

Legitimate Expectation Here to Stay

Prof Gretchen Carpenter

The classification of administrative acts into those which are said to be quasi-judicial and those which are 'purely administrative' has attracted the criticism of both writers and judges for many years. For example, Schreiner JA warned, as long ago as 1953, that one should be careful 'not to elevate what may be no more than a convenient classification into a source of legal rules' (*Pretoria North Town Council v A1 Electrical Ice Cream Factory (Pty) Ltd* 1953 3 SA 1 (A) 11A-C); Williamson JA in *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A) 278C-D expressed the fear that the classification may induce rigidity and ultimately militate against fairness; Rumpff CJ expressed the view that '[h]ierdie etikettering van 'n funksie, sonder meer, is mi gevaarlik en kan lei tot oorvereenvoudiging van die vraag of geregtigheid . . . geskied het of nie' (*Oberholzer v Paddraad van Outjo* 1974 4 SA 870 (A) 875 *in fin* -876B); Baxter (*Administrative Law* 1984 573) refers to 'the cult of the "quasi"' and criticises the effects of the categorization of administrative acts even more stringently than Wiechers (*Administrative Law* (1985) 136 and 180) who warns that the danger lies in the introduction of an unnecessary conceptualism into our law, resulting in the same confusion which reigned in English law at one time – a fear which has proved well-founded.

Existing rights

The difficulty lies in the fact that the so-called rules of natural justice need be observed only when the administrative act is perceived to be quasi-judicial, that is, when the act involves the exercise of a discretion which affects existing rights. The fact that a decision may entail serious consequences for the individual is irrele-



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The categorisation of administrative acts as either quasi-judicial or purely administrative has attracted adverse criticism, largely because of the inequitable results of the application of the rule that the rules of natural justice need to be observed only in the case of quasi-judicial acts, namely acts which involve the exercise of a discretion which affects existing rights. In English law the harsh effects of this rule have been mitigated by the development of the doctrine of legitimate expectation, in terms of which an individual may be entitled to a hearing where there is some basis upon which he entertains a legitimate expectation that he will be permitted to put his case, even though he has no vested or antecedent right which is in jeopardy. This doctrine has been applied in a number of judgments of provincial divisions in South Africa, and has now received the unequivocal approval of the Appellate Division in the *Traub* case, in which the court also dismissed the dichotomy between quasi-judicial and purely administrative acts as serving no purpose.

vant; unless he can prove that some existing right is in jeopardy, he is not entitled to a hearing or to know what considerations there may be which could count against him or to be furnished with reasons for the decision. That this may lead to grave injustice hardly requires argument. The position is exacerbated when the courts take a narrow view of what constitutes existing or vested rights. Again one or two well-known examples will suffice: in *Administrateur van SWA v Pieters* 1973 1 SA 850 (A) an attorney was refused permission to settle and practise in South West Africa (even though his wife was a permanent resident of the territory), and the court held that the *audi alteram partem* rule did not find application; likewise, in *City Council of Pretoria v Modimola* 1966 3 SA 250 (A) the applicant was deemed not to have a right to be heard before his property was expropriated; and in *Le Roux v Minister van Bantoe-Administrasie en -Ontwikkeling* 1966 1 SA 481 (A) an official who had been dismissed was held not to be entitled to the observance of the rules of natural justice, since none of his rights had been affected by his dismissal (apparently because he could have sued for damages and reinstatement in the event of an unlawful dismissal).

Legitimate expectation

The concept of quasi-judicial acts originated in England and entered South African law via English law. The injustice arising from strict adherence to the rule that an individual is entitled to the benefit of the *audi alteram partem* rule only if he can show that existing rights have been impinged upon, has, in recent years, been ameliorated by the introduction of the so-called doctrine of legitimate expectation, a term which first attracted attention after the judgment in *Schmidt v Secretary of*

State for Home Affairs 1969 1 All ER 904, although it was not applied in the case in point. Since then, however, it has indeed become fully integrated, not only into English law, but into the administrative law of Australia and New Zealand as well. The South African courts have been rather more tentative, despite pleas for the unequivocal acceptance of the doctrine into our law (see eg Hlophe 1987 SALJ 187 and Carpenter 1989 SA Public Law) but there have nevertheless been applications of the doctrine in a number of decisions of provincial divisions. The most explicit of these is perhaps the recent case of *Lunt v University of Cape Town* 1989 2 SA 438 (C). The issue did come before the Appellate Division in *Castel NO v Metal and Allied Workers Union* 1987 4 SA 731 (T), in which the court held (per Hefer JA): 'Even if the "legitimate expectation" approach were to be adopted, there is no room for its application here . . . nothing had happened before the application for authority was submitted and nothing happened thereafter which could have caused the applicant to entertain such an expectation . . . I am by no means sure that this case would in England be classified as a "legitimate expectation" case.' Far from constituting authority for a rejection of the legitimate expectation doctrine in our law, however, this judgment indeed implied that the existing rule could be extended, in line with English law, where circumstances are present which could reasonably or legitimately lead the individual to entertain an expectation that he would be afforded a hearing.

