

Our curious administrative law love triangle: The complex interplay between the PAJA, the Constitution and the common law*

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1 Introduction

The proverbial saying goes: two's company; three's a crowd. This about encapsulates the awkward relationship between the fundamental right to administrative justice (in section 33 of the Constitution¹), the Promotion of Administrative Justice Act, 2000,² enacted to give legislative effect to the right, and the common-law principles of judicial review of administrative action. Following the dawn of the constitutional era in 1994, there was 'a seismic shift in our administrative law'.³ Chaskalson JP explained the implications of this shift in the *Pharmaceutical Manufacturers* case:⁴

[A]dministrative law occupies ... a special place in our jurisprudence ... It is built on constitutional principles ... Prior to the coming into force of the interim Constitution, the common law was 'the main crucible' for the development of

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¹The Constitution of the Republic of South Africa, 1996 (the Constitution).

²The Promotion of Administrative Justice Act, 3 of 2000 (the PAJA).

³O'Regan 'Breaking ground: Some thoughts on the seismic shift in our administrative law' (2004) SALJ 424.

⁴*Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*)

these principles of constitutional law. The interim Constitution ... was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of the common law to the prescripts of a written constitution which is the supreme law.⁵

Lawyers and Judges alike had to adapt to this shift and on balance, in the pre-PAJA era, they did not fare so badly. Currie notes that, '[t]he courts, with a few hiccups, rapidly became accustomed to this new system'.⁶ This outcome, claims Currie, was not particularly surprising, given the fact that, 'besides the constitutional grounding of the basis for judicial review (and once one is over the constitutional threshold concept of administrative action), the application of the subsumed common-law rules and principles of administrative law proceeded pretty much as it had always done'.⁷ For a while, the two thus made pretty good company. Following the enactment of the PAJA, however, this apparently happy union was upset and 'two's company' became a curious crowd. The disjuncture in the interplay between the common law, the PAJA and the Constitution has resulted in both awkward overlaps (flowing from the 'proliferation of pathways'⁸ to judicial review) and dubious oversights (flowing primarily from the PAJA's narrow and complicated definition of administrative action and the 'non-appearance of certain well-established grounds of review'⁹) in section 6(2). The net result has been a misalignment between the *theoretically simple*¹⁰ interplay anticipated between the Constitution, the PAJA and the common law that was so neatly explained in the *Bato Star*¹¹ and *Pharmaceutical Manufacturers* cases, and that which has subsequently played out in *practice* before the courts. The judicial response to this strained union evidences both a reticence to put the theory into practice and an apparent misunderstanding of the theory itself. Thus, theory and practice – or, put differently, the hopes and the reality – pertaining to this interplay have failed to align.

In this article, I seek to illustrate why this has come to be so, and how this curious relationship has manifested itself in practice with reference to case law that evidences 'the pathologies of the judicial response'.¹² In doing so, I draw attention to the more extensive role of the common law that has, albeit inadvertently, ensued. I thereby proceed to refute the oft-cited claim that the

⁵*Id* para 45.

⁶Currie 'What difference does the Promotion of Administrative Justice Act make to administrative law?' (2006) *Acta Juridica* 330.

⁷*Ibid*.

⁸Hoexter *Administrative law in South Africa* (2012) (2nd ed) 131.

⁹Hoexter 'The future of judicial review in South African administrative (2000) *SALJ* 497.

¹⁰Plasket 'Post-1994 administrative law in South Africa: The Constitution, the Promotion of Administrative Justice Act 3 of 2000 and the common law' (2007) *Speculum Juris* 35.

¹¹*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC) (*Bato Star*).

¹²Currie (n 6) 325.

rights to administrative justice in section 33 of the Final Constitution, 1996, have replaced the common law principles of judicial review of administrative action entirely, thus relegating them to *mere aids in the interpretation* of the grounds of review set out in the Constitution and the PAJA, and related matters.¹³ The irony of the interplay that has panned out in practice is that the common law principles of judicial review of administrative action have come to play more than the mere interpretative role that was originally intended. I turn now to illustrate why and how this has come to be so.

2 Changes in the contextual climate led to high hopes for our ‘new administrative law’

Context matters and the common-law principles of judicial review of administrative action evolved out of a particular context: a stark legal and socio-political landscape that did little to cultivate a ‘flowering of administrative law’.¹⁴ The administrative law of our past was thus ‘underdeveloped and functioned in an undemocratic system that was antagonistic to fundamental rights, was secretive and unaccountable’.¹⁵ It was, what Dean aptly termed, a ‘dismal science’,¹⁶ and sadly, this ‘science’ was the sole interface between citizen and state. As a result, it developed in a somewhat unsystematic way and was spread too thinly.¹⁷ Concomitantly, as Justice O’Regan has noted, ‘our common-law principles of judicial review in the era before 1994 lacked coherence and consistency’.¹⁸ This was largely due to ‘the absence of a coherent political and constitutional theory to underpin administrative law and legitimize it’.¹⁹ The dawn of our constitutional era, based on the founding values of, *inter alia*, accountability, responsiveness and openness,²⁰ brought with it these fundamental theoretical underpinnings that were previously lacking. Thus, along with the constitutional recognition of a fundamental right to administrative justice, came high hopes for our ‘new administrative law’.²¹

Regrettably, as our jurisprudence reveals, aside from the Constitutional Court’s initial ‘pioneering work in giving meaning to “administrative action”’,²²

¹³The ‘problem statement’ I seek to address by elucidating the complexities of the interplay between the PAJA, the Constitution and the common law.

