PUBLIC LAW

Glenn Penfold and Kerry Williams

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Introduction

The South African legal system includes various principles and numerous statutory provisions which govern interactions with the State and other public entities. Generally, if an investor engages with, contracts with, or is affected by Government action or decisions, it is likely that public law will apply.

South Africa also has a range of legislation aimed at ensuring the accountability of the State, both in terms of its financial management and in its decision making.

Laws ensuring sound public financial management and transparency in relation to information of the State are integral to public law in South Africa.

The Constitution

The Constitution of the Republic of South Africa, 1996 (the Constitution) is the source of all public law in the country. Public law therefore permeates the South African legal system since it is engaged each time a public or private body exercises a public function or performs a public power. It is applicable almost every time the State (in whatever manifestation it might take) engages with the public.

This may be as a result of a power to, for example, make regulations, issue licences, determine tariffs, grant approvals, award contracts, provide services, allocate benefits, grant exemptions or more generally to regulate the economy. These public powers or functions are exercised in a range of industries and sectors, including healthcare, mining, telecommunications, gambling, energy, water, aviation, forestry, transport and the environment, each of which is generally characterised by its own regulatory framework.

Section 1 of the Constitution provides that one of the foundational values of South Africa is the rule of law. Section 2 reinforces this by providing that the Constitution is supreme and law or conduct which, if inconsistent with it, is invalid.

South Africa is also one of the only countries where a right to lawful, reasonable and procedurally fair administrative action is contained in its Constitution. The extent to which this right ensures the State's accountability and transparency cannot be underestimated.

The Constitution also provides that everyone whose rights are adversely affected by administrative action has the right to be given written reasons. These principles of administrative justice are given effect through the Promotion of Administrative Justice Act, No. 3 of 2000 (PAJA).

Promotion of Administrative Justice Act

PAJA provides a basis for the judicial review of the exercise of a public power or function which amounts to administrative action. The exact scope of reviewable administrative action is controversial and disputed. This is because the classification of action as "administrative action" means that courts have the power to examine the basis for the decision and to apply the rigours of administrative law.

Generally speaking, action will be reviewable as administrative action if it is a decision (or a failure to take a decision) by an organ of State (or a person exercising a public power or function in terms of an empowering provision) which adversely affects the rights of any person and which has a direct, external legal effect.

Although the classification of a decision as administrative action depends on the circumstances, the types of decisions which have been held to be "administrative action" include decisions to:

- withdraw bursaries from State-aided schools;
- suspend the activities of a company and freeze its assets;
- require tax to be paid despite an appeal having been noted;
- lease waterfront property in a harbour;
- issue licences;
- call for, adjudicate on and grant tenders; and
- make regulations (although this remains somewhat controversial and it is yet to be confirmed by a majority decision of the Constitutional Court).

PAJA gives particular substance to the right to procedurally fair administrative action. Generally, procedural fairness is dependent on the circumstances of a particular case. However, where administrative action has a material effect on a person, Section 3(2)(b) of PAJA provides that such a person must be given:

- notice of the nature and purpose of the administrative action;
- a reasonable opportunity to make representations;
- a clear statement of the administrative action;
- adequate notice of the right of internal review or appeal; and
- notice of the right to request reasons.

Where administrative action materially affects the public, Section 4(1) provides that the decision maker must decide whether to hold a public inquiry and/or follow a notice and comment procedure. The decision maker may also follow another fair, but different, procedure. These procedural obligations contribute to the fair and effective exercise of public power and performance of public functions.

Section 6 of PAJA allows any person to institute proceedings in a court or tribunal for the review of administrative action. This must be done within 180 days of the administrative action. Section 6 further provides the basis on which administrative action may be reviewed.

Administrative action may be challenged if, for example, the administrator:

- was biased or acted with an ulterior motive or purpose;
- was not empowered to act in a particular way;
- made a mistake of fact or law;
- took account of irrelevant considerations; or
- made a decision that was irrational or unreasonable.

The consequences of a successful review of administrative action vary depending on the circumstances of the case. In exceptional circumstances, a court may not only set aside the decision of an administrator, but may replace it with the court's own decision. It is, however, more common that the administrator's decision is set aside and sent back to the administrator for reconsideration.

