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## THE CONCEPT OF A “DECISION” AS THE THRESHOLD REQUIREMENT FOR JUDICIAL REVIEW IN TERMS OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

RC Williams\*

### 1 Introduction

*Bhugwan v JSE Ltd*<sup>1</sup> is the first (and, as at the time of writing, the only) High Court decision to place under a strong lens the issue of what, for the purposes of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), constitutes a decision reviewable under the Act, as distinct from an inchoate decision (or a decision not yet made at all) that is not susceptible to such review. The judgment in this case stands as a warning to persons who are considering seeking relief in terms of the Act not to jump the gun (as it turned out that the applicant in this case had done) in applying for a review. If an application for review is premature, in the sense that no decision has yet been made, it is doomed to failure. The judgment is also a warning to administrative decision-makers to apply their minds to the appropriate juncture at which to take the crucial step that the law will regard as an “administrative action” that is susceptible to judicial review, and to ensure that their utterances and conduct prior to that juncture cannot be construed as a “decision of an administrative nature”, as contemplated in PAJA. This discussion indicates the pragmatic significance of what might otherwise seem to be a point of law of little practical importance, namely what precisely constitutes a “decision”.

### 2 The facts

The essential facts of the case were that the applicant, Bhugwan, had been employed as a stockbroker by a firm called Cahn Shapiro, but had left the firm under something of a cloud. In March 2008, Bhugwan subscribed for shares in a company, Groombridge Securities (Pty) Ltd (“Groombridge”), in terms of an agreement which

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1 2010 3 SA 335 (GSJ).

included a condition precedent to the effect that that he would be “accepted by the JSE [Johannesburg Stock Exchange] as being fit and proper” to be a director or shareholder of the company. The “fit and proper” requirements of the Equity Rules of the JSE stipulated in rule 4.10 that:

- 4.10.1 An officer or non-executive director of a member, or a shareholder who is a natural person and who directly or indirectly holds in excess of 10% of the issued shares of a member, must, subject to any waiver by the JSE -
  - 4.10.1.1 be of full legal capacity;
  - 4.10.1.2 not be an unrehabilitated insolvent; and
  - 4.10.1.3 comply with such criteria of good character and high business integrity as the JSE deems fit.
- 4.10.2 In determining whether a person complies with Rule 4.10.1.3, the JSE will take into account, *inter alia*, whether the person has been -
  - ....
  - 4.10.2.4 the subject of a formal investigation by any regulatory or government agency;
  - ....
  - 4.10.2.4 refused entry to or expelled from any profession or vocation or been dismissed or requested to resign from any office or employment, or from any fiduciary office or similar position of trust.

On 18 April 2008, the company secretary of the JSE sent an e-mail to one of the directors of Groombridge which concluded with the following statement:

The JSE has information at its disposal which indicates that Mr Kamal Bhugwan does not comply with such criteria of good character and high business integrity as the JSE deems fit.

This was followed by a letter on 19 May 2008 from the JSE to Bhugwan’s attorney stating that (emphasis added):

It has come to the attention of the JSE that there are certain facts and circumstances that *may indicate* that your client does not comply with the requisite criteria of good character and high business integrity.

After sketching the background circumstances in which Bhugwan’s employment with his prior employer, Cahn Shapiro, had been terminated, this letter continues (emphasis added):

The JSE requests your client to furnish the JSE and Groombridge with all the facts and information at his disposal that will indicate that he satisfies the JSE's fit and proper requirements notwithstanding the serious allegations of improper conduct that have been leveled against him. ... *The JSE will, after receipt of your client's reply, consider all the facts and information at its disposal and decide whether Mr Bhugwan does indeed comply with the JSE's fit and proper requirements.*

An impasse then ensued in which Bhugwan declined to respond substantively to the JSE's invitation to supply facts and information. In the result, Groombridge invoked the non-fulfilment of the condition precedent in the agreement whereby Bhugwan's right to subscribe for shares in the company was dependent on his being accepted by the JSE as a fit and proper person to be a director or shareholder of a member of the JSE.

In hindsight, Bhugwan would have been better advised to respond by directing his grievance to Groombridge, and to argue that it was premature for the latter to contend that the condition precedent in their agreement had definitively failed. However, Bhugwan chose instead to embark on litigation with the JSE.

