040213pgjustice

SUMMARY OF SUBMISSIONS: RULES OF PROCEDURE FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Rules of Procedure for Judicial review of Administrative Action		
Rule	**Submission**	**Comment**
General (not specific to the Rules)	Dr R Naidoo [PAJA 4]	• Comments on the cumbersome procedures for judicial review of administrative action generally. Refers to rules of the Constitutional Court that allow for direct access but actually the ordinary person with limited resources faces many obstacles when trying to approach the Court. • Recommends: Regional constitutional courts, and at least 4 city constitutional courts, are established. Special courts, such as a Sectional Titles Homeowners Court, a Peoples' Court and a Public Servant's Court should also be established. • The Rules should be simple to allow ordinary people to access easily. There should be provision for applications for judicial review in electronic format. • There should be a judges' school at a government institution to create a pool of judges to preside over the proposed regional and local constitutional courts and specialised courts. • Refers to problems relating of clarity re Sectional Titles Act and regulations. • Public Service Commission is ineffective in dealing with officials' actions or inaction. Proposes that section 196(f) of the Constitution is amended to allow for appeal to Public Servant's Court. • Also that the Constitutional Court rules are amended to allow for the Court to accept electronic submissions for clarification and direction to the DPSA, the relevant departments and the PSC.
General	Mr P Bracher (PAJA 2]	• Many of the proposed rules overreach the powers of the Rules Board. There is a disjuncture between what is contained in the Act and the Rules.
General	Nele Meyer [PAJA 6]	• Although welcomes the proposed rules as an important milestone in implementing PJA, the rules are to complex posing an obstacle to access justice for underprivileged people. Recommends that a similar approach to those for the equality courts is followed. • The procedure for requesting reasons from the administration is sufficiently regulated in the

		Regulations on Fair Administrative Procedures, which provides a procedure for a request for reasons (Reg 27). The Rules also create a procedure for requesting reasons. Submits that the Rules should be confined to regulating practice and procedure with respect to judicial review of an administrative action and not the administrative action itself, as to do otherwise would be ultra vires. • Welcomes that cases can be heard in magistrates' courts.
Preamble	Mr P Bracher)	The preamble is unnecessary. It is also inappropriate as the rules were not made and implemented within the time period stipulated in section 7(3).
1. Application of rules		**Part A:**
(1)	Mr P Bracher	• The rules should apply to any court defined in paragraph (b) of the definition of 'court' in PAJA.
(1)	Nele Meyer	• Should not include Labour Court. Refers to Chirwa v Transnet CCT (2007)
(2)	Mr P Bracher	• Why should other courts have a choice whether to apply these rules or not? It appears to put them in a better position than the High Court.
(3)	Mr P Bracher	• The court in which the issue is raised should be given the power to decide the issue in the course of those proceedings.
(4)	Mr P Bracher	• Suggested change: '**The** rules of **the** court **in which the proceedings are instituted** apply insofar as they do not conflict with these rules.'

2. Definitions		
(1)	Mr P Bracher	• The definitions in other Acts should only apply if required by the context.
(2)	Nele Meyer	• Recommend that add 'Rules" includes the Forms **A to E'**.
'Act'	Mr P Bracher	• The definition should make it clear that the rules relate to PAJA as amended, not the Act as passed in 2000.
'relevant document'	Mr P Bracher	• There is no need to define this term. This will always be in the discretion of the court
3. Request for Reasons		**Part B:**
General	Mr P Bracher	• Rule 3 goes beyond the powers of the Rule Board to make. • It deals with matters dealt with in the Act itself and purports to amend certain provisions of PAJA. For instance rule 3(1) differs from section 5(1) of PAJA. • Section 7 requires the Rules Board to make and implement rules of procedure for judicial review. These rules have nothing to do with judicial review. • **Recommends** that the entire rule should be deleted.