¹⁴O’Regan (n 3) 424.

¹⁵Plasket (n 10) 25.

¹⁶Dean ‘Our administrative law: A dismal science?’ (1986) *SAJHR* 164.

¹⁷Corder ‘Without deference, with respect: A response to Justice O’Regan’ (2004) *SALJ* 439.

¹⁸O’Regan (n 3) 427.

¹⁹*Id* 428.

²⁰Section 1(d) of the Constitution (n 1).

²¹Currie and Hoexter *The new administrative law* vol II (2002).

²²Hoexter “Administrative action” in the courts’ (2006) *Acta Juridica* 304.

these high hopes have been dashed by the unfortunate practical interplay between the PAJA, the Constitution and the common-law principles of judicial review. This interplay has been far from harmonious thereby doing little to revolutionise our administrative law for the better. Our aspirations for the development of an integrated and accessible system of judicial review of administrative action have been shattered²³ by a return to a form of conceptualism,²⁴ incoherence and inconsistency evidenced by the judicial 'confusion as to the relationship between the Constitution, the PAJA and the common law, despite the theoretical simplicity of the issue'.²⁵

3 Why does confusion reign?

The judicial confusion regarding the appropriate inter-relationship between the Constitution, the PAJA and the common law, can primarily be ascribed to three key factors.

3.1 *The hindrance of rules of interpretation*

Hoexter notes that, 'the constitutionalising effects of section 33 ... were not fully appreciated in the early years of our democracy'.²⁶ The courts' uncertainty about the extent to which the Constitution ought to permeate the common law manifested itself through attempts to draw artificial distinctions between constitutional and non-constitutional matters. This artificiality was reinforced by the rule of interpretation that was developed in the *Mhlungu* case²⁷ in terms of which, constitutional issues should, where possible, be avoided.²⁸ This 'constitutional issue last' doctrine was taken as authority for the misplaced notion that, 'the common law still had a direct role to play in the judicial review of administrative action'.²⁹

3.2 *Jurisdictional battles*

A second and related factor that contributed to a confused and messy interplay between the common law and the section 33 right was the turf-battle between the Supreme Court of Appeal and the Constitutional Court. Under the Interim Constitution, the Supreme Court of Appeal – the old Appellate Division in a new guise – was precluded from adjudicating constitutional matters but retained its

²³Hoexter (n 9) 484.

²⁴Hoexter 'Contracts in administrative law: Life after formalism?' (2004) SALJ 618.

²⁵Plasket (n 10) 35.

²⁶Hoexter (n 8) 116.

²⁷*S v Mhlungu* 1995 7 BCLR 793 (CC) (*Mhlungu*).

²⁸Currie and De Waal *The Bill of Rights handbook* (2002) (5th ed) 25.

²⁹Plasket (n 10) 35.

status as final court of appeal on all matters on which it had previously decided. As a result, administrative law cases were dealt with before this court on the basis of the familiar common-law principles, which perpetuated the idea that there were two parallel systems of law in operation: common-law administrative law, and when the latter failed to provide a solution, the new constitutional administrative law.³⁰

Dyzenhaus notes how politically fraught this purported dual-pathway to relief really was: 'litigants could attempt to forum shop and the SCA could abet this attempt by casting challenges to government officials in a common-law mould'.³¹ A case which most clearly epitomises the Supreme Court of Appeal's attempt to preserve its jurisdiction as a final court of appeal on matters pertaining to the common-law principle of legality (the 'obverse facet of the *ultra vires* doctrine'³²) is the *Container Logistics* case.³³ In this case, Hefer JA infamously remarked that, '[j]udicial review under the Constitution and under the common law are different concepts'³⁴ and as such, review under the latter remained a possibility in the Supreme Court of Appeal. The Constitutional Court put an ostensible end to 'what was shaping up as an ugly turf war'³⁵ in *Pharmaceutical Manufacturers* in which Chaskalson JP pronounced that:

[t]here are not two systems of law ... There is only one ... It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.³⁶

The *Bato Star* case took matters a step further by clarifying the intended interplay with the PAJA in the equation:

[t]he common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution.³⁷

Within this scheme, the PAJA was intended to flesh out the constitutional right to administrative justice. Plasket thus notes that on a theoretical level, the confusion had been resolved and the interplay contemplated by the Constitutional Court seemed theoretically simple.³⁸ Unfortunately, as much of the case law illustrates: theory and practice remain misaligned with the courts still grappling to

³⁰*Ibid.*

³¹Dyzenhaus 'The pasts and future of the rule of law in South Africa' (2007) SALJ 740.

³²Hoexter (n 8) 122.

³³*Commissioner of Customs and Excise v Container Logistics (Pty) Ltd* 1999 3 SA 771 (SCA).

³⁴*Id* para 20.

