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BY

D E VAN LOGGERENBERG
SC Bluris LLB (PU for CHE) LLD (UPE)
Advocate of the High Court of South Africa and member of the Pretoria Bar
Extraordinary Professor of Law, University of Pretoria
Marcel Storme Chair Professor of Law, University of Ghent, Belgium, 2016–2017
Formerly Professor of Law, University of Port Elizabeth

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First Floor, Sunclare Building
21 Dreyer Street
Claremont
7708

lawproduction@juta.co.za

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SET BY GJ DU TOIT

53 Reviews

(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 chairperson 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, chairperson 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 or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.

[Paragraph *(b)* substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]
[Subrule (1) substituted by GN R2004 of 15 December 1967 and by GN R317 of 17 April 2015.]

(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 or her 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.

[Subrule (3) substituted by GN R317 of 17 April 2015.]

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

[Subrule (4) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R317 of 17 April 2015.]

(5) Should the presiding officer, chairperson 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 or she shall—

(a) within fifteen days after receipt by him or her of the notice of motion or any amendment thereof deliver notice to the applicant that he or she intends so to oppose and shall in such notice appoint an address within 15 kilometres of the office of the registrar at which he or she will accept notice and service of all process in such proceedings, and

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

[Subrule (5) substituted by GN R317 of 17 April 2015 and by GN R317 of 17 April 2015.]

(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.

General. As a rule, if the complaint is against the *result* of the proceedings of a magistrate's court, the appropriate remedy is by way of appeal; if the *method* of the proceedings is attacked, the remedy is to bring the matter in review. See further, in this regard, the notes to s 21(1)*(b)* of the Superior Courts Act 10 of 2013 s v 'Appeal and review' in Volume 1, Part A2.

Review of the proceedings of magistrates' courts is a matter which falls entirely within the jurisdiction of the High Court. In terms of s 21(1)*(b)* of the Superior Courts Act 10 of 2013 a division of the High Court has the power to review the proceedings of all magistrates' courts within its area of jurisdiction.

The grounds of review of proceedings of magistrates' courts are set out in s 22(1) of the Superior Courts Act 10 of 2013. The *procedure* for bringing a matter on review is regulated by this rule.[1] The notes to this rule do not, therefore, deal with the grounds upon which the proceedings of magistrates' courts may be brought under review: these are considered in the notes to s 22 of the Superior Courts Act 10 of 2013 in Volume 1, Part A2.

The proceedings of the High Court are not subject to review.

The primary purpose of rule 53 is to facilitate and regulate applications for review.[2] In substance, the draftsman of the rule has done no more than adapt the ordinary procedure under rule 6 to the special exigencies of a particular kind of application on notice of motion. An applicant is still obliged to proceed by notice of motion; the parties to be joined, cited and served in effect remain unchanged, save that the person officially in possession of the record is to be invited to (i) show cause why the relief sought should not be granted; and (ii) transmit the record to the registrar.[3]

Our courts have recognized that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function.[4]

While there is some similarity between trial discovery and review proceedings, there are fundamental differences between the two which should not be overlooked in applications for review.[5]

[1] See *Brenner's Service Station and Garage (Pty) Ltd v Milne* 1983 (4) SA 233 (W) at 238E. See also *Old Mutual Finance (Pty) Ltd v Makalapetlo* 2018 (3) SA 258 (LP) where it was held (at 262E–264F) that magistrates cannot *mero motu* submit judgments in civil cases to the High Court for review.

[2] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661E; *Cape Town City v South African National Roads Authority* 2015 (3) SA 386 (SCA) at 415F; *Helen Suzman Foundation v Judicial Service Commission* 2017 (1) SA 367 (SCA) at 374F–G, overruled, but not on this point, in *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC); *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP) at 262A–G; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 9F–G.

[3] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660I–661B.

[4] *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA) at 501C–E; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 10B–C.

[5] *City of Cape Town v South African National Roads Authority* 2015 (3) SA 386 (SCA) at 415G–417A. In *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) the majority stated the difference as follows (at 15B–C):

> 'It is helpful to point out that the rule 53 process differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. So, relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit.'

The provisions of the rule are not peremptory and the court can condone non-compliance with its provisions in appropriate circumstances.[1] See further the notes to subrule (1) sv 'Shall be by way of notice of motion' below.

As a general rule the High Court will not by way of entertaining an application for review interfere with incompleted proceedings in a magistrate's court.[2] It will, however, exercise its inherent power to restrain illegalities in magistrates' courts in rare cases where grave injustice might otherwise result or where justice might not by other means be attained.[3] If, for example, an applicant for review can show that the refusal of a magistrate to recuse himself causes serious prejudice resulting in a miscarriage of justice, he need not wait until the termination of the trial before going on review.[4]

No statutory period is prescribed within which proceedings for review which are not covered by the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') must be brought, but it is clear that they must be brought within a reasonable time.[5] If it is alleged that the applicant did not bring the matter to court within a reasonable time, it is for the court to decide *(a)* whether there was an unreasonable delay;[6] and *(b)*, if so, whether, in all the circumstances, the unreasonable delay ought to be condoned.[7] In so far as *(b)* is concerned, the court

[1] *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 (2) SA 366 (C) at 368F. See also *Steyn v Delport* 1973 (1) SA 822 (T); *Motaung v Mukubela and Another, NNO; Motaung v Mothuba, NO* 1975 (1) SA 618 (O) at 625F–626A; *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 673C–G; *Government of the Republic of South Africa v Midkon (Pty) Ltd* 1984 (3) SA 552 (T) at 558I; *Rampa v Rektor, Tshiya Onderwysskollege* 1986 (1) SA 424 (O) at 429G; *Nakani v Attorney-General, Ciskei* 1989 (3) SA 655 (Ck) at 656A–C; *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A). In *Beinash t/a Beinash & Co v Reynolds NO* 1999 (1) SA 1094 (W) the court held (at 1095C) that in an application to set aside the decision of a taxing master to tax a bill, compliance with the provisions of rule 53 are not required unless the contents of the bill or the manner in which it was taxed were challenged. In *Nelson Mandela Bay Metro v Erastyle* 2019 (3) SA 559 (ECP) it was held (at 565E–567I) that proceedings by the State to review the conduct of its own officials on the basis of legality could be instituted by way of action. Consequently, it is not required of a plaintiff who institutes such an action to seek condonation for its non-compliance with rule 53 (at 568A).