### **3 The application to the High Court for review**

Bhugwan brought an application in the High Court, contending<sup>2</sup> that the JSE had taken a "decision" that constituted "administrative action", as defined in section 1 of PAJA, and in particular that the JSE's e-mail of 18 April 2008, quoted above, "constituted a final and definitive decision which had immediate and direct legal consequences" for Bhugwan, or alternatively that the e-mail "constituted a preliminary decision which would have serious consequences" for Bhugwan. In his notice of motion, Bhugwan sought an order *inter alia*:

setting aside the decision of [the JSE] to find [sic] that the applicant does not comply with the [JSE's] criteria of good character and high business integrity in terms of section 4.10.3 of the Equity Rules.

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2 *Ibid* at paras [3] and [26].

In response, the JSE contended<sup>3</sup> that no “decision” had been taken, as contemplated in section 1 of PAJA. It was clear,<sup>4</sup> for the reasons discussed below, that if the court were to find that no “decision”, as contemplated in PAJA, had been taken by the JSE in this regard, Bhugwan’s application for review would be still-born and would have to be dismissed, and that all other issues in the case would fall away.

#### **4 The threshold requirement for justiciability in respect of the review of an administrative act in terms of the Constitution**

In *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga*<sup>5</sup> the events in question had occurred prior to the coming into force of PAJA. Consequently, the review of the actions in question in that case had to be adjudicated in the context of justiciability in respect of an “administrative act” in terms of the Constitution,<sup>6</sup> and not in terms of PAJA.

Section 33 of the Constitution refers to an “administrative act” but, unlike PAJA, does not equate this to a “decision”. However, in its gloss on section 33 of the Constitution, the Supreme Court of Appeal in *Gamevest* referred<sup>7</sup> to: “the very first and ineluctable requirement for judicial review, viz a decision by the respondent/defendant”. This point is now explicit in PAJA, where section 1 defines “administrative action” as a “decision” of an administrative nature. This was highlighted by Nugent JA in *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works*.<sup>8</sup> as follow: “[A]t the core of the definition of administrative action is the idea of action (a decision) of an administrative nature taken by a public body or functionary”. In *Bhugwan v JSE Ltd*, the High Court cited the *Gamevest* decision, and quoted from Olivier JA’s judgment in the latter case in which he said:

the words *administrative* action ... emphasise the very first question to be asked and answered in any review proceeding: what is the

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3 *Ibid* at para [3].

4 See the judgment at para [3].

5 2003 1 SA 373 (SCA).

6 Constitution of the Republic of South Africa, 1996.

7 At para [11].

8 2005 6 SA 313 (SCA), 2005 (10) BCLR 931; [2005] 3 All SA 333 at para 22.

*administrative act* which is sought to be reviewed and set aside?  
Absent such an act, the application for a review is still-born.<sup>9</sup>

Olivier JA then went on to say:<sup>10</sup>

What is an *administrative act* for the purpose of justiciability? There is no neat, ready-made definition in our case law, but in *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) Corbett CJ at 93A - B required, for common-law review, the non-performance or wrong performance of a statutory duty or power; where the duty/power is essentially a decision-making one and the person or body concerned has taken a decision, a review is available.

In this manner, the judgment in *Bhugwan* sought to interpret the justiciability of a “decision”, in terms of PAJA<sup>11</sup> consistently with the justiciability of an “administrative act” in terms of section 33 of the Constitution. The court in *Bhugwan* accepted the cautionary words expressed by Lord Steyn in *R v Secretary of State for the Home Department, Ex parte Daly*<sup>12</sup> that, in evaluating an allegedly decision-making process, “context is everything”.

## 5 Justiciability in terms of the Promotion of Administrative Justice Act

PAJA defines “decision”, but in circular terms (“any decision of an administrative nature made, proposed to be made or required to be made ...”) that throw no light on the core meaning of the word. The definition goes on to list certain “decisions” that are included in the definition, but in terms that assume that what has transpired was indeed a “decision”.<sup>13</sup> The pivotal issue in *Bhugwan* was if the JSE had in fact made a *decision*, as defined in PAJA, in regard to whether or not Bhugwan was a “fit and proper person” as contemplated in the Equity Rules.

The court commenced its examination of the meaning of *decision* in the context of PAJA by quoting various dictionary definitions, and went on to hold that, for a

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9 at para [11].