³⁵Dyzenhaus (n 31) 740.

³⁶*Pharmaceutical Manufacturers* (n 4) para 44.

³⁷*Bato Star* (n 11) para 22.

³⁸Plasket (n 10) 35.

make sense of this administrative law love triangle. This has largely been due to the third factor: the disparate concepts of administrative action.

3.3 *The three different guises of administrative action and the resultant 'proliferation of pathways'*³⁹

The concept of 'administrative action' has, since its common-law incarnation, had two rather drastic facelifts, first through the pioneering work of the Constitutional Court and subsequently through the disappointing endeavours of the Legislature in the enactment of the PAJA. It has been the disparity between the latter two conceptions that has been particularly problematic and exacerbated the awkward interplay between the PAJA, the Constitution and the common law. It is necessary to explain briefly the different guises of this key concept in order to highlight the disjuncture that has ensued.

Under the common law, the contextual setting in which our administrative law evolved meant that, 'there was virtually no threshold and ... almost anything was reviewable in principle'.⁴⁰ As such, the definition of administrative action was especially wide and consequently it had no real significance.⁴¹ The classification of functions doctrine served instead as the conceptual threshold to ensure that the requirements of administrative justice did not become too burdensome. In terms of this doctrine, the requirements of 'fairness and reasonableness' were applied in differing degrees depending on the category of administrative conduct.⁴² This resulted in an all-or-nothing conceptual approach pursuant to which administrative justice was doled out mechanically and parsimoniously. The abandonment of this doctrine prior to the advent of democracy thankfully made way for a system based upon a fundamental constitutional right to administrative action.⁴³

Hoexter notes that, 'in the constitutional era, it became apparent that our courts would have to be more careful about what was included in the realm of administrative action'.⁴⁴ Consequently, through something akin to a process of elimination, in the seminal trilogy of cases – *Fedsure*,⁴⁵ *SARFU*⁴⁶ and *Pharmaceutical Manufacturers* – the Constitutional Court began concretising a constitutional concept of administrative action, premised on the separation of powers doctrine, by circumscribing those acts which fall outside this definition. The court in *SARFU*,

³⁹Hoexter (n 8) 131.

⁴⁰Hoexter (n 22) 318.

⁴¹Hoexter (n 8) 173.

⁴²Hoexter (n 22) 318.

⁴³*Ibid.*

⁴⁴Hoexter (n 9) 505.

⁴⁵*Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 1 SA 374 (CC) (*Fedsure*).

⁴⁶*President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) (*SARFU*).

developed a flexible litmus test for deciphering administrative action by delineating various broadly-framed factors.⁴⁷ The different types of legislative and executive action that fell outside the purview of administrative action under section 33, stood instead to be reviewed under the flexible constitutional principle of legality – a crucial discovery that emerged out of this trio of cases.⁴⁸ The concept of administrative action that evolved out of our early constitutional jurisprudence seemed to strike the right balance between giving proper effect to the ‘wonderfully straightforward’ section 33⁴⁹ and ensuring not too onerous a burden on the administration.

Unfortunately, this trailblazing effort by the Constitutional Court in giving nuanced meaning to the concept of administrative action came to a juddering halt with the enactment of the PAJA which ‘severely circumscribed the realm of administrative action by means of an elaborate statutory definition’⁵⁰ and thereby distorted ‘the best features’ of section 33.⁵¹ Nugent JA, in the *Grey’s Marine* case, expressed frustration at the fact that this definition ‘serves not so much to attribute meaning to the term as to limit its meaning by surrounding it with a palisade of qualifications’.⁵² Hoexter has also vehemently criticised the definition for being ‘parsimonious, unnecessarily complicated and probably as unfriendly to users as it is possible to be’.⁵³ What is particularly worrying about it, however, is its extreme narrowness which has the result that, ‘large areas of what we traditionally call administrative law may fall outside the sphere of administrative action under the Act’.⁵⁴ This has in turn resulted in a stark disparity between the wider concept of administrative action crafted by the Constitutional Court and the narrower one contained in the PAJA which – is the ‘triumphal legislation’⁵⁵ enacted to give meaningful effect to the constitutional right.⁵⁶ This incongruence has exacerbated the uncomfortable relationship between the PAJA, the Constitution and the common law largely due to the fact that it has encouraged a judicial tendency to treat the various pathways to review as optional alternatives. This has in turn led to various judicial tendencies, which, Hoexter notes, ‘suggest problems of a ... fundamental and systemic nature’.⁵⁷ Currie summarises these disappointing judicial tendencies as follows:

⁴⁷Hoexter (n 22) 305.

⁴⁸*Ibid.*

⁴⁹*Id* 319.

⁵⁰*Id* 303.

⁵¹*Id* 319.

⁵²*Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) (*Grey’s Marine*) para 21.

⁵³Hoexter (n 22) 303.

⁵⁴*Id* 307.

⁵⁵*Sasol Oil (Pty) Ltd v Metcalfe NO* 2004 5 SA 161 (W) para 7.

⁵⁶Hoexter (n 8) 120.

⁵⁷Hoexter (n 22) 304.