The doctrine once again enjoyed the attention of the Appellate Division in the recent case of *Administrator Transvaal v Traub* 1989 4 SA 731 (A), the final episode (one can only hope) in the saga of the battle between a number of doctors at the Baragwanath Hospital and the provincial and hospital authorities. In the case *a quo* Goldstone J had found for the applicants (the medical practitioners), holding that the decision of the authorities not to confirm their appointments and prejudicially affected their rights and that they were therefore entitled to the observance of the rules of natural justice. It was therefore not necessary for him to deal with the issue of legitimate expectation. On appeal, however, it was held (per Corbett CJ) that the respondents had no right to be

appointed and that the refusal to appoint them did not affect any existing right. The issue was therefore whether 'the *audi* principle', as the court termed it, 'is confined to cases where the decision affects the liberty, property or existing rights of the individual concerned or whether the impact is wider than this' (748).

Warning

The judge then proceeded to give a comprehensive account of the history and development of the doctrine of legitimate expectation in English law and its appearances in South African law. He pointed out that the doctrine had evolved 'in the social context of the age in order to make the grounds of interference with the decisions of public authorities which adversely affect individuals co-extensive with notions of what is fair and what is not fair in the particular circumstances of the case' (61-62), and that the doctrine has taken root in both Australia and New Zealand. He concluded: 'In my opinion, there is a similar need in this country. There are many cases which one can visualise in this sphere . . . where an adherence to the formula of "liberty, property and existing rights" would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review.' He nevertheless sounded a warning that the concept of legitimate expectation is not one which is reasonably well defined in our law, and that the courts would have to tread carefully, in working out the precise scope of the doctrine in order to maintain a balance between the need to protect the individual against decisions unfairly arrived at and the need to avoid undue judicial interference with the administration.

English cases

In this regard it is instructive to refer to a few of the English cases examined by the court. In the well-known case of *Council of Civil Service Unions v Minister for the Civil Service* 1984 3 All ER 935 (commonly referred to as the *GCHO* case), Lord Fraser (943j-944a) stated: 'Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the

claimant can reasonably expect to continue . . .' In the same case Lord Roskill pointed out that a legitimate expectation can take various forms, such as an expectation of prior consultation or of being afforded an opportunity to make representations. A valuable judgment in this regard is *McInnes v Ounslow Fane* 1978 3 All ER 211 (Ch) in which Megarry VC distinguished three types of decision in which the court may be asked to intervene, namely (1) decisions in forfeiture cases, where some existing right is taken away (we would call this an onerous disposition); (2) decisions in application cases, for example where an individual applies for membership of an organization or for a permit or licence (a beneficial disposition); and (3) decisions in expectation cases, which differ from the previous category only in so far as the applicant has a legitimate expectation that his application will be granted. The judge emphasised the substantial difference between forfeiture cases and application cases, and pointed out that in many respects the intermediate category (expectation cases) will be more akin to forfeiture cases than to pure application cases 'for although in form there is no forfeiture but merely an attempt at acquisition that fails, the legitimate expectation of a renewal of the licence or confirmation of the membership is one which raises the question of what it is that has happened to make the applicant unsuitable for the membership or licence for which he was previously thought suitable' (218d-f).

Scope of doctrine

Corbett CJ summed up the position in English law and concluded that the legitimate expectation doctrine sometimes entails some benefit which an individual may reasonably expect to acquire or retain and which it would be unfair to deny without prior consultation or a prior hearing; and at other times involves the right to be heard before a decision adverse to the interests of a person may be taken. In this regard he expressed disagreement with the stance taken by Goldstone J in *Mokoena v Administrator Transvaal* 1988 4 SA 912 (W) 918E that legitimate expectation relates only to rights sought to be taken away and not to the right to a hearing.

In the case in point the court found that the respondents did in fact have a legitimate expectation to be

afforded a hearing before their appointments could be refused; this expectation was based on a long-standing practice at the hospital that such applications carrying the recommendation of the departmental head had invariably been granted by the Director of Hospital Services, the appointment being no more than a formality. This conclusion was reinforced by the seriousness of the consequences to the career prospects of the respondents which would attach to a refusal based on suitability for appointment.

