the creation of the new rules of review applications solely on either legality or the PAJA. Since the procedure for bringing review applications on these distinct bases will differ, it becomes considerably more difficult to use them in the alternative.".

[42] I can now turn to the Applicant's attacks against the new rules and the Respondents' response to those attacks, as set out in the answering affidavit filed on behalf of the Second Respondent.

Applicant's main attack on the new rules

[43] The Applicant's concern in this regard is, as is apparent from prayers 3.1 and 3.2 of the amended Notice of Motion, that the new rules, read with the definition of "*relevant documents*", are inconsistent with sections 32, 33, 34 and 23(1) of the Constitution in that -

(a) they removed the right of an applicant to request, and the duty of an administrator to provide, the full or complete "*record of the proceedings*" to an applicant;

(b) having removed the rights and obligations provided for in Rule 53 (and in Rule 7A), the new rules now provide that a person intending to bring an application

for judicial review must, in order to obtain documents directly relevant to his, her or its grounds of review, first, at a pre-litigation stage, set out his, her or its grounds of review in Form D;

(c) thereby the applicant is deprived of the right of obtaining any other documents that were before the administrator which may disclose further grounds of review of which the applicant would, because of the manner in which administrative actions are ordinarily taken, not otherwise have been aware;

(d) as opposed to an applicant's rights in terms of Rule 53 (or Rule 7A), the applicant will, after having obtained a list of the so-called "*relevant documents*" be bound to finalize his, her or its notice of motion and founding affidavit and to then run the case as a whole without the full record;

(e) an administrator is, furthermore, even in respect of "*relevant documents*", not obliged to accede to an applicant's request for the relevant documents;

(f) in such an event an applicant has, if he, she or it deems such documents to be relevant to its case, no other option than to approach the Court with an application to compel the administrator to provide him, her or it with such documents.

[44] In response to the Applicant's attack in this regard, it is the Respondents' contention -

(a) that, taking into consideration experience gained in, particularly, the State Attorney's office in relation to review applications, the First Respondent sought to provide in the new rules a procedure that would in the great majority of cases provide an aggrieved applicant with a relatively easy and simple way of gaining pre-litigation access to reasons for a disputed administrative action (as provided in **Rule 3**) and the documents relevant to the cause of dissatisfaction (as provided in **Rule 4**) and would put such an applicant in a position to decide whether to persist with bringing an application for review or not to proceed;

(b) that the Second Respondent, in, I assume, approving the new rules, endeavoured to render judicial review as an efficient and cost-effective tool for achieving administrative justice on the principle that relevant documents should all be made available, but that the wasting of time and costs in dealing with unnecessary documents should be discouraged;

(c) that the Applicant's case, in so far as it is based on the notions (a) that the record under Rule 53 (or Rule 7A) includes every "*scrap of paper*" throwing light on what the proceedings were; and (b) that under those Rules the entire record is put before the Court, is exaggerated and incorrect since the full record does not always go to the Court in terms of Rule 53 (or Rule 7A) as the record is in terms of those Rules made available to the applicant who may select the portions he, she or it considers necessary and only those go to the Court and the other parties;

(d) that the Applicant's case that limiting the duty of disclosure under the new rules is unconstitutional and unlawful, is also not valid or justified since, if there is a genuine issue about the disclosure of a document that cannot be resolved under the new rules, the ordinary rules of discovery, in the case of applications, particularly, Rule 35(13) (or, I assume, Labour Court Rule 6(4)(b)), remain in reserve.