[2] See, for example, *Lawrance v Assistant Resident Magistrate of Johannesburg* 1908 TS 525; *Ginsberg v Additional Magistrate, Cape Town* 1933 CPD 357 at 361; *Ellis v Visser* 1956 (2) SA 117 (W) at 120–1; *Sita v Olivier NO* 1967 (2) SA 442 (A) at 447E–F; *Haysom v Additional Magistrate, Cape Town* 1979 (3) SA 155 (C) at 160B–C; *Mendes v Kitching NO* 1996 (1) SA 259 (E) at 269A; *Motata v Nair NO* 2009 (2) SA 575 (T) at 578H–I; *Jofwana v Regional Court Magistrate* 2019 (6) SA 524 (ECM) at 527D–E.

[3] *R v Marais* 1959 (1) SA 98 (T) at 101–2; *Wahlhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A) at 119; *Goncalves v Addisionele Landdros, Pretoria* 1973 (4) SA 587 (T) at 596F; *Haysom v Additional Magistrate, Cape Town* 1979 (3) SA 155 (C) at 160E; *Newell v Cronje* 1985 (4) SA 692 (E) at 699D; *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 638E–G; *Mendes v Kitching NO* 1996 (1) SA 259 (E) at 269D–E; *Motata v Nair NO* 2009 (2) SA 575 (T) at 578I–580A; *Jofwana v Regional Court Magistrate* 2019 (6) SA 524 (ECM) at 527E.

[4] In *Newell v Cronje* 1985 (4) SA 692 (E) an unwarranted recusal was on review set aside and continuation of the trial ordered.

[5] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 38H–42D; *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) at 798A–F; *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at 321B; *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) at 606G–H and 612D–E; *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at 649I–650B; *Madikizela-Mandela v Executors, Estate Late Mandela* 2018 (4) SA 86 (SCA) at 91A–D.

[6] Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances, including any explanation that is offered for the delay (*Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1986 (2) SA 57 (A) at 75C–E; *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at 321F–H; *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* 2011 (3) SA 434 (WCC) at 453I–454B; *Madikizela-Mandela v Executors, Estate Late Mandela* 2018 (4) SA 86 (SCA) at 91D–93C).

[7] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39C–D, 40E–41A and 43E; *Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George* 1983 (4) SA 689 (C) at 697D–698A; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1986 (2) SA 57 (A) at 75D–83C; *Jeffery v President, SA Medical and Dental Council* 1987 (1) SA 387 (C) at 390D; *SA*

exercises a judicial discretion, taking into consideration all the relevant circumstances.[1] Among these circumstances are the giving of a satisfactory explanation; the absence of prejudice to the complaining party; and the public interest in the finality of administrative decisions and the exercise of administrative functions.[2] It is in the interests of justice that the court should be slow to exercise its discretion in a manner which undermines the principle of legality.[3] It has been held that,[4] where an applicant failed to provide a basis for condoning his unreasonable delay in the lodging of the application for review or in the events taking place after such application had been lodged, the applicant lost his right to complain.[5]

Delay in initiating review proceedings is pre-eminently a point which the respondent or the court should raise, unless the delay is so manifestly inordinate that an applicant can be expected to explain the delay in his founding affidavits. If such an objection is raised by the respondent, the applicant can deal with it in his replying affidavits.[6] While the court may raise the issue of an unreasonable delay *mero motu*, both at common law and under s 7(1) of PAJA,[7] it should not lightly do so where a respondent specifically abstains from doing so. Should the court raise it, it should give the parties an opportunity to supplement their affidavits in order to deal specifically with the apparent delay.[8] In considering a delay either under the provisions of PAJA or beyond it, a court should apply the same determining criterion, namely, the interests of justice.[9] In condoning a government department's undue delay in bringing its counter-application for review, Khampepe J, writing for the majority of the Constitutional Court in *Department of Transport v Tasima (Pty) Ltd*,[10] stated the following:[11]

Transport Services v Chairman, Local Road Transportation Board, Cape Town, 1988 (1) SA 665 (C) at 668E–F; *Sedgefield Ratepayers' and Voters' Association v Government of the Republic of SA* 1989 (2) SA 685 (C) at 696C–E; *National Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry v Photocircuit SA (Pty) Ltd* 1993 (2) SA 245 (C) at 250F–J *Mnisi v Chauke* 1994 (4) SA 715 (T) at 719G–720C; *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) at 798A–802A; *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA) at 141I–142A; *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at 321E–H; *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) at 607A–B, 609G–I, 613B and 614D–F; *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at 649I–650F; *Madikizela-Mandela v Executors, Estate Late Mandela* 2018 (4) SA 86 (SCA) at 93D–97E.

[1] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39C–D; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1986 (2) SA 57 (A) at 86E–F; *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at 321G, *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) at 607C, 610I and 614D–E; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2010 (1) SA 333 (SCA) at 346D–F and 347I–348B; *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* 2011 (3) SA 434 (WCC) at 454B–C.

[2] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41; *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at 321C–D; *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) at 606H and 612E–613A; *Madikizela-Mandela v Executors, Estate Late Mandela* 2018 (4) SA 86 (SCA) at 93C–97E. See also *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at 649–50 and *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* 2011 (3) SA 434 (WCC) at 454H–I.

[3] *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* 2011 (3) SA 434 (WCC) at 454D–G.

[4] *Du Plessis v Prokureursorde van Transvaal* [2002] 1 All SA 180 (T).

[5] *Lion Match Ltd v Paper Printing Wood & Allied Workers Union* 2001 (4) SA 149 (SCA) at 158C–E.

