GENERAL COMMENTS ON REVIEW APPLICATIONS INCLUSIVE OF COMPILATION OF THE RECORD

1. The purpose of this discussion is not to dwell on the intricacies of the difference between a review founded on aspects of legality or of a common law review as against a review relevant to the review of administrative action under the Promotion of Administrative Justice Act 3 of 2000 *("PAJA")*, but simply to highlight certain practical issues relevant to review applications brought in terms of Rule 53 of the Uniform Rules.

2. **Reasons**

2.1 A decision (constituting administrative action) will often be forwarded to an interested party with at least an indication as to the reason for such decision.

2.2 Should no reason or inadequate reasons be provided, it is of great assistance to then rely on the provisions of Section 5 of PAJA and request *"adequate reasons"*:

2.2.1 This request has to be made within 90 days after the date on which the interested person became aware of the action or might reasonably have been expected to become aware thereof (Section 5(1) of

PAJA);

2.2.2 The administrator (who made the decision) must thereafter within 90 days of receipt of the request provide *"adequate reasons"* in writing for the administrative action (Section 5(2) of PAJA);

2.2.3 In absence of the proof to the contrary where an administrator failed to furnish adequate reasons, it must, subject to Section 5(4) of PAJA, be presumed in any proceedings for judicial review that such administrative action was taken without good reason (Section 5(3) of PAJA);

2.2.4 An administrator may in terms of Section 5(4) of PAJA depart from the requirement of furnishing such adequate reasons where it is *"reasonable and justifiable"*, however, under such circumstances, the person calling for such reasons must be advised thereof (Section 5(4)(a) of PAJA, the determination of reasonableness and justifiability of such a

departure provided for under Section 5(4)(b) of PAJA).

2.3 It is to be noted that an administrator may follow a procedure which *"... is fair but different"* to that prescribed under Section 5(2) of PAJA, where so empowered by any empowering provision.

2.4 Once in receipt of such aforesaid reasons, an applicant (in respect of such review application to be launched) should be in a position to launch a review application under the provisions contained in Rule 53.

2.5 Information can obviously also be sought in terms of the provisions contained in the Promotion of Access to Information Act 2 of 2000 *("PAIA")*, however, experience has taught that this is often a protracted exercise which results in difficulties pertaining to the time limitation contained under PAJA.

3. **Delay**

3.1 Under Section 7(1) of PAJA, it is provided that any proceedings for judicial review (in terms of Section 6(1) of PAJA) must be instituted *"without unreasonable delay"* and not later than 180 days after the date of

3.1.1 internal remedies having been concluded; or

3.1.2 where no internal remedies exist, a person concerned *"was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons"*.

3.2 The 180 days should not be a target in the sense of resting on one's laurels because you have 180 days. That is a dangerous ploy in that dependant upon the circumstances and facts, a point might well be taken that even though the application had been brought within 180 days, same was still not brought *"without unreasonable delay"*.

3.3 Prior to the 180 days having lapsed it would in essence be for a Respondent to raise and convince a court that the delay was unreasonable, whilst subsequent to the 180 day delay, it will be regarded as unreasonable *per se* and an extension of the period would have to be sought (in essence similar to condonation) under the provisions contained under Section 9(1)(b) of PAJA which will only be granted should a court be of the view that *"the interests of justice"* require such extension (Section 9(2) of PAJA).

3.4 In **Opposition to Urban Tolling Alliance v South African National Road Agency Limited** [2013] 4 All SA 639 (SCA) at paragraph [26] the Court held:

"[26] At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned ... Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding

180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay ... That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not."

3.5 It is important to note that the proverbial *"clock starts ticking"*

regarding the 180 day period not once a party seeking the review becomes aware of the fact that the administrative action is tainted by irregularities, but to the contrary *"... the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably have become known) to an applicant"*. **Cape Town City v Aurecon SA (Pty) Limited** 2017 (4) SA 223 (CC) at 231 E-F and 238 G – 239 B.

4. <u>The record</u>

4.1 In **Helen Suzman Foundation v Judicial Service Commission and Others** 2017 (1) SA 367 (SCA) at 374 G – 375 C, the SCA dealing with the primary purpose of Rule 53(1), held the following:

"[13] The primary purpose of the rule is to facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or state organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential

material before court. It is established in our law that the rule which is intended to operate to benefit the applicant, is an important tool in determining objectively what considerations were probably operative in the mind of the decision-maker when he or she made the decision sought to be reviewed. The applicant must be given access to the available information sufficient for it to make its case and to place the parties on equal footing in the assessment of the lawfulness and rationality of such decision. By facilitating access to the record of the proceedings under review, the rule enables the court to perform their inherent review function to scrutinise the exercise of public power for compliance with constitutional prescripts. This, in turn, gives effect to a litigant's right in terms of s 34 of the Constitution – to have a justifiable dispute decided in a fair public hearing before a court with all the issues being properly ventilated. Needless to say, it is unnecessary to furnish the whole record irrespective of whether or not it is relevant to the review. It is those portions of the record relevant to the decision in issue

that should be made available. A key enquiry in determining whether the recording should be furnished is therefore its relevance to the decision sought to be reviewed." (own emphasis added)

4.2 In essence, subject to relevancy as stated above, the record of proceedings would include *"... every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentiary ... it does ... include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it"*.

