I Introduction

Section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) defines an ‘administrative action’ as a decision or failure to take a decision that, among other things, ‘adversely affects the rights of any person’. PAJA applies only to decisions that meet this threshold definitional requirement, and only administrative decisions that affect a right or rights can be reviewed against the standards of administrative justice. It has been pointed out that this definition of administrative action is probably narrower than the meaning of administrative action contemplated in s 33 of the Constitution of the Republic of South Africa, 1996,1 but nowhere has the definition been challenged as unconstitutionally narrow. For such a challenge to be made it would have to be argued that PAJA’s protection against abuses of public power is less extensive than the protection offered by s 33 of the Constitution. If s 33 of the Constitution, properly construed, offers a remedy against unfair, unlawful or unreasonable administrative action that PAJA does not, then PAJA, as the legislation meant to give effect to the rights in s 33, is unconstitutional.2 It is a well-established rule of statutory interpretation in the constitutional era that where a statute can be read in such a way as to avoid unconstitutionality, that interpretation is to be preferred over other interpretations that render the legislation unconstitutional.3 My aim here, however, is not to argue that the s 1 definition is unconstitutionally narrow, but to investigate the implications of the broadening of the s 1 definition in s 3. The latter section requires administrative action affecting rights or legitimate expectations to be procedurally fair, and therefore extends the application of at least s 3 of PAJA to administrative decisions affecting legitimate expectations. Section 3 creates an exception to the narrow s 1 definition; but how that exception is to be read alongside the threshold requirement of an effect on ‘rights’ is not at all clear.

There appear to be two ways of resolving this definitional inconsistency. One is to read the s 1 definition of administrative action as broadly as the meaning given to the term in s 3. This was the approach

2 I Currie & J Klaaren The Promotion of Administrative Justice Benchbook (2001) [1.28]; Hoexter (ibid) 88. See also Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC) para 97 (per Chaskalson CJ, referring to an unpublished paper by Hoexter) and para 423 (Ngcobo J).
3 Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd 2001 (1) SA 545 (CC) paras 21-23.
adopted by Yekiso J in the *Tirfu Raiders* case. He read ‘rights’ in s 1 to include legitimate expectations, and found that an effect on a legitimate expectation satisfied the threshold requirement of an effect on a right. This is certainly not an ideal solution. Yekiso J’s interpretation is not supported by the plain text of PAJA, and it is also a well-established rule of statutory interpretation that a statute can be given no meaning that its text cannot reasonably support. The other reading, to which I shall refer as ‘the alternative’ in this note, confines the broad definition of administrative action to s 3. PAJA is then read as containing two different categories of administrative action: decisions affecting rights or legitimate expectations which must be procedurally fair, and decisions affecting rights which must comply with the requirements of the rest of PAJA.

Determining which of these interpretations is to be preferred comes down to the interpretation of s 33(1) of the Constitution. I argue that s 33(1) does not draw any distinction between the application of the protections of procedural fairness, lawfulness or reasonableness, and to the extent that an interpretation of PAJA does so, that interpretation is inconsistent with the Constitution. If this argument is correct, then Yekiso J’s interpretation has to be accepted. Yekiso J makes no constitutional argument himself, and neither does he consider the alternative I describe here. If s 33(1) does not prohibit differential treatment of the three elements of administrative justice, however, then the alternative approach is a constitutionally acceptable reading of PAJA. In that case, whether Yekiso J’s reading or the alternative is to be accepted depends on which reading makes the most sense of PAJA as a whole.

II THE FACTS OF THE CASE

The applicant in the case was the Tirfu (Transvaal Independent Rugby Football Union) Raiders Rugby Club. Tirfu Raiders is a predominantly black rugby club, and a member of the Golden Lions Rugby Union (the second respondent). The Golden Lions Rugby Union is in turn a member of the South African Rugby Union (SARU), the first respondent. Tirfu Raiders sought the review and setting aside of SARU’s decision to change the procedure by which black rugby clubs are selected to compete in the National Club Championship, a club rugby competition that takes place around about September each year after the close of the provincial club rugby season.