[6] *Scott v Hanekom* 1980 (3) SA 1182 (C) at 1193C–G.

[7] *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA) at 141G; *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA 42 (CC) at 64F–65B. See further the notes s v 'PAJA' below.

[8] *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA) at 141H–J; *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA 42 (CC) at 64G–65B.

[9] *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA) at 496B–497A and the cases there referred to.

[10] *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC).

[11] At 664B–D (footnotes omitted).

'While a court "should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power", it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.'

Proceedings for review are not barred by the fact that the applicant first essayed an unsuccessful appeal against the order of the magistrate's court, which appeal failed on the ground that the order was not appealable,[1] but where an appeal has been heard on the merits and a final decision been given by the appeal court, the matter cannot be reopened by way of review of the lower court's proceedings.[2] It has, therefore, been held that where there is only an appeal before the court and it appears that there might be relief open to the appellant by way of review, it would not be proper for the court of appeal to dismiss the appeal, thus making it impossible for the appellant thereafter to get relief by way of review. In such a case the court should at least postpone its decision until the appellant has had an opportunity to bring review proceedings.[3]

PAJA. The Promotion of Administrative Justice Act 3 of 2000 ('PAJA') is in substance a codification of the rights contained in s 33[4] of the Constitution of the Republic of South Africa, 1996.[5] In *Van Zyl v Government of the Republic of South Africa*[6] it was said that review applications, in the ordinary course of events, have to be brought under this rule unless covered by PAJA. Although it is not necessary for a litigant who seeks to review administrative action to specify the provision of PAJA relied on, such litigant should identify clearly both the facts on which the cause of action is based and the legal basis of such cause of action.[7]

[1] *McLaren v Wasser* 1915 EDL 287; *Steyn v Delport* 1973 (1) SA 822 (T) at 825H–826A.
[2] *Mahomed v Middlewick NO* 1917 CPD 539; *R v D* 1953 (4) SA 384 (A).
[3] *R v Parmanand* 1954 (3) SA 833 (A) at 838D–F; *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung* mbH 1976 (3) SA 352 (A) at 368H–369F.
[4] Section 33 reads as follows:
'**33 Just administrative action**
(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must—
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.'
[5] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at 364G–H. See also *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) at 622A–B; *Transnet Ltd v Chirwa* 2007 (2) SA 198 (SCA) at 207B–E; *Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga* 2008 (2) SA 570 (T) at 577A–D; *Thebe ya Bophelo Healthcare v NBC for the Road Freight Industry* 2009 (3) SA 187 (W) at 200B, *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at 237G–H; and see *Reader v Ikin* 2008 (2) SA 582 (C) at 586B–F.
[6] 2008 (3) SA 294 (SCA) at 305G. See also *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape* 2008 (6) SA 423 (EqC) at 431E–432A.
[7] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at 507C–D; *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E) at 383E–G. In *Bhugwent v JSE Ltd* 2010 (3) SA 335 (GSJ) it was held (at 340D–J) that for a decision in terms of PAJA to have been taken which is capable of review, all or at least some of the following steps must have been completed in the decision-making process:
'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.

Under PAJA proceedings for judicial review must be instituted without unreasonable delay[1] and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.[2] Where it appears to the court on the papers that there has been a manifest delay and that the proceedings may not have been instituted within the period of 180 days, it will be entitled to raise the point itself as such a delay will be unreasonable per se and the court will not have the power to entertain the review.[3] In such circumstances the applicant should then be given an opportunity to deliver a further affidavit to explain the apparent delay, or apply for an extension in terms of s 9 of PAJA. It will, of course, be entitled not to do so and to argue the matter on the papers as they stand.[4] The period of 180 days may be extended for a fixed period by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.[5] In this regard a substantive application ought to be made when the applicant for review first approach the court for relief.[6] The court

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.

Ultimately the facts in each circumstance will have to be evaluated to determine whether or not the processes referred to above have been complied with, or to what degree these processes exist, for purposes of deciding whether an administrative decision had been taken.'

[1] The rationale for the rule that an application for the review of an administrative decision should be launched without undue delay is predicated upon a desire to avoid prejudice to those who may be affected by the impugned decision (*Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at 367J–368G).

[2] Section 7(1)*(b)* of PAJA. See also *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* 2011 (3) SA 434 (WCC) at 453I–454B and *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at 363G–J. Before 'the action' nothing happens. In the final analysis it is awareness of 'the action' that sets the clock ticking. The words 'the action' mean the 'administrative action', ie 'the decision' that is challenged in the review proceedings (*Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA 42 (CC) at 66B–C). In other words, the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought to have become known) to the party seeking review and not from the date when such party first became aware that the administrative action was tainted by irregularity (*Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 (2) SA 199 (SCA) at 207H–208A; *Cape Town City v Aurecon (Pty) Ltd* 2017 (4) SA 223 (CC) at 238E–239D; *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at 364E–I).

[3] *Mostert NO v Registrar of Pension Funds* 2018 (2) SA 53 (SCA) at 61G.

[4] *Mostert NO v Registrar of Pension Funds* 2018 (2) SA 53 (SCA) at 61G–H.

[5] Section 9(1)*(b)* of PAJA. See also *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* 2011 (3) SA 434 (WCC) at 453I–454B; *Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 (2) SA 199 (SCA) at 208; *Cape Town City v Aurecon (Pty) Ltd* 2017 (4) SA 223 (CC) at 239D–241D; *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at 365A.