Section 5 of PAJA provides that any person whose rights have been materially and adversely affected by administrative action is entitled to request written reasons for the administrative action. This must be done within 90 days of the person becoming aware of the administrative action. The administrator is then required to provide adequate written reasons within 90 days of receiving the request. If the administrator fails to respond, or to provide adequate reasons, then in any judicial review proceedings which follow, it is presumed that the administrative action was taken without good reason.

Legality

Section 1 of the Constitution provides that one of South Africa's founding values is the supremacy of the Constitution and the rule of law. The Constitutional Court's interpretation of this clause has had profound and positive effects in the area of public law.

Where an exercise of a public power or performance of a public function does not amount to administrative action, it is not reviewable under PAJA. In these circumstances, the Constitutional Court has emphasised that the exercise of the power or performance of the function is still governed by, and reviewable under, the principle of legality (or the rule of law).

The principle of legality requires that the exercise of all public powers or the performance of all public functions:

- must be authorised by law and must be in accordance with that law (usually legislation);
- must not be arbitrary or irrational; and
- the decisionmaker must act in good faith and must not misconstrue his or her powers. These principles have been applied, for example, where the President:
- had exercised his power to constitute a commission of inquiry;
- had mistakenly brought an act of Parliament into force without the necessary regulations being in place; and
- dismissed the former director-general of the National Intelligence Agency.

Public Procurement

Fair, equitable, transparent, competitive and cost-effective procurement

Section 217(1) of the Constitution provides that when an organ of State in the national, provincial or local sphere of Government (or another institution identified in national legislation) contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The award of a Government or parastatal contract can thus be challenged on the basis that the procedure followed was in violation of the five principles contained in Section 217.

The most emphatic manner in which an organ of State can demonstrate compliance with five principles is through a public and transparent tender process in which all tenderers are treated fairly and equitably.

This does not, however, mean that the use of a tender process is always required to comply with Section 217 of the Constitution. It may well be that a tender process is not required, for example in the case of a sole supplier.

In deciding whether a particular procedure complies with the provisions of Section 217 the five principles should be taken as a whole:

- the principles of fairness and equitability indicate, at a minimum, that the procurement process must be procedurally fair – interested parties should be given a reasonable opportunity to make representations relating to the award of the relevant contract, and bidders should compete on an equal footing;
- the principle of transparency promotes openness and accountability – this principle is contravened if the decision maker, for example, fails to inform all bidders of material correspondence with one bidder; and
- the principles of competitiveness and cost-effectiveness indicate that an organ of State should attempt to procure goods or services at the lowest possible cost by striving to achieve value for money.

Preferential procurement

The design of the South African preferential procurement framework is located within the history of apartheid. As a result, the Preferential Procurement Policy Framework Act, No. 5 of 2000 (the PPPFA), and the regulations promulgated pursuant to the PPPFA (the Procurement Regulations) are aimed at redressing historical disadvantage and increasing opportunities for those previously prevented from actively participating in the country's mainstream economy.

While Section 217(1) of the Constitution imposes an obligation on organs of State to comply with the five principles of public procurement, Sections 217(2) and (3) permit those institutions to implement a preferential procurement policy. These provisions oblige those institutions which are bound by Section 217 and which choose to implement a preferential procurement policy, to do so in accordance with the constitutionally mandated PPPFA and the Procurement Regulations.

The PPPFA provides a framework for the implementation of the procurement policy contemplated in Section 217(2) of the Constitution. According to the PPPFA, an organ of State must determine and implement its preferential procurement policy within a framework consisting of, among other factors, a preference point system and specific goals which may include contracting with persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability.

It is important to note that Section 3 of the PPPFA provides that the Minister of Finance may, on request, exempt an organ of State from any of its provisions if "(a) it is in the interests of national security; (b) the likely tenderers are international suppliers; or (c) it is in the public interest".

The Minister of Finance, acting on this power, has in the past exempted public entities listed in Schedules 2, 3B and 3D of the Public Finance Management Act, No. 1 of 1999 (the PFMA), from the operation of the bulk of the provisions of the Procurement Regulations. However, there is currently no general exemption of this sort in place.

The Procurement Regulations provide considerably more detail on the way that preferential procurement operates. They reconcile procurement law with the Broad-Based Black Economic Empowerment Act, No. 53 of 2003 (the B-BBEE Act).

The system outlined in the PPPFA and developed in the Procurement Regulations, in terms of which tenders are evaluated, involves the allocation and calculation of preference points. Where the tender invitation stipulates that the tender will also be evaluated on the basis of functionality, an assessment into whether the tender is acceptable is first required before it can be evaluated in terms of the applicable preference points system.