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4 *Tirfu Raiders Rugby Club v SA Rugby Union* [2006] 2 All SA 549 (C).
5 Hoexter (note 1 above) 107.
6 *Hyundai* (note 3 above) para 24.
The history of black rugby clubs in the National Championship is relevant. Black rugby clubs became eligible to compete in the same club championships as white clubs only in 1992. Teams qualify to compete in the National Club Championship by winning the competition league in their respective provincial unions. Since 1992, however, it has invariably been the ‘traditionally white rugby clubs’ that have qualified to play in the National Club Championship. In 2000 a policy was introduced whereby the 6 top black clubs, determined with regard to their positions on their respective logs at the end of the rugby season, would participate with the top rugby clubs from each of the fourteen provincial unions in the Club Championship. On 15 July 2005 it was decided by SARU’s management committee that only two black clubs would be selected to participate in the Club Championship along with the fourteen provincial club champions. These would be the top black clubs from the North and from the South. The decision was approved by the SARU President’s Council (a body made up of the presidents of the provincial rugby unions affiliated to SARU) on 29 July 2005 and conveyed to the applicants and other affected parties on 2 August 2005. The applicant’s primary complaint was that in terms of the new system the determination of the top black rugby clubs would be made with reference to the log standings as at 1 August 2005. This was inconsistent with past practice whereby the determination was made with reference to the log standings at the end of the rugby season in September. As it happened, Tirfu Raiders was not the top black club in the Northern region on 1 August 2005, and was not given an opportunity to compete in the Club Championship.

Tirfu Raiders complained against the decision on a number of grounds. They argued that the decision was unlawful in that SARU’s management committee was not empowered to make the decision it did; that the decision was not rationally connected to the purposes for which it was taken and was unreasonable; and that the decision was procedurally unfair in that the neither SARU nor the management committee had afforded Tirfu Raiders an opportunity to be heard prior to the decision. Tirfu Raiders relied on the provisions of PAJA for all of its grounds of complaint. Yekiso J had to decide whether PAJA was applicable to the matter, and after deciding that the decision amounted to the exercise of a public power or the performance of a public function in terms of an empowering provision, he turned his attention to whether the decision adversely affected any rights held by Tirfu Raiders. He concluded that based on past practice, Tirfu Raiders had a legitimate

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7 Tirfu (note 4 above), para 7.3.
8 Ibid paras 7.4 and 8.
9 Ibid paras 8 and 21.
10 Ibid paras 8, 9 and 15.
11 Ibid para 12.
expectation that teams would be selected on the basis of log standings at the end of the season. The remarkable conclusion Yekiso J draws is that the disappointment of this legitimate expectation satisfied the definitional requirement in s 1 of PAJA.

In my view the applicant has succeeded to make out a case that its rights, in the form of legitimate expectation, were adversely affected by the decision of the Management Committee of the first respondent taken on 1 August 2005. In concluding this issue, I thus determine that the Management Committee of the first respondent, in taking the decision it did on 1 August 2005, exercised ‘administrative action’ as defined in section 1 of the Promotion of Administrative Justice Act.

Yekiso J upheld the application. In light of the finding that PAJA was applicable, he turned to s 6(2) of PAJA and found that the decision was not rationally connected to the purposes for which it was taken and reviewable in terms of s 6(2)(f)(ii)(aa), and that in adopting a discriminatory and inappropriate approach SARU had acted unlawfully in terms of s 6(2)(f)(i). The court victory was unfortunately one of few that Tirfu Raiders enjoyed. They lost all but one of their matches at the Club Championships.

It is hard to see how Tirfu Raiders would have had a cause of action founded on PAJA had Yekiso J not reached the remarkable conclusion he did. Where PAJA protects legitimate expectations in s 3, it is still ‘administrative action’ that must be procedurally fair. If the narrow s 1 definition of administrative action is applied to the term as it appears in s 3(1), then the words ‘or legitimate expectations’ are rendered almost meaningless. No person will be able to rely on s 3 of PAJA to protect legitimate expectations unless the administrative action complained against affects a right to begin with. The legislature must be presumed, however, to have had some purpose in including legitimate expectations within the protections of procedural fairness. To construe PAJA in such a way that this inclusion is rendered nugatory would be to fail to give effect to the intention of the legislature. Creative interpretation of the statute is necessary and justified in light of this definitional confusion, and the rest of this article compares the two competing interpretations.

III Weighing the Alternatives

The most compelling reason to accept Yekiso J’s conclusion, or rather to reject the alternative, is the operation of the Hyundai principle that unconstitutional statutory interpretations are to be avoided. Accepting
Yekiso J’s conclusion rests primarily on showing that the alternative is inconsistent with the Constitution.

(a) The constitutionality of the alternative approach

Section 33(1) of the Constitution states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. There is no indication that this right to administrative justice is limited to administrative action that affects rights.16 Section 33(2), by contrast, states that everyone whose rights are affected by administrative action has the right to be given written reasons explaining it. There is therefore some support for the suggestion that PAJA’s definition of administrative action narrows the scope of the s 33(1) right. This is, however, not a new argument;17 and neither is it a knock-down argument. There is simply too little to suggest what the scope of administrative action contemplated in s 33(1) is.18 What I wish to suggest is something a little different. My argument is that in extending the protections of procedural fairness to administrative decisions that affect legitimate expectations, while denying the protections of lawfulness and reasonableness in respect of the same or similar decisions, PAJA draws a distinction between lawfulness and reasonableness on one hand and procedural fairness on the other that is not contemplated in s 33 of the Constitution.