Related issue

A related issue which received attention in the judgment was that of the traditional dichotomy between quasi-judicial and other administrative acts, which has been referred to earlier in this note. This feature of English administrative law has long since been discarded by English law itself, but until now has continued to flourish here despite trenchant criticism voiced against it. As early as 1970, Lord Denning himself stated in *R v Gaming Board for Great Britain ex parte Benaim* 1970 2 All ER 528 (CA) that the 'heresy' to the effect that the

rules of natural justice do not apply in administrative proceedings had been scotched in *Ridge v Baldwin* 1963 2 All ER 66, while Lord Oliver in *Leech v Parkhurst Prison Deputy Governor*; *Prevot v Long Lorton Prison Deputy Governor* 1988 1 All ER 485 stated that 'the susceptibility of a decision to the supervisory jurisdiction of the court does not rest on some fancied distinction between decisions which are "administrative" and decisions which are "judicial" or "quasi-judicial"' (496d). Corbett CJ referred to the criticism which has been levelled by South African authorities against the categorisation of administrative acts into quasi-judicial and purely administrative, and came to the conclusion that, indeed, 'a classification as quasi-judicial adds nothing to the process of reasoning: the court could just as well eliminate this step and proceed straight to the question as to whether the decision does prejudicially affect the individual concerned' (762).

Judgment welcomed

This judgment is to be welcomed without reservation, not least for its

lucidity and for the total absence of the convoluted style which has so often been a blemish on legal writing. The sooner the idea that writing is learned only if it is couched in language so obscure as to be virtually unintelligible loses currency, the better. But what is even more important is that our highest court has excised from our administrative law that quite unnecessary phenomenon, the quasi-judicial act (surely this ghost must now be laid to rest at last?) and has endorsed the principle which has long been recognized in other jurisdictions, namely that it is no more than fair that a legitimate expectation should entitle an individual to a hearing even where he cannot prove any existing or vested right. The practical application of the doctrine of legitimate expectation has been placed on a sound footing, with guide-lines for its applicability, in order to ensure a balance between the interests of the individual and the demands of administrative practice. Important judgments in the sphere of administrative law have appeared thick and fast in recent years; but this one may yet prove one of the most significant of all. ■

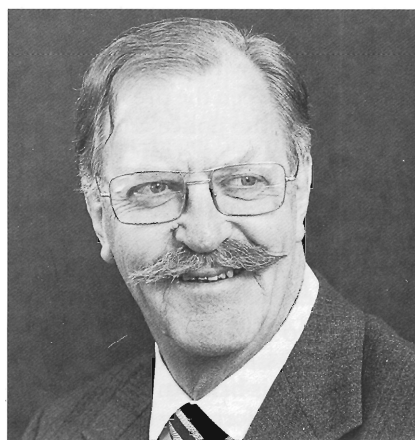
The following is a tribute to the late Mr Justice GA Coetzee (4.4.1920 – 23.12.1989) delivered by Advocate A Mendelow QC on behalf of the Johannesburg Bar at the Memorial Service in the Supreme Court on Tuesday, January 16 1990 at 10:00.

I would respectfully associate the Johannesburg Bar with the remarks which have fallen from your Lordship.

My Lord, I personally have known the late Mr Justice Coetzee since long before he qualified as an advocate – when he was still employed in the Department of Justice, in charge of the default judgment book at the Magistrate's Court at Johannesburg, this was then housed at the spot where the present Van Der Bijl Park bus terminus is to be found. With the exception of the members of his family, I think it would be correct to say that I have known him longer than anyone else in this courtroom.

He was admitted to the Bar on the 14th March 1946 and became a foundation member of the Group of which I am now the leader and, until his elevation to the Bench, we were in almost daily contact with one another.

IN MEMORIAM



The late Mr Justice GA Coetzee
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Apart from his many other qualities, he had two that were outstanding – he was fiercely independent and an unrelenting perfectionist. If these two qualities were his strengths, they were, also, possibly, his weaknesses. At a time when it became fashionable in certain quarters to attempt to place upon the shoulders of the judicial arm of government, functions which rightly belonged to the legislative arm, he spoke out in defence of his judicial colleagues with a ferocity

bordering almost on the aggressive. His evidence before the Hoexter Commission, is ample corroboration of that fact. His independence is further illustrated by his demolition of the incipient importation of the Anton Piller procedure, into South Africa.

His insistence upon perfection resulted in a measure of some unpopularity in the ranks of the junior bar. What was often mistaken for possible abruptness on his part was, however, in essence, nothing more than a desire for perfection. The counsel who had done his preparatory work properly and correctly, had nothing to fear from Mr Justice Coetzee. He was impatient of shoddy work, and like many other great intellects, perhaps, intolerant of fools. It was this feeling that led him to prepare the Practice Manual which became known, affectionately, as 'Oom Gert Vertel'.

And yet, he was a much travelled, cultured and warm person; always concerned for the welfare of his fellowman, concerned about his wife and children, courteous to his staff, with a tremendous reservoir of energy, which he canalised into his profession and his hobby – woodworking. At the Bar, he

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