[6] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at 365A–B. Where it appears from the applicant's papers that there had been a delay of more than 180 days, and there is no application for an extension of the period, a respondent is entitled to raise the point in argument that the court has no power to hear the review. This is not raising a defence—it is a submission that, on the applicant's own papers, the court has no power to entertain the review (*Mostert NO v Registrar of Pension Funds* 2018 (2) SA 53 (SCA) at 61I–J).

or tribunal may grant an application for extension where the interests of justice so require.[1] The question whether the interests of justice require the grant of an extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.[2] Although a consideration of the prospects of success of the application for review requires an examination of its merits, this does not encompass their determination.[3]

An organ of state seeking to review its own decision must do so under the principle of legality and cannot rely on PAJA.[4] The approach to delay in bringing a legality review is as follows:[5]

(a) First, it must be examined whether the delay was reasonable. This is to be answered by considering the explanation offered for the delay. If the delay, covering its entire period, can be explained and justified, it was reasonable, and the matter could be heard;[6]

(b) If the delay was unreasonable, the second enquiry is whether the interests of justice require it to be overlooked, and the matter heard. This is to be decided by considering four factors: (1) the potential prejudice to affected parties as well as the consequences of setting the decision aside; (2) the nature of the decision and the challenge to it (the asserted illegality); (3) the applicant's conduct; and (4) the court's duty to declare an unlawful decision invalid.[7]

During 2009 Rules for the Judicial Review of Administrative Action made by the Rules Board for Courts of Law under s 7 of PAJA were published.[8] In *Lawyers for Human Rights v Rules Board for Courts of Law*[9] these rules were declared to be inconsistent with the Constitution of the Republic of South Africa, 1996, unlawful and invalid to the extent set out in the following order that was made:

'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 ... ("the new rule"), 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 documents" in Rule 2 of the new rules of the following definition:

[1] Section 9(2) of PAJA. See also *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* 2011 (3) SA 434 (WCC) at 454I–455D; *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at 365I–366B; and see *Cape Town City v Aurecon (Pty) Ltd* 2017 (4) SA 223 (CC) at 239G–H.

[2] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at 365I–366B; and see *Cape Town City v Aurecon (Pty) Ltd* 2017 (4) SA 223 (CC) at 239G–H.

[3] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at 366B–I.

[4] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at 344B. See also *BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation* 2019 (6) SA 443 (ECG); *Swifambo Rail Leasing (Pty) Ltd v Prasa* 2020 (1) SA 76 (SCA).

[5] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC). See also *BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation* 2019 (6) SA 443 (ECG).

[6] At 344I–345A and 346B–C.

[7] At 346D–353C.

[8] Under GN R966 of 9 October 2009 (*GG* 32622 of 9 October 2009).

[9] [2012] 3 All SA 153 (GNP).

"'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 the decision which is sought to be reviewed and set aside.'

On 4 November 2019 new Administrative Review Rules, made by the Rules Board for Courts of Law under s 7 of PAJA, came into operation.[1] Under the Administrative Review Rules an application for review in terms of PAJA must be brought in terms of rule 6 or rule 53 of the Uniform Rules of Court, as the case may be. Prior to the coming into operation of the new rules it was held that a failure to follow rule 53 in reviewing a decision of an administrative organ was not necessarily irregular, as the rule existed primarily in the interests of an applicant, and an applicant could waive procedural rights. An applicant could, however, not elect to disregard the provisions of the rule to impinge upon the procedural rights of a respondent. In a review application if the rights of a member of the public were involved, the latter was entitled to have the full record before the court and to have the reasons for the impinged decisions available.[2]

The right to seek judicial review may be deferred until the aggrieved person has exhausted the domestic remedies available to him in terms of the governing legislation or, in the case of a private organization, in terms of the agreement between him and the organization concerned.[3]

[1] Under GN R1284 of 4 October 2019 (*GG* 42470 of 4 October 2019). GN R1284 repealed GN R966 of 9 October 2009. The rules are reproduced in Volume 3, Part V1.

[2] *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons* 2003 (3) SA 313 (SCA) at 319F–G and 320A–C. In *Nelson Mandela Bay Metro v Erastyle* 2019 (3) SA 559 (ECP) it was held (at 565E–567I) that proceedings by the State to review the conduct of its own officials on the basis of legality could be instituted by way of action. It was held (at 570F) that the suggestion that a review (whether founded upon PAJA or the principles of legality) by action proceedings necessarily denied an affected party procedural benefits and defences, was contrary to authority. It was held, further (at 567H–I and 570G–H), that the plaintiff had indeed formally initiated a process to invoke the court's authority to review the conduct and decisions of plaintiff's office bearers. It had given due and proper notice to parties affected thereby; it had fully pleaded the basis upon which it sought relief; and it had framed the declaratory relief it sought as relief precedent to its consequential monetary claims against the defendants. It had therefore met the procedural requirements without prejudice to the rights of the defendants; the defendants remained vested with all of the procedural protections provided by the Uniform Rules of Court. Consequently, it was not required of the plaintiff to seek condonation for its non-compliance with rule 53 (at 568A).

[3] This paragraph has been referred to with approval in *Meepo v Kotze* 2008 (1) SA 104 (NC) at 118E–F. PAJA has reformed the common law. Section 7(2) of PAJA reads as follows:

'2 *(a)* Subject to paragraph *(c)*, no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph *(c)*, a court or tribunal must, if it is not satisfied that any internal remedy referred to a paragraph *(a)* has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

It is therefore compulsory for aggrieved parties in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of an exemption order in terms of s 7(2)*(c)* (*Nichol v Registrar of Pension Funds* [2006] 1 All SA 589 (SCA) at 595*a–b*; *Reader v Ikin* 2008 (2) SA 582 (C) at 586B–F; and see *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) at 16A–G; *City of Cape Town v Reader* 2009 (1) SA 555 (SCA) at 564F–G; *Sumbana v Head of Department of Public Works, Limpopo*

The Arbitration Act. An arbitration award in terms of the Arbitration Act 42 of 1965 does not fall within the purview of 'administrative action' as contemplated in s 33(1) of the Constitution of the Republic of South Africa, 1996.[1] The hallmark of arbitration is that it is an adjudication flowing from the parties' consent to the arbitration. The parties themselves define the powers of adjudication and are free to modify or withdraw the arbitrator's powers.[2] Section 33(1) of the Arbitration Act 42 of 1965 sets out the grounds for review[3] and the procedure is in accordance with this rule.