Applicant's attack on specific provisions of the new rules

[45] In this regard, referring to Rules 3(5)(e), 4(4), 4(6) and 7 and 7(3)(e) and (f), it s contended -

(a) in relation to Rule 3(5)(e) which provides that an administrator may, in addition to four grounds the nature of which is clearly spelled out in paragraphs (a) to (d) of that Rule, refuse a request to furnish reasons for a decision taken "*on any other valid ground*", that it provides no guidance to an administrator as to what may or may not be a "*valid ground*" and that it is otherwise impermissibly vague;

(b) in relation to Rule 4(4) which provides that an administrator may refuse to furnish a list of "*relevant documents*" if there are "*valid grounds*" for the refusal, that similarly it provides no guidance to an administrator as to what may or may not be a "*valid ground*" and that it is otherwise impermissibly vague;

(c) in relation to

(i) Rule 4(7) which provides that an administrator may refuse to allow an applicant to inspect and copy documents specified in Part 2 of Schedule A to Form D, that no provision is made as to when documents may legitimately be placed in Part 2 of the said Schedule A;

(ii) Rule 7 which provides for applications by an applicant to apply for an order compelling an administrator, *inter alia*, to grant access to a document specified in Part 1 of Schedule A to Form D, that no provision is made for a similar application in respect of documents specified in Part 2, being documents placed, as I have already indicated, by an administrator in his, her or its own discretion in that Part;

(d) in relation to Rule 7(3)(e) and (f) which provides for a court to order an administrator to furnish a list of relevant documents or access to a document specified in Part 1 if it is satisfied, *inter alia*, that there are *prima facie* grounds for the intended review of the administrative action (**paragraph (e)**) and that the documents are necessary for the intended review (**paragraph (f)**), that (a) a requirement that an applicant must show *prima facie* grounds for the intended review before obtaining documents; and (b) a requirement that an applicant must show that certain documents are necessary for an intended review without having had sight of the documents are inconsistent with sections 32, 33, 34 and 23 of the Constitution.

[46] In response to these attacks it is the Respondents' response -

(a) in relation to the Applicant's objections against Rule 3(5)(e), that it is patently incorrect to submit that the provision violates sections 33, 34 and 23(1) and even section 195(1)(f) of the Constitution as an administrator is authorized to refuse reasons for a "*valid reason*" and that there is no requirement that a provision of this nature must give guidance on determining the validity of other grounds and that ultimately there is judicial control over the process;

(b) in relation to the Applicant's objections against **Rule 4(4)**, that the requirement that the grounds for refusal must be valid, refutes the objection raised by the Applicant since an applicant is in any event entitled to bring in terms of Rule 7 an application to compel the administrator to furnish the list and that, in so far as this would slow down the judicial review process, it is regrettable, but does not render the provision unconstitutional;

(c) in relation to the Applicant's objections against **Rule 4(7)** -

(i) that the objection overlooks the provisions of Rule 12 providing for the continuance of the rules relating to discovery of documents in motion proceedings; and

(ii) that the position is no different to those of an applicant under Uniform Rule 35 (and Labour Court Rule 6(4)) where documents are listed in the confidential section of a discovery schedule and where there is an application to compel production;

.../...

(d) in relation to the Applicant's objections against **Rule 7**, that, as submitted in the case of Rule 4(7), that the objection overlooks the provisions of Rule 12 providing for the continuance of the rules relating to discovery of documents in motion proceedings;

(e) in relation to the Applicant's objections against **Rule 7(3)(e) and (f)**, that (a) the Applicant's argument seeks to shore up a right to institute unfounded review applications which are somehow to be justified subsequently by delving through the record; and (b) the Applicant's objection also overlooks the provisions of Rule 12 that keeps the rules of court relating to discovery in tact.

The Applicant's attack relating to the private respondent

[47] In this regard it is the Applicant's concern -

(a) that no provision is made for the private respondent as he or she is, like the applicant, in no position to consider the record to defend the validity of the decision and may in certain scenarios even be worse off than the applicant; and

(b) that, if the rights of another member of the public were involved, he, she or it may even be worse off than the applicant in that he, she or it may, for example, find himself, herself or itself at the mercy of the state decision-maker if he, she or it chooses to abide by the review proceedings and will have to defend a decision of which he, she or it was not the author and of which he, she or it has

no knowledge.

[48] In response to the Applicant's attack it is the Respondents' contention that Rule 53 (or Rule 7A) also makes no such provision and that the Applicant identified no right or constitutional principle which is infringed by not making provision for the proposed mechanism in the new rules.