(Johannesburg City Council v The Administrator Transvaal and Another (1) 1970 (2) SA 89 (T) 91 H

4.3 A question which often arises relates to confidentiality in documentation and specifically also in tender documentation. In this regard it was held in **ABBM Printing and Publishing (Pty) Limited v Transnet Limited** 1998 (2) SA 109 (WLD) that:

4.3.1 joinder of all unsuccessful tenderers would not of necessity be necessary as it is only required where such other party has a direct or substantial legal interest in the subject matter of proceedings which may be prejudicially affected by an order of court (at 120F);

4.3.2 the position pertaining to joinder may change after consideration of the content of tender documents and if an applicant decides to proceed further (at 120 G-H);

4.3.3 as for confidential information contained in various tenders and the party sought to be compelled to disclose same being bound to a confidentiality undertaking, the Court there held (but not having been in possession of the tender document) that *"Part of it, such as the tender price, the tenderer's experience and expertise cannot be confidential. Other parts of it may well contain confidential information as this term is understood in the*

considerable case law involving confidential information and which should be protected from disclosure." (at 121 F-G);

4.3.4 it would be counter-productive and contrary to the Constitution to allow a respondent to hide behind an unsubstantiated blanket claim to confidentiality on behalf of tenderers or an express undertaking of confidentiality given to all tenderers (at 121 H-I);

4.3.5 in the result, the Court ordered copies of all reports, minutes and other documents to be delivered, inclusive of all tenders received, but made that subject to the qualification that:

"2.1 On the copy of each such tender or in a separate document the respondent shall mark or record that part of the tender which it considers to be confidential.

2.2 Save for the purpose of consulting with counsel or an independent expert, the

applicant's attorney shall not disclose to any other party, including the applicant, any part of a tender or contract in respect of which the applicant claims confidentiality.

2.3 *Should the applicant dispute any claim to confidentiality and should the parties be unable to resolve such dispute, the applicant shall on notice to the respondent and any person having an interest therein, have the right to apply to a judge in chambers for a ruling on the issue."*

(at 122 I – 123 B)

4.4 In **Goodman Bros (Pty) Limited v Transnet Limited** 1998 (4) SA 989 (W), Blieden J, however, did not follow the decision by Swartzman J in **ABBM Printing and Publishing (Pty) Limited** *(supra)* and held:

4.4.1 With reference to an earlier decision by Heher J, that an unrestricted right of access to documents in

possession of a public body can easily lead to abuse *"... especially where, as here, some of the information and the documents has been furnished by third parties in the reasonable expectation that outsiders or competitors will not have unrestricted access to such information"* and *"I do not consider that the form of the order worked out by the learned Judge in the ABBM case supra provides a realistic and businesslike expedient. Rather I think it will simply spawn further litigation."* (at 999 C-G);

4.4.2 The Court further held that :

4.4.2.1 *"It seems that the whole basis for the present portion of the application is for the applicant to gather information which it might or might not use in further legal proceedings which it might or might not embark upon. In addition to these facts, the fact that six other tenderers have not been joined is in my view fatal to this*

section of the applicant's case." at (1000 E-F) (own emphasis added); and

4.4.2.2 *"... it is clear that a substantial amount of the information which the respondent requires to be contained in the documents is of a confidential nature to anyone who is a tenderer. The documents concerned require details of not only a description of the watches tendered, the price for such watches, the discount allowed on the goods purchased and the mode of delivery, but also details as to the business profile of the tenderer and the names of those who are shareholders and directors if the tenderer is a company. They also require details as to the percentage of black persons who are in the tenderer's employ as skilled staff and those who are employed in management positions, as well as the*

number of black persons who make up the shareholding of the tenderer concerned. In my view this kind of information is by its very nature confidential to every tenderer. To allow a competitor such as the applicant sight thereof must cause the relevant tenderers prejudice." (own emphasis added); and

4.4.2.3 "*... it should also be mentioned that the respondent wrote to all the tenderers other than the applicant asking them whether they had any objection to the respondent making the relevant documentation available to the applicant. Some of the tenderers were prepared to agree to this, but others, including the successful tenderer, were not prepared to do so. In my view, these tenderers and particularly the successful tenderer, do*

have a direct and substantial interest in not wanting the contents of their tender documents to be revealed to the applicant, a competitor, and their non-joinder is a further factor in justifying a refusal of this portion of the relief claimed by the applicant." (own emphasis added) (at 1001 A-C)

4.5 In **Tetra Mobile Radio (Pty) Limited v MEC, Department of Works and Others** 2008 (1) SA 438 (SCA) the Supreme Court of Appeal accentuated that:

4.5.1 *"fairness, transparency and the other facts mentioned in s 217 permeate the procedure for awarding or refusing tenders"*; and

4.5.2 an Appeals Tribunal (as was the case in that matter, the Court holding that the appeal there provided for, was in substance a review) *"... cannot determine whether any of these grounds has been established*

without reference to the documents that were before the relevant committee, the record of relevant meetings and the reasons for the late decision. In this matter, the tribunal would need sufficient information in order to determine (inter alia) whether the Third Respondent was capable of undertaking the work. This follows from the very nature of the process and the grounds for interference. There is little purpose served if the unsuccessful tenderer does not know what case it must meet. This is a basic tenet of fairness, which in turn is a fundamental requirement of administrative action."

4.6 The Supreme Court of Appeal in **Tetra Mobile Radio (Pty) Limited** then proceeded and ordered the Third Respondent therein (having been the successful tenderer), to furnish to the Applicant a complete set of its tender documents, but it made an order restricting sight thereof to Applicant's attorney, its counsel or an independent expert similar to the order made in the **ABBM** matter.

4.7 In **Comair Limited v Minister for Public Enterprises and Others** 2014 (5) SA 608 (GP) the Court:

4.7.1 ordered *"unredacted"* copies of minutes to be disclosed, but again with a similar prohibition to wit : *"That, save for purposes of consulting with counsel or any independent experts, the applicant's attorneys shall not disclose to any other party, including the applicant, any part of the aforesaid documents."* (at 610 C) and

4.7.2 summarised comprehensively the Applicant's argument in which the relevant authorities pertaining to what should be contained in a record (at 616 G – 620 A) inclusive of the well known quote from **Johannesburg City Council v the Administrator, Transvaal and Another (1)** as already referred to above.

4.8 In the **Comair** judgment, comments were also made on aspects pertaining to commercial information (in contradiction

to what Blieden J held in the **Goodman** matter) (at 618 I – 619 C) and reference was made to **SA Neon Advertising (Pty) Limited v Claude Neon Lights (SA) Limited** 1968 (3) SA 381 (W) where it was *inter alia* held:

> *"The Respondent would, I was told, rather abandon part of its claim than make such information available to the Applicant. I have some sympathy for the Respondent in that regard, but I am unable to assist it. It need disclose nothing that is not material; but what is material, in the wide sense that that word bears in relation to the duty to make discovery, must be disclosed, whatever the commercial consequences may be ..."*

4.9 As for relevance, the Court in **Comair Limited** reiterated with reference to **Ekuphumleni Resort (Pty) Limited and Another v Gambling and Betting Board, Eastern Cape and Others** 2010 (1) SA 228 (E) that in considering the question of relevance, it is important to bear in mind that there is now a constitutional obligation for reasons to be given for administrative decisions, which must be justifiable as rational

and reasonably sustainable.

4.10 Compelling the provision of the record or a proper record can be effected in terms of an application under Rule 30A as it comprises the non-compliance with the rule and consideration can be given pertaining to an incomplete record to bring an application under Rule 30 as an irregular proceeding.

4.11 Where a respondent has failed to provide a proper record, an applicant would be in a position to argue that the matter is to be determined solely on the record as provided under Rule 53, however, Judges will often have some leniency pertaining to documents attached to an answering affidavit, the difficulty with such leniency being that Applicant will find it difficult to rely on aspects contained therein as further grounds for the review as same will often then be dealt with within a replying affidavit and run the risk of being struck out. Under such circumstances, I would rather suggest that leave be sought from the court under the provisions of Rule 6(5)(e) to file a supplementary founding affidavit.

4.12 Applicant's obligations under the provisions of Rule 53(3) to cause copies to be made of such portions of the record as may be necessary for purposes of the review and to furnish the Registrar with two copies and each of the other parties with one copy thereof should not be overlooked.

5. Amending, adding or varying the terms of a notice of motion and supplementing the founding affidavit

5.1 All too often Applicants are rather slack in utilising this further opportunity and mindful of the fact that this is essentially an Applicant's last bite at the cherry, same should be fully utilised.

5.2 To enable an Applicant to fully utilise it, it is necessary for the record filed to be meticulously considered as more often than not, further substantial grounds of review flow from the contents of a record.

6. Conclusion

The aforesaid is a brief synopsis of certain procedural aspects

pertaining to review applications, however, it barely touches the surface of all the aspects involved, such as whether the decision or action sought to be set aside constitutes administrative action, whether same falls within the ambit of PAJA, when is a decision deemed to be for example irrational, the obligation to exhaust internal remedies, what relief is to be granted even should a court find that a decision is reviewable in that the setting aside thereof might not always be the result, etc. Should there be a need therefor, a future meeting might be arranged for discussion of such aforesaid further aspects which are far more prone to lead to debate than the essential procedural aspects briefly set out above.

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