The courts ... have variously responded to the difficulties of the definition by: ignoring it (and the Act) completely; fussing over the formal complexities of the concept of administrative action at the expense of dealing with the substance of the Act and the substance of the administrative-law challenge; sidestepping the definition by constructing a secondary system of administrative law, largely identical in content to the common law and grounded in the constitutional principle of legality.⁵⁸

I turn now to provide some illustrations of these judicial inclinations to thwart the intended interplay between the Constitution, the PAJA and the common law. I do so by juxtaposing the theoretical aspirations with the practical difficulties that have played out in the courts.

4 Theoretical simplicity: The intended interplay between the PAJA, the Constitution and the common law

In theory, this interplay should not have been so challenging. The Constitutional Court encapsulated the purported relationship with apparent simplicity. O'Regan J put it thus in *Bato Star*:

The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution.⁵⁹

Thus, as Hoexter notes, the PAJA now provides the most immediate justification for the judicial review of administrative action, 'drawing its own legitimacy from the constitutional mandate in section 33(3)'.⁶⁰ Chaskalson CJ confirmed this in the *New Clicks*⁶¹ case:

PAJA is the national legislation that was passed to give effect to the rights contained in section 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and it purports to do so.⁶²

This was certainly intended to be the case, at least in relation to the grounds of review.⁶³ As a result, the Judge went on to caution that, '[a] litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section

⁵⁸Currie (n 6) 325.

⁵⁹*Bato Star* (n 11) para 25.

⁶⁰Hoexter (n 8) 118.

⁶¹*Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) (*New Clicks*).

⁶²*Id* para 95.

⁶³Currie (n 6) 340.

33(1) of the Constitution or the common law'.⁶⁴ Ngcobo J also disapproved of the creation of parallel streams of law where Parliament enacts legislation to give effect to a constitutional right.⁶⁵ This is in line with the principle of subsidiarity that was recently re-emphasised by the Constitutional Court in the *Mazibuko* case.⁶⁶

This court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.⁶⁷

Theoretically it seemed clear and simple: a cause of action for judicial review of administrative action must be grounded in the PAJA – the primary pathway to review. The common law, 'to the extent that it is in harmony with the democratic constitutional ethos' must *inform* the interpretation of the PAJA.⁶⁸ Section 33 too, like the common law, continues to play a role, but neither ought to ground a cause of action for judicial review of administrative action. Direct review under section 33 is thus available only in limited circumstances. First, as Plasket notes, while PAJA serves as the sword that enables citizens to hold the administration to account, section 33 'acts as a shield against laws, policies and practices that undermine administrative justice'.⁶⁹ For example, *albeit* an imperfect one,⁷⁰ in the *Zondi* case,⁷¹ the Constitutional Court tested the validity of the provisions of the Pound Ordinance 32 of 1947 directly against section 33 insofar as, reasoned Ngcobo J, when legislation is challenged on the basis of conflicting with the administrative justice right, that right itself must be the benchmark against which the conflict is assessed – not the PAJA.⁷² Secondly, section 33 plays a direct role in informing the interpretation of the PAJA and keeping it within constitutional bounds. Finally, direct recourse may be had to section 33 to challenge the constitutionality of PAJA itself – a challenge which, Hoexter argues, may be an eventuality given, *inter alia*, the severe curtailment of the scope of administrative action by the Act.⁷³ Despite the apparent simplicity of the theory, however, practice reveals all sorts of difficulties – largely due to the contrasting conceptions of administrative action – and in particular, an apparent cherry-picking of pathways to judicial review and a

⁶⁴*New Clicks* (n 61) para 96.

⁶⁵*Id* para 436.

⁶⁶*Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) (*Mazibuko*).

⁶⁷*Id* para 73.

⁶⁸*POPCRU v Minister of Correctional Services* [2006] 4 BLLR 385 (E) para 50.

⁶⁹Plasket (n 10) 31.

⁷⁰See Currie's criticism of this case (n 6) 335-341.

⁷¹*Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) (*Zondi*).

⁷²*Id* para 99.

⁷³Hoexter (n 9) 517. See further for a discussion of these 3 ways in which direct recourse may be had to section 33: Klaaren and Penfold 'Just administrative action' in Woolman and Bishop (eds) *Constitutional law of South Africa* (2008) (2nd ed) ch 63.2.

concomitantly misplaced reliance on section 33 and the common law. I proceed to give examples of these manifestations of the complicated relationship between the PAJA, the Constitution and the common law.⁷⁴

5 The problematic interplay that has ensued in practice: 'a proliferation of pathways and the avoidance of the PAJA'⁷⁵

5.1 *The flawed reliance on section 33 and the common law*

Hoexter admits that, '[w]orking out the relationship between the various pathways to judicial review in administrative law is not a simple exercise'.⁷⁶ However, in many cases the courts seem to have made little effort to get the relationship right. Instead, in what seems to be an attempt to avoid the complexity of the conceptual hurdles in the PAJA (notably the definition of administrative action), the courts are bypassing the Act by making direct recourse to section 33 and/or the common law.⁷⁷ Currie expresses his dismay at this trend: '[i]t should not have been this way. The origins of the Act lie in an entirely well-meaning attempt at law reform that was mandated by the 1996 Constitution.'⁷⁸ The PAJA ought not to be rendered superfluous. Yet, many of our Justices, suffering from the 'PAJA blues',⁷⁹ seem to be allowing as much. The following case examples illustrate the trending confusion in our jurisprudence.