Evaluation of the submissions made on behalf of the parties

[49] In considering the issues involved in this matter, I will deal with the submissions in the same order as the matter was approached by the parties.

Firstly, Applicant's main attack on the new rules

[50] As is apparent from what I have already indicated, it leaves no doubt that the new rules effected a dramatic and drastic change to the procedure as provided in Rule 53 (and, of course, also Rule 7A).

[51] The question is, however, whether this change constitutes an infringement of any of the relevant fundamental rights.

[52] The new rules obviously deviate from Rule 53 (and Rule 7A) in various material respects, namely -

(a) it removes the right of an applicant, as provided in Rule 53 (and Rule 7A) to request an administrator, at the institution of an application for judicial review of administrative action taken, to furnish the full record of the proceedings relating to the decision sought to be reviewed, together with the reasons for such action;

(b) instead in terms of the new rules an applicant may, at a pre-litigation stage, request an administrator to furnish reasons for administrative action taken (**Rule 3**) and to furnish a list of "*relevant documents*" (**Rule 4**) (which, per definition, are only those documents which directly relates to a ground of judicial review and which must be specified in Form C requesting the list of relevant documents).

[53] The new rules are obviously based on an assumption or understanding that an applicant will or should be in a position to know exactly on what grounds any application for judicial review can be instituted before having had sight of any documents or information on which the administrative action has been taken. Such an assumption or understanding is obviously in many, if not in the majority, of cases clearly wrong. It is common knowledge that administrative action is more than often taken, so to speak, behind closed doors. An applicant for a request for a list of relevant documents will in those cases have to second-guess all the grounds on which the administrative action in question can be subjected to judicial review. It will then be on that basis that an administrator will have to determine what documents are directly relevant to the grounds so second-guessed by the applicant (and not, as is currently provided in Rule 53 *and Rule 7A, relevant to the decision taken), no matter whether there are any other

documents that may disclose any further grounds of judicial review of which the applicant can impossibly be aware of. In the result such documents or information will remain unfairly and unjustifiably in a veil of secrecy

In this regard I can refer to ***President of the Republic of South Africa v M & G Media Ltd [2011] ZACC 32 at para 10*** in which it was held as follows:

> *"The constitutional guarantee of the right to access to information held by the state gives effect to accountability, responsiveness and openness as founding values of our constitutional democracy, it is impossible to hold accountable a government that operates in secrecy. The right to access to information is also crucial to the realisation of other rights in the Bill of Rights.".*

[54] The result is, apart from in effect suppressing transparency of actions taken by administrators -

(a) that an applicant is deprived of a right of access to all information held by an administrator entrenched in section 32 of the Constitution (and duly provided for in the provisions of the Promotion to Access of Information Act, 2000), and instead the administrator is given the sole discretion to decide what is to be provided to the applicant as being relevant to his, her or its grounds of review formulated at a stage before he, she or it has had sight of any documents or information relating to the decision taken;

(b) that an applicant is, not having granted access to documents relating to the decision taken, denied a right to fair administrative justice entrenched in section

33 of the Constitution;

(c) that, in relation to the right to institute an application for judicial review in the Labour Court, an applicant is denied the right to fair labour practices in so far as he or she had not been provided with all the documents and information held by either the state or private body concerned.

[55] The next question is whether the Respondents' actions in having made, and having approved of, the new rules can be justified under section 36 of the Constitution.

[56] As already indicated, the Respondents defend this aspect of the new rules primarily on the basis -

(a) that they would render the process of judicial review more efficient and less costly;

(b) that the entire record does not always go to the court under Rule 53;

(c) that if there is a genuine dispute about the disclosure of a document the ordinary rules relating to discovery remain in tact.

[57] These contentions cannot in my view serve as justification for the infringement of an applicant's rights under section 32, 33 or 23 of the Constitution.

[58] With regard to the contention that the new rules are aimed at effecting an efficient and cost-effective tool for achieving administrative justice, our courts, as well as foreign courts, have recognized, particularly, the principle that administrative convenience or the lack or need of resources is not a proper basis for avoiding constitutional obligations.