10 *Ibid* at para [12].

11 See also in this regard the judgment of Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA); 2005 (10) BCLR 931; [2005] 3 All SA 333 at para 22.

12 [2001] 3 All ER 433 (HL) at 447a and quoted with approval by Nugent JA in *Aktiebolaget Hässle v Triomed (Pty) Ltd* 2003 1 SA 155 (SCA), [2002] 4 All SA 138 at para 1.

13 *Bhugwan v JSE Ltd* 2010 3 SA 335 (GSJ) at para [8].

decision to have been taken that was amenable to judicial review, “all or at least some” of the following steps must have been completed, namely:<sup>14</sup>

- “1. Save where an authority legitimately acts coercively or of its own accord, a *final application, request or claim* must have been addressed by a subject to an authority which exercises statutory or public powers to exercise those powers in relation to a set of factual circumstances applicable to the subject.
2. All relevant information, either presented by the subject or otherwise reasonably available *must have been gathered* (which may require an investigative process) *and placed before the authority* which is to make the decision.
3. There must have been an *evaluative process* where the authority considers all of the information before him or her, identifies which components of such information are relevant and which are irrelevant and in which the authority assigns, through a process of value judgments, a degree of significance to each component of the relevant information, regard being had to the relevant statute or other empowering provision in terms of which the authority acts.
4. A *conclusion* must have been reached by the authority, pursuant to the evaluative process, as to how his or her statutory or public power should be exercised in the circumstances.
5. There must have been an *exercise of the statutory or public power* based on the conclusion so reached.”

It is, with respect, not clear how points 2 and 3 above can in any sense be regarded as prerequisites for coming to the conclusion that a “decision”, as defined, has been made. Indeed, it may be the absence of these factors that is the basis for the application to review the decision in question. The court in *Bhugwan*<sup>15</sup> quoted from Baxter, *Administrative Law*, to the effect that the criterion as to whether or not a sufficiently “ripe” action has been taken to constitute a reviewable decision is: “whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not”.

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14 *Ibid* at para [10].

15 *Ibid* at para [11].

## 6 Had the JSE taken a “decision” as contemplated in PAJA?

In *Bhugwan*, Nugent JA said<sup>16</sup> that “a simplistic linguistic reading” of the JSE’s e-mail of 18 April 2008 did not indicate that a decision had been taken by that entity. As was noted above, that e-mail said: “[T]he JSE has information at its disposal which indicates that Mr Kamal Bhugwan does not comply with such criteria of good character and high business integrity as the JSE deems fit”. The court observed<sup>17</sup> that the operative word in this email was “indicates”, rather an expression such as “confirms”, “establishes” or “proves”, and that:

the letter, properly construed linguistically was to give [Bhugwan] an indication of information in possession of [the JSE] which would tend to indicate that he did not comply with the requisite requirements.

The court said that it was:

fortified in this linguistic interpretation by the fact that the letter invited further discussion of the matter. It does not purport to close the door after a final and determinative decision had been made.

The court went on to say that a contextual approach put the matter beyond doubt, in that no case was made in Bhugwan’s founding affidavit that he had “applied” to the JSE for a determination as to whether or not he satisfied the requirements of Equity Rule 4.10, and the court said in this regard that: “[T]here is no basis in law to review a so-called decision if the applicant does not make out a case that he had applied for such a decision to be made”.

This dictum, with respect, goes too far in elevating an “application” by the affected person to a *sine qua non* for a review in terms of PAJA. There is nothing in the language of the Act to justify the inference that this is a prerequisite for review of the decision in question. Indeed, it is not difficult to imagine situations in which an administrative act may be set aside on review precisely because it was made

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<sup>16</sup> *Ibid* at para [27].

<sup>17</sup> *Ibid*.



precipitately. In the result, the court held<sup>18</sup> that, on the facts, the JSE had not made a “decision”, as contemplated in section 1 of PAJA in which it had purported to “close the door after a final and determinative decision had been taken”.<sup>19</sup>

An issue not explored at all in the judgment is that of a “proposed decision”, and how this differs from a “decision”. Section 1 of PAJA defines “administrative action” as connoting “any decision taken or failure to take a decision”, and goes on to define *decision* (emphasis added) as “any decision of an administrative nature made *or proposed to be made* ...” (emphasis added). It would therefore have sufficed for Bhugwan to show that what the JSE had done was to notify him, not of a decision already taken, but of a decision *proposed to be made*. It is unfortunate that his counsel did not press this line of argument, which would have rested on stronger ground than the contention that the JSE’s decision was a *fait accompli*. Such an argument would have obliged the court to make a ruling on the important distinction between a decision of an administrative nature that has been *made* and one that is *proposed to be made*, as contemplated in the definition of “decision” in section 1 of PAJA.