General	Prof G Quinot (Dept of Public Law, Stellenbosch University) [PAJA 5]	• Rule 3 (along with forms A and B) is unlawful. • Section 7(3) mandates the Rules Board to make rules of procedure for judicial review. But Rule 3 does not deal with rules of procedure for judicial review: The right to written reasons guaranteed in s33(2) of the Constitution and contained in section 5 of PAJA exists independently of judicial review. Can't argue that rules (such as Rule 3) relating to requests for reasons and provision of reasons amount to rules of procedure for judicial review. Therefore Rule 3 is beyond the powers of the Rules Board as contemplated in section 7(3) of PAJA, and as such Parliament has no power to approve such rules in terms of section 7(5) of the Act. • The power and obligation to make Regulations dealing with the procedure for requesting reasons is placed on the Minster in terms of section 10 (1)(d) of the Act, such regulations need only be submitted to Parliament. • The Minister has already made these regulations and Chapter 4 deals with requests for reasons and the procedure to be followed. It is inappropriate and unlawful for the Rules to contain procedures on requesting reasons. • **Recommends** that Rule 3 and Forms A and B is omitted.
(1)	Nele Meyer	• Add: Any person whose rights are materially and adversely affected by an administrative action **and who has not given adequate reasons** may request the administrator to….
(2)	Nele Meyer	• Is an obstacle to the right to request reasons. Rule 3 does not stipulate access to Form A. It is not clear whether this form will be automatically sent to the recipient of an adverse administrative action, in which language it is written and how access is to be ensured in cases in which the applicant seeks reasons because no decision was taken. Nor is it clear what the legal consequences are if an applicant requesting reasons does not use Form A but writes a simple letter stating his/her intention. • **Recommends** a two-pronged approach is followed, allowing requesters to submit the request in written form or using Form A. Form A should be simplified and formulated in plain language. Access to the form should be facilitated by providing Thusong Centres and Community Development Workers with samples of the form. Recipients of adverse administrative acts should not only be informed about

		their right to request reasons but also where to access Form A if they wish to use it. Requesters preferring not to use Form A should be given minimum requirements, such as stipulated in Regulation 27 of *Regulations on Fair Administrative Procedures.*
(2)	Nele Meyer	• Rules 3 (2) and (2) (??) stipulate a mandatory administrative procedure but fail to determine the legal consequences if the procedure is not applied. Recommend that the Rules should provide for what is to happen if there are formal deficiencies in the procedure.
(4)	Nele Meyer	• **Recommends** that add: *...the administrator must furnish the **written** reasons within the period....*
(5)(a)	Nele Meyer	• **Recommend**s that add: *...**adequate** written reasons have already been furnished to the requester;'.*
(5)(d)	Nele Meyer	• **Recommends** that add: *...to depart from the requirement to give **written** reasons in terms of ...'.*
(5)(d)	Nele Meyer	• **Recommends** that divide into 2 sub-rules: **'(d) it is reasonable or justifiable to depart from the requirement to give written reasons in terms of section 5 (4) of the Act;** **(e) or on any other valid ground.'**
4. Request for Disclosure		
General comment	Mr P Bracher	• Rule is amending the Act. • The Rules Board is not empowered to make rules on pre-disclosure review. This is dealt with in PAJA. Special rules of pre-judicial proceedings discovery should not be made for judicial review proceedings. • The proposed rule 4(1)(b) differs from section 9(1) of PAJA. • If there is agreement to mediate in terms of rule 4(1)(c), this should not be a final mediation.

General	Prof G Quinot	• Welcomes new disclosure mechanism appears to allow for the record of the administrative decision as well as a range of further relevant documents, but raises the following concerns in relating to Rule 4 read with Rule 7: ➢ *Timing*: How is the 15 day period granted for disclosure in rule 4(3) to be calculated in the absence of a request for reasons? Rule 4(3) simply refers to the date on which reasons are furnished as the starting point for the 15 day period. When will the 15 day period start where no request for reasons is made? ➢ *Is the 15 day period adequate*, given that many people affected by administrative action live in rural areas with limited access to legal assistance and yet are the most dependent on administrative action?[1] Suggests that it is not and will deny many applicants their judicial review remedy. Notes that in terms of current time frames in respect of Rule 53 of the Uniform Rules of Court, an applicant can launch an application and obtain the record 180 days after internal remedies were exhausted or in the absence of such remedies. Therefore the new 15 day period is a far cry from the current 180 days which puts applicants at a distinct disadvantage and will effectively undermine judicial review in terms of PAJA as an effective mechanism for the protection of constitutional rights; particularly for the poor and marginalised. • **Recommends** that while the pre-notice of motion disclosure mechanism should be retained, the 15 day period should be extended to a more reasonable time-frame.
General	Nele Meyer	• There should be a provision that when the applicant is informed about the right to judicial review, the applicant must also be informed about the.right to request disclosure of documents.
(6)	Nele Meyer	• t is suggested not to limit the right to disclosure to documents which have been **identified by the administrator** but allow the requester to inspect all **relevant** documents subject to the provisions of

[1] Vumazonke v MEC for Social development, Eastern Cape and three similar cases 2005 (6) SA 229 (E); Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA).