Other statutes. Some statutes authorize special or automatic review. Others do not. In the latter case the court may, depending of the circumstances of the matter, exercise its inherent powers to correct proceedings in lower courts within its jurisdiction despite the fact that neither the relevant Act nor any other statutory provision expressly provides for such review.[4] In the absence of any express provision for automatic review in any Act, a review to the High Court would be a review in terms of this rule at the instance of one of the parties.[5] It falls outside the scope of this work to list the relevant statutes.

See further the notes to subrule (1) sv 'Save where any law otherwise provides' below.

Subrule (1) 'Save where any law otherwise provides.' The form of review contemplated under s 33(1) and (2) of the Arbitration Act 42 of 1965 is *sui generis* and the provisions of this rule do not apply thereto.[6]

Section 46 of the Small Claims Courts Act 61 of 1984 does not contemplate a procedure for the review of the proceedings of a small claims court other than that prescribed in this rule.[7]

Province 2009 (3) SA 64 (VHC) at 70F–G and 72B–C; *Koyabe v Minister of Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) at 343D–346A; *Basson v Hugo* 2018 (3) SA 46 (SCA) at 51B–55G). What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue. Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be 'objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and our law'; and available if it can be pursued 'without any obstruction, whether systemic or arising from unwarranted administrative conduct'. An internal remedy is adequate if it is capable of redressing the complaint. See, in this regard, *Koyabe v Minister of Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) at 343D–346A; *Basson v Hugo* 2018 (3) SA 46 (SCA) at 51B–F, 52J–55G and 62B–63E.

[1] *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) at 673E–H.

[2] *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) at 673H–I.

[3] Section 33(1) of the Arbitration Act 42 of 1965 contains the following three grounds of review: (i) where any member of the arbitration tribunal has misconducted himself in relation to his or her duties as arbitrator or umpire; (ii) where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; (iii) where an award has been improperly obtained. See also *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at 292C–297B; *Bantry Construction Services (Pty) Ltd v Raydin Investments (Pty) Ltd* 2009 (3) SA 533 (SCA) at 541I–542B; *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* 2018 (5) SA 462 (SCA) at 465F–466A; *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd* 2020 (2) SA 295 (SCA) at paragraph [11]. Section 33 of the Act applies to an arbitration appeal tribunal and its award in the same way as it applies to an arbitration and an arbitral award (*Hos + Med Medical Aid Scheme v Thebe ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd* 2008 (2) SA 608 (SCA) at 610D–F). The application for review is made to court after due notice to all other parties.

[4] See *In re Moatsise Boedel* 2002 (4) SA 712 (T) at 717A and 717F.

[5] *Sentrale Karoo Distrikraad v Roman* 2001 (1) SA 711 (LCC).

[6] *Government of the Republic of South Africa v Midkon (Pty) Ltd* 1984 (3) SA 552 (T) at 558F–I.

[7] *De Kock v Simon's Bak- en Spuitverfwerk (Edms) Bpk* 1989 (3) SA 189 (C); *Kele v Trafalgar Garage* 1989 (4) SA 1011 (E).

The right of 'appeal' under s 31 of the Estate Agency Affairs Act 112 of 1976 connotes a hearing in the nature of a review, but it is not a review within the ambit of this rule.[1]

Taxation, if irregularly performed, is an irregular proceeding within the meaning of rule 30(1) and even if such an irregular taxation is reviewable under this rule, it is cognizable under rule 30 so long as the relief sought falls within the ambit of that rule.[2]

The proceedings at an inquest under the Inquests Act 58 of 1959 are reviewable under this rule; such proceedings do not constitute 'criminal proceedings' as intended in Chapter 30 of the Criminal Procedure Act 51 of 1977 and are not reviewable in terms of the provisions of that Chapter.[3]

'All proceedings to bring under review the decision or proceedings.' These words make it clear that the applicability of the provisions of the rule is not limited to 'proceedings' but also embraces 'decisions' which do not necessarily comprehend proceedings.

'Shall be by way of notice of motion.' A party who is obliged by this subrule to bring proceedings by way of notice of motion, in the event of a conflict of fact arising on the papers which can be resolved only by oral evidence, cannot be penalized on the basis that he should have anticipated the conflicts and proceeded in another way.[4] Similarly, a party who seeks to discharge an onus of proof which rests upon him by asking for an opportunity to adduce oral evidence or to cross-examine deponents to answering affidavits, should not lightly be deprived of that opportunity in view of the fact that such a party was obliged to proceed by way of notice of motion proceedings.[5]

The provisions of this subrule are not peremptory[6] and in appropriate circumstances the court is entitled to condone non-compliance with the provisions[7] by, for example, hearing review proceedings brought by way of summons[8] or by way of notice of motion under rule 6.[9]

Procedure by way of a rule *nisi*, with or without the grant of interim relief, may in appropriate cases be utilized in connection with review proceedings under this rule.[10] By reason