The case of *National Educare Forum*⁸⁰ is an illustration of the earlier trend of our courts to treat the common law and the constitutional right as alternatives.⁸¹ In this case, Van Zyl J decided that although the decision of the Commissioner constituted the implementation of legislation and thus amounted to administrative action under the Constitution, 'the common law was still central to the judicial review of administrative action' which was simply bolstered by virtue of the Constitution.⁸² As a result, the case was decided on the basis of the common law and the Judge held that the High Court did have jurisdiction to decide the matter in that, '[s]ection 47 [of the Value-Added Tax Act, 1989] itself does not suggest that the inherent jurisdiction of the High Court to grant appropriate, other or

⁷⁴Note that a consideration of the further 'pathway', special statutory review, is beyond the purview of this article and so will not be discussed.

⁷⁵Hoexter (n 8) 131.

⁷⁶Hoexter (n 22) 314.

⁷⁷*Ibid.*

⁷⁸Currie (n 6) 325.

⁷⁹*Ibid.*

⁸⁰*National Educare Forum v Commissioner, South African Revenue Service* 2002 5 SA 567 (Tk) (*National Educare Forum*).

⁸¹Hoexter (n 22) 314.

⁸²Plasket (n 10) 35.

ancillary relief is excluded.⁸³ This case is a clear illustration of the dangers of the judicial tendency to be tempted by familiarity. As O'Regan J warned in 2004:

[r]easoning from first principles is hard and unaccustomed work for lawyers. But it is compulsory in our new constitutional order. We must be careful not to let our familiarity with the common law result in evading that constitutional obligation.⁸⁴

An early example of the tendency to ignore the PAJA and appeal to section 33 directly occurred in the *Mafongosi* case⁸⁵ which concerned disciplinary decisions taken by a political party against the applicants. Jafta AJP held that,

[I]t is unnecessary for me to express any opinion on whether the provisions of section 3 of PAJA apply to the present case ... In my view, the matter can be disposed of sufficiently by having recourse to the provisions of section 33 of the Constitution ...⁸⁶

Plasket criticises this case on the basis that, *inter alia*, 'it is simply not permissible to decide to ignore the PAJA and to apply section 33 directly because the former gives effect to the latter'.⁸⁷ Come 2005, the courts still seemed to think this cherry-picking of pathways to review was an unquestionable possibility. Malan J, in the *Johannesburg Municipal Pension Fund* case⁸⁸ found that the decisions taken by the applicants to terminate two pension funds and cease contributions to them amounted to administrative action within the purview of the PAJA. This notwithstanding, however, he went on to hold that even if he was wrong in this regard, 'direct recourse to section 33 of the Constitution appears to be possible ... [and] there appears to be merit in the applicants' contention that PAJA is not and cannot be exhaustive of the right to administrative justice'.⁸⁹ While I would agree with this latter contention, in that, as Currie notes, the PAJA – an exercise in 'codification-reform'⁹⁰ – 'is more than legislation that aims merely to codify the grounds of judicial review',⁹¹ Malan J nonetheless appears to go wrong in his reasoning. Presumably frustrated by the narrowness of the definition of administrative action, he simply turns his focus to section 33. However, insofar as the grounding of a cause of action for judicial review of administrative action is concerned, our Constitutional Court has been clear: this must be done in terms of the PAJA.⁹²

⁸³ *National Educare Forum* (n 80) 128H-129A.

⁸⁴ O'Regan (n 3) 437.

⁸⁵ *Mafongosi v United Democratic Movement* 2002 5 SA 567 (Tk) (*Mafongosi*).

⁸⁶ *Id* para 12.

⁸⁷ Plasket (n 10) 36.

⁸⁸ *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 6 SA 273 (W) (*Johannesburg Municipal Pension Fund*).

⁸⁹ *Id* para 15.

⁹⁰ Currie (n 6) 332.

⁹¹ *Id* 340.

⁹² *Bato Star* (n 11) para 25.

Two recent cases highlight the fact that this confusion continues to reign. In *Botha*,⁹³ despite having found that a local council decision regarding the appointment of a mayor did not constitute administrative action, the court curiously held that, 'the issue falls to be decided in terms of the court's common law powers of judicial review'.⁹⁴ In the context of the requirement to give reasons, the *Koyabe* case⁹⁵ provides a further illustration of 'PAJA avoidance'. In this case, Mokgoro J held for a unanimous Constitutional Court, that section 33(2) of the Constitution, read with the PAJA, entitled the applicants to reasons even in the absence of a request (which is mandated under s 5 of the Act), concluding simply that, 'the Constitution indeed entitles the applicants to reasons for the decision declaring them illegal foreigners'.⁹⁶ Hoexter has criticised this finding on the basis that it appears to contradict the principle of subsidiarity by deliberately avoiding engagement with the applicable request-driven regime of section 5 of the PAJA.⁹⁷

5.2 *The expanding parallel universe of administrative law: The principle of legality*