The PPPFA contemplates two types of preference points systems. These are referred to as the 80/20 and 90/10 systems. The Rand value of the contracts being tendered for will determine the applicable system. For contracts where the Rand value is:

- equal to or above ZAR 30 000 and up to ZAR 1 million, the 80/20 system will apply; or
- above ZAR 1 million, the 90/10 system will apply.

The bulk of the points are awarded on the basis of price, with the remaining 10 or 20 points awarded according to the tenderer's Broad-Based Black Economic Empowerment (B-BBEE) status level.

The Department of Trade and Industry is empowered to predetermine a level of local production and content must be achieved and which industry in a sector it designates in.

As a result, when a tender takes place in a designated sector, the organ of State administering the tender must advertise it with a specific condition, that only the following will be considered:

- locally produced goods, services or work; or
- locally manufactured goods with a stipulated minimum threshold for local production and content.

Where there is no designated sector, an organ of State may still impose local production and content as a specific tendering requirement, provided it is done in terms of directives issued for this purpose by the National Treasury.

To further its aim of providing an advantage to those previously disadvantaged under the apartheid regime (thereby facilitating economic empowerment of these groups), the Procurement Regulations prohibit the practice of fronting. Fronting occurs when a business with a strong B-BBEE status level tenders for a contract when in reality the majority of the work will be sub-contracted to a business with a less favourable B-BBEE status level.

While it is an operational reality that tenderers often engage in sub-contracting, the Regulations cap sub-contracting to an entity which has a lower B-BBEE status level than the tenderer to a maximum of 25% of the value of the contract. This limit on sub-contracting does not apply where a tenderer sub-contracts to an Exempted Micro-Enterprise.

Procurement in the form of public-private partnerships

A public-private partnership (PPP) is a contract between a public sector institution and a private party, in which the private party assumes substantial financial, technical and operational risk in the design, financing, building or operation of a project.

PPPs have become increasingly prevalent as a mechanism whereby national and provincial Government departments seek to achieve service delivery objectives in a manner that appropriately allocates risk, makes use of private sector resources and gives value for money.

The central legislation governing PPPs (for national and provincial Government departments, certain constitutional institutions and public entities) is Treasury Regulation 16 issued under the PFMA.

Treasury Regulation 16 requires that the procurement procedure must include:

- an open and transparent pre-qualification process;
- a competitive bidding process in which only pre-qualified organisations may participate; and
- criteria for the evaluation of bids to identify the bid that represents the best value for money.

It further states that the procurement procedure may include a preference for categories of bidders, in terms of the relevant legislation, such as persons disadvantaged by unfair discrimination, provided that this does not compromise the value-for-money requirement.

Public Finance Management

The PFMA gives effect to Sections 213 and 215 to 219 of the Constitution. These sections require national legislation to establish a national treasury to:

- introduce uniform treasury norms and standards;
- prescribe measures to ensure transparency and expenditure control in all spheres of Government; and
- set the operational procedures for borrowing, guarantees, procurement and oversight over the various national and provincial revenue funds.

The object of the PFMA is thus to secure transparency, accountability and sound financial management of the institutions to which it applies (ie departments, specified public entities, constitutional institutions, Parliament and provincial legislatures). It distinguishes "major" public entities, such as Transnet Limited, Eskom and Alexkor Limited, from other public entities. Major public entities are subject to slightly less regulatory control.

The PFMA establishes the National Treasury and provincial treasuries and deals with their composition, functions, powers and responsibilities. The National Treasury is obliged, among other functions, to:

- promote Government's fiscal policy framework;
- coordinate macro-economic policy;
- coordinate and manage inter-Governmental financial and fiscal relations and the budget preparation process; and
- promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of public institutions.

Provincial treasuries have similar obligations. The PFMA also governs the process and content of national and provincial budgets and the reporting requirements that promote greater transparency in the implementation of a budget.

The PFMA requires that all national and provincial institutions and entities have accounting officers (or accounting authorities), and stipulates the extensive financial management obligations of these officers or authorities. In addition, for example, it sets out the financial management responsibilities of ministers, the general principles on borrowing, and the issuing of guarantees, indemnities and securities and provides for disciplinary and criminal proceedings in the event of financial misconduct.