[1] *Hanley v Estate Agents Board* 1978 (3) SA 281 (T).
[2] *Brenner's Service Station and Garage (Pty) Ltd v Milne* 1983 (4) SA 233 (W) at 238E.
[3] *In re Mjoli* 1994 (2) SA 815 (T) at 824C (also reported at 1994 (1) SACR 336 (T)). See also *Padi v Botha NO* 1995 (2) SACR 663 (W) at 675*a–c*.
[4] *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B) at 497E–G; *Chief Motlegi v President of Bophuthatswana* 1992 (2) SA 480 (B) at 488D; *Federal Convention of Namibia v Speaker, National Assembly of Namibia* 1994 (1) SA 177 (NmHC) at 193A–B.
[5] *AECI Ltd v Strand Municipality* 1991 (4) SA 688 (C) at 698J–699A.
[6] *S v Baleka* 1986 (1) SA 361 (T) at 397J–398A; *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 (2) SA 366 (C) at 368E–H; *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661H–662B; *Federal Convention of Namibia v Speaker, National Assembly of Namibia* 1994 (1) SA 177 (NmHC) at 193C; *Nelson Mandela Bay Metro v Erastyle* 2019 (3) SA 559 (ECP) at 565C–570H.
[7] Decisions to the contrary, such as *Secretary for the Interior v Scholtz* 1971 (1) SA 633 (C) at 637F, *South African Pharmacy Board v Norwitz* 1978 (3) SA 1001 (C) and *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B) at 497C–D must now be regarded as having been superseded.
[8] *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 (2) SA 366 (C) at 368F. In *Steyn v Delport* 1973 (1) SA 822 (T) the court condoned the fact that a decision of a magistrate made in excess of his jurisdiction had been challenged by way of appeal instead of review under rule 53. In *Nelson Mandela Bay Metro v Erastyle* 2019 (3) SA 559 (ECP) it was held (at 565E–567I) that proceedings by the State to review the conduct of its own officials on the basis of legality could be instituted by way of action. Consequently, it is not required of a plaintiff who institutes such an action to seek condonation for its non-compliance with rule 53 (at 568A).
[9] *Administrateur, Transvaal v Traub* 1989 (4) SA 731 (A); *Coin Security Group (Pty) Ltd v Smit NO* 1992 (3) SA 333 (A); *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A); *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A).
[10] *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674D–676F. See also *Pietermaritzburg City Council v Local Road Transportation Board* 1959 (2) SA 758 (N); *National Transport Commission v Airoadexpress (Pty) Ltd* 1981 (3) SA 109 (N); *Metro Transport (Pty) Ltd v National Transport Commission* 1981 (3) SA 114 (W); *Coin Security Group (Pty) Ltd v Smit NO* 1991 (2) SA 315 (T), 1992 (3) SA 333 (A).

of the sudden and sometimes devastating impact of the decisions of public bodies or officialdom, applications for the review of such decisions may require urgent handling and, in proper circumstances, the grant of interim relief.[1]

'Of any tribunal.' These words are wide enough to include a domestic tribunal of contractual origin.[2]

'Board' The rule applies where a decision has been arrived at by, *inter alios*, a board presided over by a chairman, after something in the nature of proceedings (of which a record is kept) have taken place before it. The proceedings may be quasi-judicial or purely administrative.[3]

'Directed and delivered.' The word 'directed' is not defined in the rules but it seems to be 'an appropriate word to describe the process whereby a respondent is cited in motion proceedings'.[4] 'Delivered' is defined in rule 1 to mean 'serve copies on all parties and file the original with the registrar'. Within the present context 'deliver' accordingly means service upon the persons and parties concerned of a copy of the notice of motion.[5]

'By the party seeking to review.' If the founding affidavit in proceedings for review is made by an applicant's attorney, it should be clearly stated that the attorney is authorized to bring the application for review on behalf of his client.[6]

'To the magistrate, presiding officer or chairperson.' In an application for the review of a decision of a statutory board, the notice of motion should be directed and delivered to the chairperson of the board in the chairperson's representative capacity. The rule does not require the separate citation of the board.[7] In the absence of prejudice to any party the court is entitled to condone the incorrect citation of a party.[8]

'All other parties affected.' This would include the opposite party, or parties, in the proceedings which it is sought to bring under review.[9]

Subrule (1)*(b)*: 'The record of such proceedings sought to be corrected or set aside.' The requirement that the decision-maker file the record of decision is primarily intended to operate in favour and to the benefit of an applicant in review proceedings.[10] It helps ensure that review proceedings

[1] *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674C–D. See also *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) and *Nasionale Bierbrouery (Edms) Bpk v John NO* 1991 (1) SA 85 (T); *Magano v District Magistrate, Johannesburg (1)* 1994 (4) SA 169 (W) at 172A–C.

[2] *Blacker v University of Cape Town* 1993 (4) SA 402 (C) at 407G; *Klein v Dainfern College* 2006 (3) SA 73 (T) at 79D–83F.

[3] *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 274H; and see *Kennasystems South Africa CC v Chairman, Board on Tariffs and Trade* 1996 (1) SA 69 (T).

[4] *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 670D.

[5] *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 670E.

[6] *Levinsohn's Meat Products (Edms) Bpk v Addisionele Landdros, Keimoes* 1981 (2) SA 562 (NC).

[7] *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) overruling *Prospect Investment Co Ltd v Chairman, Community Development Board* 1981 (3) SA 500 (T). See also *SAR & H v Chairman, Bophuthatswana Central Road Transportation Board; SATS v Chairman, Bophuthatswana Central Road Transportation Board* 1982 (3) SA 629 (B).

[8] *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 673C–G.

[9] *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 670C. See also *SAR & H v Chairman, Bophuthatswana Central Road Transportation Board; SATS v Chairman, Bophuthatswana Central Road Transportation Board* 1982 (3) SA 629 (B).

[10] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660E–H and 661H–I; *Ekuphumleni Resort (Pty) Ltd v Gambling and Betting Board, Eastern Cape* 2010 (1) SA 228 (E) at 232F–233C; *Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC) at 503D–E, overruled, but not on this point, in *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC); *Cape Town City v South African National Roads Authority* 2015 (3) SA 386 (SCA) at 415A–G; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 9F–G.

are not launched in the dark.[1] An applicant should not be deprived of the benefit of this procedural right unless there is clear justification therefor.[2] In this regard it has been held[3] that compliance with rule 53 regarding time frames and providing a complete record is not just a procedural process, but is a substantive requirement which serves to ensure that the substance of the decision is properly put to the fore at an early stage; any attempt to frustrate this should be met with displeasure by our courts. An applicant is entitled to waive the requirements of the subrule.[4]

The purpose of the record is to enable the applicant and the court fully to assess the lawfulness of the decision-making process.[5] It allows the applicant to interrogate the decision and, if necessary, to supplement his grounds of review under subrule (4).[6] Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution of the Republic of South Africa, 1996, to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.[7] The record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponents.[8]This requires 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'.[9]

[1] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660D–E; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 9F.