The constitutional principle of legality – an aspect of the rule of law – provides a general justification for the review of public power and thereby operates as a residual source of review jurisdiction: a 'fourth pathway to review'.⁹⁸ In this regard, it serves as a safety net that gives the courts a degree of control over action that amounts to an exercise of public power, but *falls short* of administrative action for the purposes of the PAJA or section 33.⁹⁹ Hoexter has described it as 'a wonderfully useful and flexible device' with a reassuringly wide spread.¹⁰⁰ Its breadth, simplicity and flexibility make it a very tempting alternative to the rocky pathway to review under PAJA with all of its conceptual hurdles. As a result, the courts have expanded the principle incrementally, incorporating under its broad umbrella most of the ordinary rules of administrative law.¹⁰¹ This is why, in the Constitutional Court decision of *Affordable Medicines Trust*,¹⁰² 'one sees the court applying administrative-law principles to non-administrative action without referring to the PAJA or section 33 of the Constitution at all'.¹⁰³

⁹³*Botha v Mathabeng Municipality* [2010] ZAFSHC 18 (18 February 2010) (*Botha*).

⁹⁴*Id* para 32.

⁹⁵*Koyabe v Minister for Home Affairs* 2010 4 SA 327 (CC) (*Koyabe*).

⁹⁶*Id* paras 60-61.

⁹⁷Hoexter (n 8) 484-485.

⁹⁸*Id* 121.

⁹⁹*Id* 124.

¹⁰⁰Hoexter 'The principle of legality in South African administrative law' (2004) *Macquarie LJ* 183.

¹⁰¹Hoexter (n 22) 320.

¹⁰²*Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) (*Affordable Medicines Trust*).

¹⁰³Hoexter (n 8) 255.

As a result of this overlap, the principle of legality has come to be called 'administrative law applied under another name'¹⁰⁴ and tempted by its simplicity and generality, our courts frequently review action that *would* amount to administrative action within the purview of the PAJA, under the principle of legality instead. Thus, the avoidance of the Act has been further encouraged through the steady development of this 'parallel universe of administrative law'.¹⁰⁵ Currie notes that this flawed approach stems from the misguided conception of the PAJA as an optional course, in instances where it ought to be the sole pathway to review.¹⁰⁶ He states that, by incorrectly treating the PAJA as optional, the courts are quick to 'put it aside in favour of the familiar consolations of the doctrine of legality'¹⁰⁷ thereby exacerbating the already awkward inter-relationship between the PAJA, the Constitution and the common law.

Hoexter cites the *Albutt* case¹⁰⁸ as a recent example 'of explicit and deliberate avoidance of the PAJA and its definition of administrative action'¹⁰⁹ in favour of the simplicity of the principle of legality. This judgment evidences a worrying general pattern displayed (in particular) in Ngcobo's administrative law jurisprudence: a tendency to avoid the PAJA in favour of this supple principle. In this case, despite the High Court having found that the exercise of the power under section 84(2)(j) of the Constitution amounted to administrative action under the PAJA, the Constitutional Court simply chose to deal with it under the principle of legality, stating that the administrative action question could be 'left open for another day'.¹¹⁰ Hoexter thus criticises this judgment for evidencing a 'blunt and unapologetic' avoidance of PAJA by categorising it as an 'ancillary issue'.¹¹¹ This subversive reasoning is – with respect – rather disconcerting and as Hoexter notes, 'the PAJA would soon become redundant on the court's approach'.¹¹² A second example of this type of judicial reasoning is evidenced in the *Diggers Development* case.¹¹³ In this matter, despite concluding that the local council decision fell outside the ambit of administrative action under the PAJA, the judge

¹⁰⁴Hoexter (n 22) 321, quoting Plasket.

¹⁰⁵Hoexter (n 8) 124.

¹⁰⁶Currie (n 6) 347.

¹⁰⁷*Ibid.*

¹⁰⁸*Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) (*Albutt*). See further, as an illustration of Ngcobo J's tendency to avoid the PAJA in favour of direct recourse to section 33, the case of *Chirwa v Transnet Ltd* 2008 4 SA 367 para 139: '[t]he question whether particular conduct constitutes administrative action must be determined by reference to s 33 of the Constitution'.

¹⁰⁹Hoexter (n 8) 136.

¹¹⁰*Albutt* (n 108) para 83.

¹¹¹Hoexter (n 8) 136.

¹¹²*Id* 137.

¹¹³*Diggers Development (Pty) Ltd v City of Matlosana* [2010] ZAGPPHC 15 (9 March 2010) (*Diggers Development*).

nonetheless proceeded to decide the case as if the Act applied. Quinot notes that, '[h]e was fortified in this approach by noting that the principle of legality would apply in any case ... and that the grounds of review raised in terms of the PAJA could just as easily be founded on legality'.¹¹⁴ In this regard, Murphy J conceived of the PAJA as superfluous legislation that would make little difference in practical terms.¹¹⁵

And so it would seem, we are all left with a case of what Currie dubbed: 'the PAJA blues'.¹¹⁶ But more than this, the hopeful administrative lawyers who so readily anticipated the 'seismic shift' in our administrative law are left with a sense of heartbreak as the relationship between the PAJA, the Constitution and the common-law principles of judicial review, becomes increasingly strained and dysfunctional. One of the inadvertent consequences of this tricky interplay, has been an expansion in the role of the common law, which has come to play a far more rigorous part in our current administrative law than the mere interpretative role that was initially anticipated it would play. I turn now to elucidate what I understand to be five key roles of our common law principles of judicial review of administrative action and thereby refute the claim that it has been relegated to a mere interpretative aid.