		Chapter *4* of the *Promotion of Access to Information Act.* • Recommend that the period of time in which the disclosure must take place is included.
5. Application for variation of time		
(1)	Mr P Bracher	• Rules are amending the Act. • There is no provision in PAJA allowing the administrator to alter the time periods in term of the Act. There are also times when the administrator will not be party to the review. • **Recommends** that the matter should be left to section 9(1) of PAJA.
(2)	Mr P Bracher	• The current rules of the Supreme Court relating to the review of administrative and other proceedings set out a clear procedure. • **Recommends** that the rule is harmonised with the Act
6. Application for reasons		
(1)	Mr P Bracher	• This rule is not within the power of the Rules Board to make, as it It proposes to make different law from that contained in section 5(3) of PAJA.
(2)	Mr P Bracher	• This rule should also fall away.
7. Application to compel disclosure and access		

General	Mr P Bracher	• The matters dealt with in this rule are already dealt with in PAJA.
General	Mr G Quinot	• The rule as drafted does not allow for a potential challenge to an administrators decision to list documents in Part 2 of Schedule A of Form D. It is an anomaly that the rules to provide for applications to compel an administrator to furnish a list and disclose documents (Part 1 of Schedule A of form D) but is completely silent on any remedy should an administrator list a document in Part 2 of Schedule A of Form D. • **Recommends** that a further sub-rule allows for challenges to an administrator's decision to list a document in Part 2 of Schedule A of Form D.
(2)(c)	Nele Meyer	• Unclear what point in time the term "failure" refers to. Recommend that refer to the time periods of Rule 4 (5) and (6). •
(3)(b)	Nele Meyer	• Should refer to section 7 (2)(**b**) of PAJA..
(3)(b)	Mr L Van der Schyff (State legal Adviser: Western Cape Provincial Government) [PAJA 3]	• The rule refers to section 7(2)(d) of PAJA, there is no such section. • **Recommends** that reference be amended to refer to section 7(2)**(a)** of PAJA.
(3)(d)	Nele Meyer	There should be explicit reference to the time period in Rule 4(5).
Part C:		

8. Application for judicial review		
(1) –(4)	Mr P Bracher	• These rules do not add much to what is already in the rules • Also, amendments to proceedings for judicial review contained in the rules should specifically amend the existing rules of court regarding judicial review.
5(c), (d) & 7 (b), (c)	Nele Meyer	• Requires that the applicant place specifically legally relevant information that is not easily accessible to a lay-person before the court. These complex procedural requirements practically force applicants to have legal representation. Issue of accessibility. • **Recommends** that a simplified application procedure is introduced as for the Equality Courts. That it be inquisitorial, allowing the court fact-finding competencies.
(9)	Mr P Bracher	• **Recommends** that 'functionary' is defined. (For example, does it include a Cabinet Minister who would not normally be described as a functionary?)
General	Prof G Quinot	• Welcomes the citation of respondents under Rule 8 and 9, but the citation of political heads of state as nominal respondents as envisaged in s2 of the State Liability Act 20 of 1957 iis not addressed. • **Recommends** that it would be useful if the rules clarify whether the political head of the relevant organ of state should be cited nominally as suggested by the State Liability Act or whether the organ of state itself should be cited.
9. Opposition and reply		
General	Mr P Bracher	• Why not keep to the already existing rules relating to methods of service and time limits.

		• There is no reason to confuse the issue by having different provisions for judicial review applications and other applications in the same court.
10. Form of affidavit		**Part D: General**
10(2)	Mr P Bracher	• Should keep to the existing law regarding taking an oath or doing a declaration to avoid confusion, especially for commissioners of oaths. • Why should a phrase such as 'under pain of perjury now appear in a declaration? Is it perjury if the declaration is not made under oath?
		Forms
Forms A and B (request for reasons and response to request for reasons)	Mr P Bracher; Prof G Quinot	• **Recommend** that both Forms are omitted, as unlawful.
Form C (Request	Prof G Quinot	• In a number of places in Form C statements are made that a persons rights must be materially and

for disclosure)		adversely affected before she can bring judicial review proceedings under the rules (specifically item 3 of Part A). • This is not in line with the Act, section 38 of the Constitution (which refers to 'own interest', with no mention of rights), or case law on standing to enforce fundamental rights. • Section 6(1) of the Act simply states that any person may institute proceedings for judicial review of administrative action'. In terms of section 1 to qualify as administrative action it must adversely affect the rights of any person. But there is no requirement that the rights of the applicant must specifically affected or that such impact must be material. • Refers to case law providing that administrative action simply requires action that has the capacity to affect legal rights and that impact directly and immediately on individuals. It may also include action that impacts on legitimate expectations. • The restrictive approach adopted here is not justified. • **Recommends** that the requirements in Form C that require that a persons rights must be 'materially and adversely affected' to be able to bring an action for judicial review are deleted.