Section 33(1) does not establish three separate and independent rights to lawful administrative action, procedurally fair administrative action and reasonable administrative action. Rather, s 33(1) confers a right to administrative justice that encompasses three elements. The importance of the distinction lies in recognising the fact that entitlement or access to each element of the right is equal. Whatever qualifications limit the application of the right, or however s 33(1) defines the scope of the right, those qualifications apply equally to each of the three elements of the right. This is quite different to the situation under the interim Constitution,19 which, by virtue of item 23(2)(b) of Schedule 6 of the 1996 Constitution continued to apply mostly unchanged up until the entering into force of PAJA. Section 24 of the interim Constitution stated that every person had the right to:

16 Hoexter (note 1 above), 104. Courts too have relied on this view. In Combrink v Minister of Correctional Services 2001 (3) SA 338 (D), 342F-343A Levinsohn J held that prisoners had a legitimate expectation that they would be considered for parole on the basis of the policy in force at the time of their incarceration. The judge held that a decision altering this policy was administrative action because it affected this legitimate expectation, and that the decision impugned in the application ‘infringe[d] the applicants’ right to fair, that is to say, procedurally fair, and reasonable administration’ (my emphasis). Smuts AJ approved of and applied this reasoning to reach a similar conclusion in Mohammed v Minister of Correctional Services 2003 (6) SA 169 (SE), 188H-189B.

17 See for example the authority referred to in note 16 above.

18 Hoexter argues in any case that a narrowing of the definition of administrative action is not fatal: (note 1 above) 112.

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;
(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

This formulation did draw distinctions between the elements of the administrative justice right, and in fact created a number of distinct administrative justice rights. Crucially, the gateway to the protection of each of these rights was different: administrative action affecting rights or interests had to be lawful, administrative action affecting rights or legitimate expectations had to be procedurally fair, and administrative action affecting only rights had to be justifiable in relation to the reasons given for it. Section 33(1) gives no indication of what the gateway to the administrative justice right is; but it seems clear from the plain meaning of the text that whatever that gateway is, it is the same in respect of each of the three elements of the right. The 1996 Constitution has rejected the approach of the interim Constitution and established a system of administrative justice in which access to the protections of lawfulness, reasonableness and procedural fairness is undifferentiated. An interpretation of PAJA that follows the model of the interim Constitution and creates a similarly tiered system of administrative justice must be seen as inconsistent with the system established by s 33 of the Constitution.

Yekiso J’s approach avoids the stratification of the elements of administrative justice. By expanding the definition of administrative action in s 1 to include legitimate expectations, Yekiso J’s approach ensures that the protections of lawfulness and reasonableness apply as extensively as the protections of procedural fairness. Indeed, Yekiso J scrutinised the decision on the basis of PAJA’s rationality and lawfulness provisions and found that the decision was irrational and unlawful as well as procedurally unfair. An interpretation of PAJA that removes the disparity between the extent of the protections of procedural fairness and the protections of lawfulness and reasonableness is consistent with the view of s 33(1) of the Constitution I describe here. If that view is correct, then Yekiso J’s construction of PAJA has to be preferred over any interpretation that preserves that disparity.

(b) A definition of administrative action specific to s 3
The alternative interpretation is that ‘administrative action’ bears two different meanings in s 3 and s 1 (and the rest of PAJA). Giving different

20 Tirfu (note 4 above), paras 37-39.
meanings to the same term within a single piece of legislation is certainly an unorthodox way of interpreting a statute. More than this though, any argument in favour of this double-definition approach must necessarily be a counter-argument to the view that the Constitution does not allow differentiated approaches to the three elements of the right to administrative justice.

A possible counter-argument is based on the distinction between ‘deprivation’ and ‘determination’ theories of rights. Administrative decisions can be classified by the effect they have on rights — on one hand, a decision may deprive individuals of rights or interfere with rights, but on the other hand a decision, such as a decision on an application for a license of some sort, may determine whether a right exists at all. In the latter situation there is no pre-existing right. The applicant has an interest in the outcome of the matter, or at most a legitimate expectation of a particular outcome. Section 3 of PAJA applies explicitly to these determination situations, recognising that the process by which rights are determined must be fair. This is certainly a principle that few would disagree with. But while the principle justifies extending the protections of procedural fairness to decisions affecting legitimate expectations, it offers no justification for denying the protections of lawfulness and reasonableness in respect of decisions affecting legitimate expectations. The same sense of injustice is ignited by a decision that refuses the conferral of a right following an unfair procedure as by an unreasonable or unlawful decision that does the same. If the procedural fairness provisions of PAJA are to apply to determination situations where a legitimate expectation is affected, there is no reason that lawfulness and reasonableness provisions should not cover similar situations.