6 The common law lives on¹¹⁷

What was the hope for the PAJA? Currie notes that it was meant to be an exercise in 'codification-reform'¹¹⁸ in which, 'the best of the common law would be mirrored in the Act'¹¹⁹ but the Act itself would serve as more than a mere restatement of the common law in order to reform the existing administrative law where applicable.¹²⁰ Although the PAJA does reform the law in some respects and thus has some redeeming features, on the whole, 'it is a flawed piece of legislation that shows all the signs of the rushed job that it was'.¹²¹ Plasket notes that, '[t]he PAJA is intended to cover the field ... [and] [i]ts major flaw lies in the fact that it falls short in this respect because of the complicated, qualified, illogical and incomplete definition of administrative action'.¹²² Furthermore, section 6 – the 'heart of PAJA' – is meant to be a codification of the grounds of review,¹²³ however, certain well-known common-law grounds have been omitted from the

¹¹⁴Quinot 'Administrative law' (2010) *Annual Survey of South African Law* 45.

¹¹⁵*Ibid.*

¹¹⁶Currie (n 6) 325.

¹¹⁷Hoexter (n 8) 29.

¹¹⁸Currie (n 6) 332.

¹¹⁹Hoexter (n 9) 517.

¹²⁰Currie (n 6) 333-334.

¹²¹Plasket (n 10) 27.

¹²²*Ibid.*

¹²³*Ibid.*

list. The hope and the reality have thus, once again, failed to align. As a result of these loopholes, the common law lives on in a way more prevalent than that which was originally intended:¹²⁴ in the words of Currie, ‘it continues to play a decisive role’.¹²⁵

The first role the common law plays is that which was originally intended for it: *an interpretative, informative and supplementary role* to guide the interpretation of the PAJA and section 33. As the Constitutional Court confirmed in *Pharmaceutical Manufacturers*, the common-law principles would ‘continue to inform the content of administrative law ... and contribute to [its] future development’.¹²⁶ Hlophe wrote in 2004 that, ‘much of our [common law] jurisprudence is relevant in giving shape to constitutional interpretation’.¹²⁷ In the *Manong* case,¹²⁸ Davis J highlighted the importance of this role of the common law, stating that many of the concepts used in the PAJA, ‘require recourse to common law jurisprudence’ in order to give meaning to them.¹²⁹ A case that provides a quintessential example of the use of the common law as an interpretative tool is the *Premier, Mpumalanga* case¹³⁰ in which O’Regan J gave meaning to the concept of ‘legitimate expectation’ as used in section 24 of the interim Constitution, by drawing on the rich common law jurisprudence on the subject.¹³¹ She noted that, ‘[t]he concept of “legitimate expectation” employed in section 24 ... needs to be interpreted in the light of the concept ... that sprang from Lord Denning’s judgment in *Schmidt*’ and found its way into our law in the benchmark case of *Traub*.¹³²

Secondly, particularly given the loopholes in section 6(2) of the PAJA, the common law plays a *gap-filling role* in respect of ‘well-established grounds of review’¹³³ that have been omitted from the Act. Thus, for example, the grounds of vagueness, buck-passing and the no-fettering rule (also known as ‘rigidity’),¹³⁴ – all well-known at common law, but omitted from the Act – may continue to find direct application in our ‘new administrative law’ through the catch-all ground

¹²⁴See, eg, *Bato Star* (n 11) para 25.

¹²⁵Currie (n 6) 326 fn 2.

¹²⁶*Pharmaceutical Manufacturers* (n 4) para 45.

¹²⁷Hlophe ‘A response to Justice O’Regan’ (2004) SALJ 447.

¹²⁸*Manong and Associates v Director-General: Department of Public Works* 2005 10 BCLR 1017 (C) (*Manong*).

¹²⁹*Id* 1026H-1027A.

¹³⁰*Premier of Mpumalanga v Executive Committee of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC) (*Premier, Mpumalanga*).

¹³¹See also Breitenbach ‘The place of the common law in “constitutional” administrative law’ in Corder and Van der Vijver (eds) *Realising administrative justice* (2002) 41.

¹³²*Premier, Mpumalanga* (n 130) para 36, referring to *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) (*Traub*).

¹³³Hoexter (n 9) 497.

¹³⁴Hoexter (n 8) 325.

contained in section 6(2)(i) of PAJA.¹³⁵ This catch-all provision will also enable further developments of the common law which can be 'fed into the PAJA'¹³⁶ via this section.