It is arguable that the reason why the legislation includes a decision “proposed to be made” in the statutory definition of a “decision” was to prevent an administrative decision-maker from remaining outside the scope of PAJA by the stratagem of saying to the affected party something along the lines of – we have resolved to take view x of the matter unless and until you persuade us otherwise. If the definition of “decision” were not wide enough to encompass such a provisional or *prima facie* decision, a decision-maker could ensure that his response remained outside the scope of PAJA indefinitely, or at least for a protracted period, as each supply of further information by the affected person was deemed inadequate to persuade the decision-maker to alter his provisional view.

The argument open to Bhugwan, but unfortunately not advanced by him,<sup>20</sup> was that, in effect, this was what the JSE had done. In other words, that the impersonal mode

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18 *Ibid* at [27] and [30].

19 *Ibid* at [28].

of expression in the JSE's e-mail of 18 April ("The JSE has information at its disposal which indicates that Mr Kamal does not comply ...") artfully concealed a decision which could just as accurately have been expressed in the active voice ("The JSE has information at its disposal on the basis of which it has provisionally decided that ...")

## 7 Conclusion

It is submitted that, in interpreting the definition of "decision" in section 1 of PAJA, the critical distinction is between, on the one hand, a decision actually *made or proposed to be made* (both of which fall within the scope of that definition) and a decision *deferred*, (which would fall outside of the definition). It is for the court to decide, with due regard for the nuances of language, into which category the communication from the would-be decision-maker falls. In making that decision, the court must of course not scrutinise the particular letter, e-mail or other communication in a blinkered fashion, but must interpret it in its full context of previous communications and prior events.

It is submitted that a preliminary, provisional or *prima facie* decision is not a decision *deferred*, and consequently falls within the scope of a "decision", as defined in section 1 of PAJA.

It is submitted that the distinction to be drawn in this regard is between, on the one hand, a communication by a decision-maker that says in effect – "on the basis of what I know, my mind is still open" (which would not be a decision, as defined in PAJA), and, on the other hand, a communication that says in effect – "on the basis of what I know, I have made a provisional decision, but I could be persuaded to change my mind" (which, it is submitted, would be either a decision or a proposed decision, as contemplated in PAJA).

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20 Bhugwan's counsel did put forward an argument (see the judgment at para [26]) that the JSE had made a "preliminary" decision which (in terms of the decision in *Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga* 2008 2 SA 570 (T)) constituted a "decision" for the purposes of PAJA. In its judgment in the latter case, the court did not explain what constituted a "preliminary" decision, but it would seem that the court had in mind in this regard not a "provisional" decision but a decision which would form the basis for further decisions.

In my view, the facts in *Bhugwan* are close to the border between these two categories. In particular, the content of the JSE's e-mail of 18 April 2008, read in isolation, teeters on that border. But the JSE's email of 19 May 2008 to Bhugwan's attorney was unequivocal in stating that (emphasis added):

The JSE will, *after receipt* of your client's reply consider all the facts and circumstances at its disposal *and decide whether Mr Bughwan does indeed comply with the JSE's fit and proper requirements.*

The latter e-mail, it is submitted, makes clear that the JSE's standpoint was not of a *decision made* (even on a provisional, preliminary or *prima facie* basis) but of a *decision deferred*.

My criticism is therefore not that the decision in *Bhugwan* was wrong in its application of the law to the facts, but that the court failed to take sufficient cognizance of the fact that the definition of "decision" in section 1 of PAJA includes a decision *proposed to be made*. Furthermore, that the court failed to articulate and apply the distinction, suggested above, between a preliminary, provisional or *prima facie* decision (all of which, it is submitted, constitute a decision as defined in the Act) and a decision deferred (which falls outside the definition of "decision" and is therefore not amenable to review in terms of PAJA).

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