In ***S v Jaipal 2005 (4) SA 581 (CC)*** the Constitutional Court held at ***602B, para [55] and [56]*** in this regard as follows:

> *"[55] For the State to respect, protect, promote and fulfil the rights in the Bill of Rights, resources are required. The same applies to the State's obligation to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. The right to a fair trial requires considerable resources in order to provide for buildings with court rooms, offices and libraries, recording facilities and security measures and for adequately trained and salaried judicial officers, prosecutors, interpreters and administrative staff.*
>
> *[56] Few countries in the world have unlimited or even sufficient resources to meet all their socio-political and economic needs. In view of South Africa's history and present attempts at transformation and the eradication of poverty, inequality and other social evils, resources would obviously not a lways be adequate. However, as far as upholding fundamental rights and the other imperatives of the Constitution is concerned, we must guard against popularising a lame acceptance that things do not work as they ought to, and that one should simply get used to it. .... Responsible, careful and creative measures, born out of a consciousness of the values and requirements of our Constitution, could go a long way to avoid undesirable situations. ....".*

In ***Singh et al v Minister of Employment and Immigration et al [1985] 14 CRR 13 at 57*** (quoted with approval in ***Bel Porto School Governing Body v Premier, WC 2002 (3) SA 265 (CC) at 318A, para [170***) the Supreme Court of Canada has taken the same approach, emphasizing, as follows, that administrative convenience is not a

proper basis for failing to comply with fundamental rights:

> "*(T)he guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.*".

[59] Even if it were constitutionally permissible to limit rights by making the process of judicial review more efficient and costly this is not the effect of the new rules. There is certainly no reason why the approach in the new rules could not be combined with allowing an applicant sight of the full record instead of the limited record envisaged in Rule 4. There is also no reason to say that the new rules would reduce the work load and costs of the State and would promote efficiency as some administrators will have to work through all the documents that were before him, her or it at the time of the decision in order to determine which of those documents are relevant to the applicant's intended grounds of review. In terms of Rule 53 (or Rule 7A) such an exercise would be unnecessary. The administrator is merely required to make all documents relevant to the decision taken available to the applicant without any administrative burden to separate from those documents all documents which are in his, her or its sole discretion relevant to such grounds of review (and not to the decision taken).

The following extract from the ***article by Geo Quinot, supra, at 659*** addresses this problem in no uncertain terms:

> "*The core of the problem with the new disclosure mechanism here is that the administrator is given the sole discretion to decide what is relevant, what will be provided to the applicant and in what manner. It seems anomalous, even unfair, to leave such matters to the sole discretion of one of the parties to the dispute and in particular the state party, given the fact judicial review is a key form of constitutional control over the exercise if public power. The position becomes particularly objectionable when the courts' powers of supervision over the exercise of this administrative discretion are significantly curtailed. It is furthermore unrealistic to think that administrators will generally have the capacity to accurately gauge the relevance of documents in relation to grounds of review. Such an exercise requires expert knowledge of administrative law.*".

See also: ***Hoexter, Administrative Law in South Africa, p. 531***

[60] The fact that the entire record does not always go to court is no justification since an applicant is in terms of Rule 53 (or Rule 7A) at least allowed free access to the full record.

[61] In relation to the contention that the ordinary rules relating to discovery remained in tact and can be utilized to obtain sight of any documents not covered by the definition of "*relevant documents*" is in my view no justification for depriving an applicant access to the full record of proceedings sought to be reviewed and set aside.

The provisions of Rule 35(13) is in any event not generally applicable to application proceedings. In order to use discovery to obtain the full record, an applicant for judicial review would have to launch an application to court which will only be considered after all the legal issues have been established and only if all the affidavits have been filed.

[62] In so far as this procedure is, as contended on behalf of the Respondents,

available to an applicant, the question arises why an applicant cannot in any event be allowed access to the whole record and why it should first be necessary for the applicant to bring an application under Rule 35(13).

[63] In view of the aforegoing, I find it difficult to understand why the Respondents elected to introduce this dramatic and drastic change in the existing and tested situation.