It is particularly important to note that Section 66 of the PFMA stipulates that Government and public entities may only borrow money, issue a guarantee, indemnity or security or enter into any other transaction involving a future financial commitment, through certain persons. Section 68 goes on to provide that the State is not bound by the transaction if Section 66 is not complied with.

Access to Information

The Promotion of Access to Information Act, No. 2 of 2000 (PAIA) gives effect to the constitutionally enshrined right of access to information, contained in Section 32(1) of the Constitution. PAIA allows for access to information held by public and private bodies.

Public and private bodies

PAIA is primarily divided into two components: Part 2 deals with access to information held by a public body, while Part 3 allows for access to records of private bodies.

"Public bodies" are defined as "any department of [S]tate or administration in the national or provincial sphere of Government or any municipality in the local sphere of Government, any other functionary or institution when exercising a power or performing a function in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation".

A "private body" is defined as either "a natural person who carries on or who has carried on any trade, business or profession, but only in such capacity; a partnership which carries on or has carried on any trade, business or profession; or any former or existing juristic person". A "private body" specifically excludes a "public body".

Access to information of public bodies

Persons requesting records from public bodies must be given such information if they comply with the procedural requirements, and if no grounds of refusal are applicable. PAIA lists the grounds for the refusal of access to information of public bodies.

Access to the following records of a public body can be refused in terms of PAIA:

- certain personal information about a third party;
- certain records of the South African Revenue Service;
- commercial and confidential information of a third party;
- information endangering the physical safety of an individual;
- legally privileged records;
- records relating to the defence, security, international relations, economy and financial welfare of South Africa;
- research information of a third party;
- records relating to the operations of public bodies; and
- frivolous or vexatious requests for information.

Nevertheless, Section 46 of PAIA contains a general public interest override. In terms of this provision, a record must be disclosed if it reveals evidence of a substantial contravention of law or an imminent and serious public safety or environmental risk, and the public interest in disclosure clearly outweighs the harm caused by disclosure.

Access to information of private bodies

PAIA states that a record of a private body must be disclosed if:

- that record is required for the exercise or protection of any right;
- the procedural requirements set out in PAIA are met; and
- there is no applicable ground for refusal.

It follows that, in relation to requests of private bodies, the requester must first establish that the record is required, in the sense that it is reasonably required in order for the requester to exercise or protect a right.

In general, courts have not been generous in interpreting this requirement. For instance, courts are reluctant to grant access to documentation in circumstances where the requester will in any event obtain such documents through the discovery process if legal proceedings are instituted, provided that the requester has sufficient information at his or her disposal to make an informed decision as to whether to institute litigation.

In another case, it was held that a shareholder is not entitled to use PAIA to access the books of account of a company in order to determine its true financial position and the true value of his or her shares in circumstances where the Companies Act, No. 71 of 2008, does not provide for such access and where the requester had not shown that he or she reasonably required the records for the exercise or protection of his or her rights.

The grounds of refusal for private bodies are generally similar to those listed in the section on public bodies. They relate to:

- protecting the privacy of a third person;
- protecting certain confidential information of a third party;
- protecting the safety of individuals;
- protecting information that is privileged from production in legal proceedings;
- preventing disclosure of commercial information of a private body; and
- protecting research information of a third party or private body.

Once again, there is a general mandatory public interest to override in relation to private bodies.

Publication of a manual

Sections 14 and 51 of PAIA state that all public and private bodies are required to produce a manual that sets out, among other things, the subjects and categories of records that are held by that body. Section 90 provides that it is an offence to wilfully, or in a manner that is grossly negligent, compile a manual.

PAIA is an important step towards allowing for access to information. It provides for an open society in which citizens can feel confident in being able to access information held by the State and by private bodies.

Instead of refusing to disclose records simply as a matter of principle, information must now be disclosed unless one of the grounds of refusal can be established.

Conclusion

Public law is operational in every market, industry and network in which the State operates or influences. It is evident that public law is important both for private bodies and public entities. The State is constrained to take decisions and act in ways which comply with the law, are reasonable and rational as well as procedurally fair. Private bodies can hold the State to these and other constitutional obligations.

Private bodies, contracting with Government, will do well to bear in mind the obligations that Government procures fairly, equitably, cost-effectively, competitively and transparently. In addition to all the obligations on the State and the ways in which private bodies can ensure lawful, reasonable, rational and procedurally fair decision making, there is also the possibility of accessing information held by the State using constitutionally mandated legislation. South Africa accordingly has a sophisticated system of ensuring accountability, good financial management and proper decision making.