A second problem facing the alternative interpretation lies in the scheme of PAJA as a whole. Section 6(2) establishes a number of distinct grounds of review, and s 6(2)(c) empowers courts to review procedurally unfair administrative actions. Section 3 of PAJA cannot be read in isolation, and our courts have made it clear that s 3 must be read together

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21 Hoexter (note 1 above), 212.
22 The clearest example I can think of to illustrate this is the allocation of fishing rights in terms of the Marine Living Resources Act 18 of 1998. The Act requires persons or businesses wishing to engage in commercial marine fishing activities to apply for a share of the total annual allowable catch of a species of fish. Applicants have no right to catch any portion of the total allowable catch until the administrative process by which those rights are allocated has been completed. Nevertheless, various applicants for fishing rights have complained, successfully and unsuccessfully, that decisions were procedurally unfair, unlawful and unreasonable. Judicial review of the decisions was not confined to procedural fairness. See Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) and the string of Foodcorp decisions reported at 2004 (5) SA 91 (C), 2006 (2) SA 191 (SCA) and 2006 (2) SA 199 (C). It was simply accepted in these cases that the decisions amounted to administrative action and that PAJA governed proceedings.
with s 6(2)(c) in particular. While s 3 establishes standards of procedural fairness, it is s 6(2)(c) that empowers courts to review administrative action on the basis of procedural unfairness. The protection of legitimate expectations in s 3 is meaningful only if ‘administrative action’ in s 6(2)(c) applies to decisions that affect legitimate expectations. Confining the expanded application of procedural fairness to s 3 strips away any substantive protection that s 6(2)(c) affords to legitimate expectations. The difficulty is that it must be assumed in the absence of any indication to the contrary that ‘administrative action’ as it appears in s 6(2) bears the meaning given to it in s 1: s 6(2) does not explicitly expand the definition in the same way as s 3(1). Moreover, the term ‘administrative action’ as it appears in s 6(2) applies to all the grounds of review enumerated in the subsequent paragraphs. The subsection reads: ‘A court or tribunal has the power to judicially review an administrative action if—’, and then goes on to set out grounds of review including procedural unfairness. All the grounds of review established by the paragraphs of s 6(2) operate in respect of administrative actions that affect rights, and although administrative actions affecting legitimate expectations will be assessed for procedural fairness against the standards of s 3, only procedurally unfair administrative actions affecting rights can be reviewed in terms of s 6(2)(c). A whole class of procedurally unfair administrative actions — those that affect legitimate expectations — is left unreviewable. This result surely defeats the purpose of including legitimate expectations within the purview of s 3.

If the purpose of including legitimate expectations within the purview of s 3 is to be given effect to by reading 6(2)(c) as applying to administrative decisions that affect legitimate expectations, then all of the grounds of review listed in s 6(2) must be read to apply to decisions affecting legitimate expectations. Practically, this result is no different from the results of Yekiso J’s approach. Creative interpretation of s 6(2) might suggest on the other hand that s 6(2)(c) should be treated exceptionally, and that ‘administrative action’ in s 6(2) should be read to apply to legitimate expectations only for purposes of s 6(2)(c). Even if room can be found in s 33(1) for the differentiated approach that this creative interpretation requires, my own view is that the integrity of PAJA is better served if the phrase ‘administrative action’ is given only one meaning throughout the text of the statute. That requires expanding the s 1 definition as Yekiso J did. It is too artificial a construction of PAJA to maintain two distinct definitions of the phrase, and apply each one depending on the context in which it is used.

23 This was most recently stated by Plasket J in Police and Prisons Civil Rights Union v Minister of Correctional Services [2006] All SA 175 (E) para 70.
IV Conclusion

Yekiso J was confronted with an interpretive difficulty to which there is no satisfactory solution. Nevertheless, courts have a duty to interpret statutes as best they can, in accordance with principles and rules of interpretation. Yekiso J’s reading depends on a constitutional argument that he does not make in the judgment, but which I argue can be made successfully. My primary reason for rejecting the alternative reading remains the fact that it preserves the distinction between elements of the right to administrative justice that I argue is not in keeping with the spirit of s 33(1) of the Constitution. Even if I am wrong, the alternative interpretation creates the singularly odd situation where two distinct definitions of administrative action operate within the terms of PAJA. This may, ultimately, have been the intention of the legislature; but until a court decides what s 33(1) means or the legislature makes its intentions clear, it is difficult to know which approach should be followed. In the meantime I suggest that the precedent set by the Tirfu Raiders case be accepted and followed.

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