In would appear that the new rules have been preceded by various drafts from which it is notable that at least two drafts produced in 2006 and 2007 (**Annexures JVG 4, record p. 81, and JVG 5, record p. 100**) preserved the essential elements of Rule 53.

It is difficult to understand the Respondents' persistence, as the only voices in favour of the new rules, to still proceed with its opposition against the Applicant's application, notwithstanding the many voices against the new rules by practising attorneys (Glen Ronald Penfold (**record p. 117**), André Pieter Vos (**record p. 124**) Pieter Abraham Lodewyk Bester (**record p. 251**)) and academics such as Professors Quinot and Hoexter, and the collective wisdom expressed, as I already indicated, by prominent Judges of the Supreme Court of Appeal and our High Courts on the purpose, need and effect of the provisions of, particularly, Rule 53.

[64] In conclusion I find the following extract from the article by ***Geo Quinot, supra, at 665*** of particular significance:

> " *.... the new rules replace existing mechanisms with new ones that will chip away at the constitutional commitment to administrative justice in*

South Africa, rather than enhance it. This is particularly critical in relation to transparent government. By removing a key element of the procedure of the procedure of judicial review, viz., the right to obtain the full record of the decision, the new rules narrow down citizens' ability to shine a bright light on state conduct.".

[65] This brings me to the next attack of the Applicant.

Secondly, the other flaws in the new rules

[66] As already indicated, the Applicant's attack is directed at Rules 3(5)(e), 4(4), 4(7), 4(6) and 7 and 7(3)(e) and (f) of the new rules.

[67] I deal *seriatim* with each of these attacks.

Rule 3(5)(e)

[68] Before dealing with the real objection against Rule 3(5)(e), I need to point out that it is badly drafted in that it does not make grammatical sense if read together with the preceding words in subrule (1), namely, "*... may refuse a request for reasons if - .... (e) on any other valid ground*" instead of, for example, "*any other valid ground exists*".

[69] I am in respectful agreement with the Applicant's objections that this paragraph is legally objectionable.

[70] It is so objectionable for at least three reasons.

[71] **Firstly**, it purports, as I have already indicated, to extend the provisions of section 5(4) of t he PAJA by the addition of an additional ground on which an administrator may depart from the requirement to furnish reasons. In so far as it is aimed at adding such an additional ground, it seems to be an intrusion on the powers of the Legislature.

[72] **Secondly**, in so far as it may otherwise be permissible to extend the provisions of the PAJA, it fails to provide any guidance to an administrator to determine what other grounds might exist for the exercise of this discretion or powers (***Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) at 969C, paras 54-56; Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO 2001(3) SA 29 (CC) at 42B, para [25]***).

[73] **Thirdly**, the paragraph is in my view impermissibly vague as neither administrator nor the applicant is in a position to know what may a valid ground be (***Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC)at 288I, para [108]***).

Rule 4(4)

[74] Apart from the fact that Rule 4 as a whole is, as I have already indicated, constitutionally objectionable in so far as it, as read with the definition of "*relevant*

documents", infringes an applicant's right to access to information and, therefore, also to fair administrative justice, subrule (4) is in particular, for the same reasons as in the case of Rule 3(5)(e), constitutionally objectionable.

Rules 4(7) and 7

[75] In terms of Rule 4(6) an administrator is empowered to classify, apparently in his, her or its own discretion, "*relevant documents*" in two Parts, namely, Part 1 and Part 2 of Schedule A to Form D.

[76] In terms of Rule 4(7) an administrator may refuse to allow the requester to inspect and copy the documents in Part 2.

[77] In terms of Rule 7 a requester may, if an administrator refuses to grant him, her or it access to a document in Part 1 of Schedule A to Form D, apply to court for an order compelling an administrator to grant access to documents on the list in the said Part 1, but not in relation to documents in Part 2 of that Schedule.

[78] The Applicant's objections against these Rules are twofold, namely -

(a) that there is no guidance as to which documents are to be placed in Part 2 of that Schedule; and

(b) that a requester is simply prevented from approaching the court for an order

granting him, her or it access to any document in the said Part 2.