[2] *Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC) at 503F and the authorities there referred to, reversed on appeal, but not on this point, in *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC). As to the 'virtually institutionalised disregard for the rules and practices of the court by functionaries in ... refugee-status-decision judicial-reviews', and the dismay expressed by the Western Cape Division of the High Court with the situation, see *Tshiyombo v Refugee Appeal Board* 2016 (4) SA 469 (WCC) at 482A–483F.

[3] *General Council of the Bar v Jiba* 2017 (2) SA 122 (GP) at 161I–162D, overturned on appeal, but not on this point, in *Jiba v General Council of the Bar* 2019 (1) SA 130 (SCA).

[4] *Motaung v Mukubela and Another NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 625H–626A.

[5] In *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) the Constitutional Court held (at 608C–D):

> 'Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function.'

[6] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660D–G and 662F–H; *Comair Ltd v Minister of Public Enterprises* 2014 (5) SA 608 (GP) at 617A–D; *Cape Town City v South African National Roads Authority* 2015 (3) SA 386 (SCA) at 415A–E; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 10A.

[7] *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA) at 501C–E; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 10B–C. See also Sejako Senatle 'Review procedure—extent of record on review' 2014 (November) *De Rebus* 42.

[8] *Lawyers for Human Rights v Rules Board for Courts of Law* [2012] 3 All SA 153 (GNP) at paragraph [23]; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 10C–D.

[9] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660G; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 10D–E.

The right to open justice (ie that the courts must be open to the public) includes the right of access to court files. Hence the so-called implied-undertaking rule, in terms of which parties are prohibited from using discovered documents for purposes other than the litigation in question, is unconstitutional and does not form part of South African Law. The implied-undertaking rule could, accordingly, not be used to bar access of a rule 53 record.[1]

The subrule expressly provides only for 'the magistrate, presiding officer, chairperson or officer, as the case may be' to despatch the record to the registrar. No provision is made to seek documents alleged to be the record or portions thereof from third parties.[2] The provisions of rule 30A do not find application in such event.[3] The provisions of the Promotion of Access to Information Act 2 of 2000 could, however, be employed to obtain the documents sought.[4]

The keeping of a record is not a prerequisite for the applicability of the rule; in other words, proceedings may be brought under review despite the fact that no record of the proceedings sought to be corrected or set aside had been kept.[5]

The whole record of the proceedings sought to be corrected or set aside, whether or not it is relevant to the application for review, need not be furnished: only that part of the record relevant to the decision or ruling sought to be reviewed need be furnished.[6] Information is relevant if it throws light on the decision-making process and the factors that were likely at play in the mind of the decision-maker.[7]

Privileged information may be excluded from the record.[8] The fact that documents contain information of a confidential nature does not per se confer on them any privilege against disclosure.[9]

In *Helen Suzman Foundation v Judicial Service Commission*[10] the issue to be decided by the Constitutional Court was whether the deliberations of the Judicial Service Commission ('the JSC'), the body which selects judges for appointment by the President, formed part of the rule 53 record on review of its decision to select certain candidates for appointment. The majority of the Court held[11] that the issue had to be considered in two stages: *(a)* whether deliberations in general ought to be excluded from rule 53 records; and *(b)* whether the JSC's deliberations in particular ought to be excluded.

[1] *Cape Town City v South African National Roads Authority* 2015 (3) SA 386 (SCA) at 396C–417A and 421G–423D.
[2] *Stevens v Swart NO* 2014 (2) SA 150 (GSJ) at 155D.
[3] *Stevens v Swart NO* 2014 (2) SA 150 (GSJ) at 156D–E.
[4] *Stevens v Swart NO* 2014 (2) SA 150 (GSJ) at 156A–B
[5] *Secretary for the Interior v Scholtz* 1971 (1) SA 633 (C) at 637A–D.
[6] *Muller v The Master* 1991 (2) SA 217 (N) at 219J–220C; *Ekuphumleni Resort (Pty) Ltd v Gambling and Betting Board, Eastern Cape* 2010 (1) SA 228 (E) at 233D; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 11A.
[7] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 11B.
[8] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 11A–D. In *Comair Ltd v Minister for Public Enterprises* 2014 (5) SA 608 (GP) it was held (at 618C) that documents that are privileged are not per se to be excluded from the record. If such documents are relevant they should be included but their discovery could be limited by agreement between the parties or by order of court.
[9] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 11D and 29G–30H. In *Cape Town City v South African National Roads Authority* 2015 (3) SA 386 (SCA) Ponnan JA stated (at 416G–H): '[A]s rule 53 will only ever apply to the disclosure of documents by public bodies, I entertain some doubt as to whether such body can invoke the right to privacy to protect from disclosure documents relied upon by it to make its decisions. That does not mean that public bodies never have a claim to keep their documents confidential. But any claim of confidentiality arises from other interests such as security or perhaps even the privacy rights of persons mentioned in the documents, but not from its right to privacy.'
[10] 2018 (4) SA 1 (CC).
[11] At 12G.

As to *(a)* the majority held that:[1]

(i) the filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker;

(ii) a rule 53 record is an invaluable tool in the review process which may help *(a)* to shed light on what happened and why; *(b)* to give the lie to unfounded *ex post facto* justification of the decision under review; *(c)* in the substantiation of as yet not fully substantiated grounds of review; *(d)* in giving support to the decision-maker's stance; and *(e)* in the performance of the reviewing court's function.

As to *(b)* the majority in summary held (*per* Madlanga J):[2]

> 'In sum, I can think of no reason why deliberations as a class of information ought generally to be excluded from a rule 53 record. For me, the question is whether deliberations are relevant, which they are, and whether—despite their relevance—there is some legally cognisable basis for excluding them from the record. This approach to what a record for purposes of rule 53 should be better advances a review applicant's right of access to court under s 34 of the Constitution. It thus respects the injunction in s 39(2) of the Constitution that courts must interpret statutes in a manner that promotes the spirit, purport and objects of the Bill of Rights.'