Thirdly, the common law plays an important role in 'ameliorating the harshness of some of the provisions of the PAJA which appear on their face to be less in step with the Constitution and its values and the common law.'¹³⁷ To this extent, the common law plays a crucial *role of introducing nuance and variability into our administrative law to mitigate the potentially harsh effects of the PAJA*. Plasket gives two examples of where this 'ameliorating role' may come into play. First, in the context of the time-limit within which to institute judicial review proceedings: the 180-day time frame mandated by section 7(1) read with section 9(1) of the PAJA 'is more rigid than the common law delay rule, but there are indications that it may be applied in much the same way'.¹³⁸ Secondly, the section 7(2) obligation to exhaust internal remedies before instituting judicial review under PAJA, 'is far more hostile to the right of access to court than the more nuanced common law rule'¹³⁹ and as a result the courts have tended to read the section down to bring it into step with the flexible common law. A more controversial example (insofar as 'administrative action' is the *gateway* to relief under the PAJA) pertains to an attempt to ameliorate the harsh effects of the narrow definition of administrative action under the Act. Thus, in the case of *Oosthuizen's Transport*¹⁴⁰ Fabricius AJ brought the investigative action in question under the purview of 'administrative action' within the PAJA notwithstanding the fact that these decisions lacked finality. The judge pointed out that even preliminary decisions may have serious consequences and the right to be heard was recognised at common law, post-1994 but pre-PAJA case law, as well as English law and thus the PAJA ought to be brought into step with these well-established principles.¹⁴¹

Fourthly, the common law plays the *role of a contextual backdrop* against which new grounds of review, that were not available at common law, can be interpreted and developed. Plasket gives the example of review for unreasonableness – a ground not independently recognised under common law. For instance, in *Bato Star*, O'Regan J drew from the English common law in

¹³⁵'The action is otherwise unconstitutional or unlawful'.

¹³⁶Plasket (n 10) 37.

¹³⁷*Id* 38.

¹³⁸*Ibid*. See, eg, *Scenematic Fourteen (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 BCLR 430 (C) in which non-compliance with the time limit was not an issue in the appeal from this decision.

¹³⁹Plasket (n 10) 38.

¹⁴⁰*Oosthuizen's Transport (Pty) Ltd v MEC, Road Matters, Mpumalanga* 2008 2 SA 570 (T) (*Oosthuizen's Transport*).

¹⁴¹*Id* paras 25-29.

giving meaning to section 6(2)(h) of the PAJA. She referred to Lord Cooke's insights on unreasonableness in the case of *R v Chief Constable of Sussex, Ex Parte International Trader's Ferry Ltd*,¹⁴² and held that, '[s]ection 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach'.¹⁴³

Finally, Hoexter notes that, 'the common law still ... continues to play an *independent role* in the cases not covered by PAJA or by the Constitution more generally'.¹⁴⁴ Thus, in relation to the reviewability of private power exercised by private bodies (particularly in a disciplinary setting), the common law remains a direct pathway to review insofar as the PAJA's formulation of administrative action seems to exclude such conduct entirely.¹⁴⁵ Claasen J confirmed as much in the *Klein* case.¹⁴⁶

To my mind the Constitution makes no pronouncements in respect of this branch of private administrative law. Thus, continuing to apply the principles of natural justice to the coercive actions of private tribunals exercising no public powers will in no way be abhorrent to the spirit and purports of the Constitution.¹⁴⁷

In the recent case of *National Horseracing Authority of Southern Africa v Naidoo*,¹⁴⁸ although the question did not have to be decided, the majority held that cases such as this, in which disciplinary powers are exercised by a domestic body, ought not to be decided under the PAJA (as Wallis J intimated in his minority judgment) but rather under the established principles of our common law which emerged from the line of Jockey Club cases.¹⁴⁹

7 Conclusion

In this article I have sought to elucidate the complexities of the interplay between the PAJA, the Constitution and the common-law principles of judicial review of administrative action. In doing so, I have juxtaposed the theoretically simple interplay that was propounded by the Constitutional Court in something akin to a formula in *Pharmaceutical Manufacturers* and *Bato Star*, with that which has panned out in practice in our jurisprudence. This jurisprudence evidences various disconcerting pathologies in the judicial response to our administrative law love triangle – particularly since the enactment of the PAJA – and I have sought to

¹⁴²[1999] 1 All ER 129 (HL) 157.

¹⁴³*Bato Star* (n 11) para 44.

¹⁴⁴Hoexter (n 8) 253.

¹⁴⁵*Id* 206.

¹⁴⁶*Klein v Dainfern College* 2006 3 SA 73 (T) (*Klein*).

¹⁴⁷*Id* para 24.

¹⁴⁸2010 3 SA 182 (N).

¹⁴⁹*Id* para 4 of Levinsohn DJP's judgment.

illustrate these pathologies with reference to case examples. Finally, I have shown how, given the complexities of the curious relationship between the PAJA, the Constitution and the common law, the latter has come to play a far more extensive role in our 'new administrative law' than that of 'mere interpretative aid'. In doing so, I have sought to refute the claim that the common law principles of judicial review of administrative action have been entirely replaced by the section 33 right to administrative justice, as given effect to through the PAJA. Rather, the common law is 'the golden thread that runs through South African administrative law'¹⁵⁰ and although its role may have changed somewhat, it nonetheless remains important.

¹⁵⁰Plasket (n 10) 40.