[79] As far as the first of these objections is concerned, we are here faced with a similar situation with which I have already dealt with in relation to the objections against Rule 3(5)(e) which I have already held to be legally objectionable.

[80] As far as the second of these objections is concerned, a requester is, not only deprived of his, her or its right to access to information entrenched in section 32 of the Constitution, but, as is apparent from Rule 7(1), is also effectively, contrary to the provisions of section 34 of the Constitution, deprived of his or her right of access to the court in relation to a refusal to grant him access to a documents specified in Part 2.

Rule 7(3)(e) and (f)

[81] Rule 7(3) governs applications by a requester for an order compelling an administrator to furnish a list of relevant documents or to grant access to a document listed in Part 1 of Schedule A of Form D.

[82] Rule 7(3)(e) and (f) provides that a Court may grant an application for the furnishing of a list of relevant documents or granting access to a document in Part 1 if it is satisfied -

(a) that there are *prima facie* grounds for the intended review (**para (e)**); and

(b) that the documents are necessary for the intended review (**para (f)**).

[83] These provisions are problematic in various respects.

[84] **Firstly**, they constitute, as already indicated in relation the Applicant's main attack against the new rules, an infringement of a requester's right of access to information envisaged in section 32 of the Constitution and the right against fair administrative justice envisaged in section 33 thereof.

[85] **Secondly**, and, perhaps, linked to the first consideration, the provision places a requester in an impossible position and thereby rendering his, her or its aforesaid rights for all practical purposes ineffective in that it is hardly imaginable how a requester can show that there are *prima facie* grounds for review or that the documents sought to be are necessary without having had sight of those documents.

The position of the private respondent

[86] We are here concerned with a situation where an applicant has in a review application, apart from the administrator, cited another party having an interest in the relief claimed who is often a so-called private respondent.

[87] In terms of Rule 53(3) (and Rule 7A) an applicant, having obtained a record of proceedings and having caused copies to be made of the record, is required to furnish copies to all other parties cited in the application that will include the private respondent.

[88] This is well illustrated in the decision of ***South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons 2003 (3) SA 313 (A)***, being a matter where an application was launched which was primarily review proceedings, but the applicant elected not to bring the application in terms of Rule 53. The result was that a private respondent cited in the matter was not afforded an opportunity of seeing the record of the proceedings which was sought to be reviewed and set aside.

At ***319F*** Harms JA (as he then was) remarked in this regard as follows:

> "*[5] Since the present proceedings are primarily review proceedings, SAFA should have utilised the provisions of Uniform Rule 53. SAFA chose not to do so. A failure to follow Rule 53 in reviewing a decision of an administrative organ is not necessarily irregular because the Rule exists principally in the interests of an applicant, and an applicant can waive procedural rights. An applicant is not, however, entitled, by electing to disregard the provisions of the Rule, to impinge upon the procedural rights of a respondent. If, as is the usual case, the proceedings are between the applicant and the organ of State involved, the latter can always, in answer to an ordinary application, supply the record of the proceedings and the reasons for its decision. On the other hand, as in this instance, if the rights of another member of the public are involved, and the organ of State, hiding behind a parapet of silence, adopts a supine attitude towards the matter since the order sought will not affect it (no costs were sought against the Registrar if the latter were to remain inactive), the position is materially different. Stanton was entitled to have the full record before the Court and to have the Registrar's reasons for the impugned decisions available. As a respondent in an ordinary application it does not have those rights.*" (my underlining).

[89] In so far as the new rules purports to do away with Rule 53 (and Rule 7A) the private respondent's right to be served with a record of the proceedings as prepared by the applicant, has also fallen by the wayside.

.../...

Conclusion

[90] As I have indicated, the new rules seem to be objectionable in various respects which may, if I am correct, call for the new rules as a whole to be reconsidered (hopefully in consultation with interested parties), but since I did not hear argument in relation to some of those respects, I cannot undertake to express any firm view on those respects.