The 'record of proceedings' may in a proper case include the record of prior proceedings.[3]

If an incomplete record of the proceedings sought to be corrected or set aside is handed to the registrar, the applicant is entitled to rely on the provisions of rule 35 relating to discovery.[4] In particular rule 35(13), the provisions of which apply *mutatis mutandis* to applications, may be relied upon without any direction from the court.[5]

Rule 53(1)*(b)* applies *mutatis mutandis* to applications for the reviewing and setting aside of decisions of the President unless it can be shown that its application in a particular case would result in a failure of justice.[6]

Subrule (2): 'Setting out the grounds and the facts and circumstances.' An application is defective if it fails to set out the grounds and the facts and circumstances upon which the applicant relies.[7]

Subrule (3): 'The applicant shall ... cause copies of such portions of the record.' The right to require the record of the proceedings is primarily intended to operate for the benefit of the applicant.[8] The purpose of the rule is, clearly, to provide to an aggrieved applicant, who might not necessarily have all the evidence at his disposal, the opportunity to supplement the case made in the application for review by providing potential evidence in the full record of the review proceedings.[9] Having been given such opportunity, it is the duty of the applicant to select what is relevant from the record to serve as evidence for the purpose of the review application. It is only what is selected by the applicant in terms of the subrule that serves as evidence.[10] Depending on the circumstances, the respondent should not be prevented from

[1] At 10C–11A.
[2] At 15D–E.
[3] *Johannesburg City Council v The Administrator, Transvaal (1)* 1970 (2) SA 89 (T).
[4] *Pieters v Administrateur, Suidwes-Afrika* 1972 (2) SA 220 (SWA) at 228A.
[5] *Pieters v Administrateur, Suidwes-Afrika* 1972 (2) SA 220 (SWA) at 228D.
[6] *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP) at 261D–263G.
[7] *Terblanche v Wiese* 1973 (4) SA 497 (A).
[8] *Motaung v Mukubela and Another NNO* 1975 (1) SA 618 (O) at 625F; *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660E–H; *SACCAWU v President, Industrial Tribunal* 2001 (2) SA 277 (SCA).
[9] *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 90A–B.
[10] *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 90B–C.

placing the record, or the relevant parts thereof, before a court simply because the applicant does not do so.[1]

'Such portions of the record as may be necessary for the purposes of the review.' It has been held that the idea 'that more is better and that it is wiser "to put everything before the judge" belongs to the lazy and the insecure'.[2] Thus, practitioners ought to take heed of the provisions of rule 53(3) and apply their minds to what is relevant for purposes of the review.[3]

'The other parties with one copy.' The record must be made available to the other party a reasonable time before the hearing of the application so that the other party will have sufficient opportunity to prepare his defence to the application.[4]

Subrule (4): 'Amend, add to or vary.' This subrule gives an applicant for review a clear right to amend, add to or vary the notice of motion and to supplement the founding affidavit without the consent of the opposite party or the leave of the court.[5] A respondent is not entitled to circumvent the applicant's right to the record by giving undertakings and any talk of the relief being conceded, etc would be premature. The applicant is entitled to sight of the record and to evaluate his position in the light of its contents.[6]

Subrule (5): 'Desire to oppose the granting of the order.' It is clear from the provisions of this subrule, and those of subrules (3) and (4), that a respondent is not obliged to take any step to oppose an application for review until a copy of the record of the proceedings had been furnished to the respondent.[7]

Subrule (6): 'Replying affidavits.' In so far as there are disputes of fact, the respondent's version must be preferred on the basis of the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[8] unless some inherent improbability in relation thereto can be demonstrated.[9]

Subrule (7): 'The provisions of rule 6 as to set down of applications shall *mutatis mutandis* apply.' Rule 6(5)(*f*)(ii) provides that an applicant may apply for the allocation of a date for the hearing of an application within five days of the delivery of his replying affidavit, or, where no replying affidavit is delivered, within five days of the expiry of ten days after service upon him of the answering affidavit. If the applicant fails to apply, then the respondent may do so immediately upon the expiry thereof.[10] Where a respondent applies for the allocation of a date as contemplated in rule 6, it cannot be argued that the review has lapsed.[11]

[1] *SACCAWU v President, Industrial Tribunal* 2001 (2) SA 277 (SCA); *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 90B–C.
[2] *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 90F–G.
[3] *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 90G–H.
[4] *Car-to-Let (Pty) Ltd v Addisionele Landdros* 1973 (2) SA 99 (O) at 101D.
[5] *Pieters v Administrateur, Suidwes-Afrika* 1972 (2) SA 220 (SWA) at 225G; *Fizik Investments (Pty) Ltd t/a Umkhombe Security Services v Nelson Mandela Metropolitan University* 2009 (5) SA 441 (SE) at 444F–445A.
[6] *Fizik Investments (Pty) Ltd t/a Umkhombe Security Services v Nelson Mandela Metropolitan University* 2009 (5) SA 441 (SE) at 445A–B.
[7] *Vereniging van Bo-grondse Mynamptenare van SA v President of the Industrial Court* 1983 (1) SA 1143 (T) at 1145E. See also *Fizik Investments (Pty) Ltd t/a Umkhombe Security Services v Nelson Mandela Metropolitan University* 2009 (5) SA 441 (SE) at 441I–445A.
[8] 1984 (3) SA 623 (A) at 634A–635C.
[9] *Klein v Dainfern College* 2006 (3) SA 73 (T) at 77B–C. See also *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA). In *Ackermans Ltd v Commissioner, South African Revenue Service* 2015 (6) SA 364 (GP) Mothle J, in the context of a review of certain assessments which the Commissioner had issued, remarked (at 374B) that '[w]hile there appeared to be very few authorities supporting the contention that a review application filed on papers should be referred to the hearing of oral evidence, I agree with the submission that there are no rules which prohibit such'.
[10] Rule 6(5)(*f*)(iii).
[11] *Arendse v Arendse* 2013 (3) SA 347 (WCC) at 349E–G.