[91] In so far as the concerns of the Applicant on which I did hear argument, I came by way of summary to the following conclusions:-

[92] **Firstly**, in relation to the attack on the new rules to the effect that Rule 4, read with the definition of "*relevant document*" in Rule 2, I am of the opinion that the new rules are to that extent inconsistent with the Constitution in that they infringe the right of an applicant (requester) and a private respondent entrenched in -

(a) section 32 of the Constitution to obtain, as opposed to the rights secured in Rule 53 (and Labour Court Rule 7A), access to all documents and information which were before the administrator at the time the decision sought to be reviewed, was taken (or which documents or information are relevant to the decision taken);

(b) section 33 of the Constitution to fair administrative justice, being a right which cannot be achieved unless all such documents and information are made

.../...

available to the applicant concerned;

(c) section 34 of the Constitution to have, particularly, a dispute concerning access to a document specified in Part 2 of Schedule A to Form D, be resolved in the Court;

(d) section 23(2) of the Constitution to fair labour practices in so far as an applicant for judicial review is, as opposed to Labour Court Rule 7A, deprived of the right to have access to all documents and information held by an administrator and, in the absence of such documents and information, to a fair adjudication of any dispute between such applicant and the administrator.

[93] **Secondly**, in relation to the attack on specific provisions contained in the new rules, I am of the opinion that the following rules are unfair and a violation of the protection afforded by, particularly, section 33 of the Constitution -

(a) Rules 3(5)(e) and 4(4) because of their vagueness and, in the case of Rule 3(5)(e), because of an unauthorized apparent attempt to amend the provisions of the PAJA and, furthermore, because of the fact that no guidance is provided to an administrator as to how it should be determined what should be held to be a "*valid ground*" for refusal of a request for reasons or to furnish a list of relevant documents;

(b) Rules 4(7) and 7 because (apart from, in the case of Rule 4(7), the lack of

guidance as to how the administrator should exercise his, her or its discretion in refusing to allow an applicant to inspect and copy a document specified in Part 1 of Schedule A to Form D) of the fact that it deprives an applicant of the right of access to Court on any dispute relating to access to a document specified in Part 2 of that Schedule;

(c) Rule 7(3)(e) and (f) because of the almost impossible burden placed upon an applicant to show, without having had sight of any relevant documents, that there are *prima facie* grounds for the intended review and that the documents are necessary for the intended review.

[94] Furthermore, as far as the private respondent is concerned, the rules deprive such a respondent of the right, as is the position under the current Rule 53 (and Rule 7A), to obtain a copy of at least the portion of the record prepared by the applicant.

Order and costs

[95] As is apparent from the reasons set out in this judgment I am satisfied (although I am inclined to think that the new rules ought, with due regard to my *obiter* remarks, as a whole be reconsidered), that, on at least the considerations raised by the Applicant, the new rules are inconsistent with the Constitution, unlawful and invalid.

[96] On that basis I considered the relief sought in the Notice of Motion and was somewhat concerned on whether I am empowered to grant an order in terms of which

it is declared that the new rules can be remedied by a formulation set out in the order as it may be regarded as in an intrusion on the powers of the First Respondent to itself draft the rules.

[97] However, in ***Mkhize v Umvoti Municipality and Others 2012 (1) SA 1 (SCA) at 7D, para [12]*** the learned Judge of Appeal, referring with approval to the judgment *a quo* in Mkhize v Umvoti Municipality 2010 (4) SA 509 (KZP) at 524B, para [30], remarked in this regard as follows:

> *"In considering whether the order in Jaftha was unconstitutional, Wallis J discussed the purposes of the constitutional remedies of reading in, reading down, severance or notional severance and concluded that it always took place within the context of the separation of powers:*
>
> > *'Under the Constitution responsibility for legislation lies with the legislative bodies established in terms of the Constitution. Where a court interferes with legislation it does so within the ambit of its own constitutional responsibility for determining whether legislative provisions comply with the Constitution. Whether it applies a remedy of severance or one of reading-in, or a combination of the two, its sole aim and function are to render the legislation compliant with the provisions of the Constitution. It is not vested with any general legislative capacity merely by virtue of the fact that it has found a particular statutory provision not to comply with the Constitution. Its function is to frame an appropriate order that remedies the constitutional defect. It is for this reason that stress is laid on the court's obligation to endeavour to be faithful to the legislative scheme.'*
>
> *The dominant inquiry, he continued, is whether the chosen remedy is an unconstitutional intrusion into the domain of the legislature. Reading in must conform and be consistent with the Constitution and its fundamental values, and should interfere as little as possible with the laws adopted by the legislature. Words should not be read in unless a court can define with sufficient precision how the statute ought to be extended. Deference to the legislature and restraint are called for to avoid a court's engagement in lawmaking. ".*

.../...

[98] On this basis it seems to me to be in order to adhere to the Applicant's claim for an order set out in prayer 3.2 of the amended Notice of Motion.

[99] I realize that the order I intend making will affect the provisions of section 7(3) of the PAJA providing for these rules to have been made before 25 February 2009, but I accept that the delay in making these rules can be remedied by an appropriate amendment of section 7(3).

[100] As far as costs are concerned, the Applicant claims costs against all parties opposing the application.

[101] Although the First Respondent has indicated that it will abide by the Court's decision there was appearance on its behalf in circumstances where it clearly appears that the First Respondent joined forces with the Second Respondent in his opposition to the application.

[102] I accordingly see no reason why the First Respondent should not also be held liable for the Applicant's costs.

In te result I make the following order:-

1. **THAT** it be declared that Rule 4, read with the definition of "*relevant document*" in Rule 1, of the Rules of Procedure for Judicial Review of Administrative Action

made under section 7(3) of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), and published in Government Gazette No. 32622 by Government Notice R. 966 of 9 October 2009 ("*the new rules*"), to be inconsistent with the Constitution, unlawful and invalid, to the extent that it deprives, contrary to the provisions of sections 32, 33, 34 and 23(2) of the Constitution, a person intending to institute an application for judicial review from access to all documents and information which were before an administrator at the time the decision which may be sought to be reviewed, was taken.

2. **THAT** it be declared that the inconsistency, unlawfulness and invalidity referred to in paragraph 1 of this order to be remedied by the substitution for the definition of "*relevant document*" in Rule 2 of the new rules of the following definition:

> "'*relevant documents' mean every document that was before or available to the administrator when the administrator took the decision sought to be reviewed;*".

3. **THAT** it be declared Rules 3(5)(e), 4(4) and (7) and 7(3)(e) and (f) of the new rules are inconsistent with the Constitution and, therefore,

4. **THAT** it be declared the new rules for judicial review to be inconsistent with the Constitution, unlawful and invalid to the extent that they fail to provide for a mechanism whereby a private respondent in an application for judicial review can obtain access to the record and reasons for a decision which is sought to be reviewed and set aside.

.../...

5. **THAT** the Respondents to be ordered to pay, jointly and severally, the one paying the other to be absolved, the Applicant's costs.

.....
P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANT	**ADV S BUDLENDER** **ADV C STEINBERG**
On the instructions of:	**LAWYERS FOR HUMAN RIGHTS** **JOHANNESBURG LAW CLINIC** **Ref: Ms. Gina Snyman** **c/o LAWYERS FOR HUMAN RIGHTS** **PRETORIA LAW CLINIC** **Kutlwanong Democracy Centre** **357 Visagie Street** **PRETORIA** **Ref: Cote/PAJA** **Tel: 012 320 2949**
ON BEHALF OF THE RESPONDENTS	**ADV W R E DUMINY SC** **ADV. M S MPHAHLELE**
On the instructions of:	**THE STATE ATTORNEY (PRETORIA)** **Manaka Heights** **8th Floor** **167 Andries Street** **PRETORIA** **Ref: Mrs J L de Lange** **Tel: 012 309 1565 or 072 366 7707**
DATE OF HEARING	**6 February 2012**
JUDGMENT DELIVERED ON	**11 April 2012**