Speculum Juris

Vol 34 No 2 (2020)
Published 29 January 2021

ISSN 2523-2177

University of Fort Hare
Together in Excellence

Cite as: Mathiba and Lefenya "Rethingking the Regulation of Mining Activities in a Declared Protected Environment: *MEJCON* case Analysis" 2020 (34) Spec Juris 146

Rethinking the Regulation of Mining Activities in a Declared Protected Environment: *MEJCON* Case Analysis

*Gaopalelwe Mathiba**
Lecturer, Faculty of Law, Rhodes University

*Kesolofetse Lefenya***
Senior Lecturer, Faculty of Law, North-West University

Abstract

This note assesses the importance of the right to procedural fairness in terms of section 33 of the South African Constitution. The assessment is undertaken in the context of Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs, a case from which the North Gauteng High Court delivered a well thought out judgment in late 2018. The matter was brought up by a coalition of eight civil society organisations advocating for environmental justice. The coalition challenged a range of issues in respect of mining and environmental authorisations (by the Minister of Environmental Affairs and the Minister of Mineral Resources, respectively) that permitted underground coal mining in a declared protected area in Mabola, Mpumalanga. For determination by the court was the lawfulness of those authorisations giving rise to proposed coal-mining projects in the Mabola Protected Environment (MPE) near Wakkerstroom. In its determination, the court considered both the procedural and substantive grounds of review and consequently ruled overwhelmingly in favour of the coalition. The judgment significantly reasserts the significance of the right to procedural fairness and have important consequences and lessons for errant ministers. It is argued in the note that egregious violations of this kind do not only prejudice vulnerable communities where they often happen but are also threatening South Africa's strong constitutional democracy. The note further records the unlawful conduct of public officials and the resultant cost and consequence in the hope that conduct of this nature is not repeated. Lastly, the note

* LLB (NWU); LLM cum laude (UWC); PhD in progress (UCT). Email address: g.mathiba@ru.ac.za

** LLB; LLM; LLD (NWU). Email address: kesolofetse.lefenya@nwu.ac.za.

submits, on the basis of this judgment, that increased effort remains necessary to achieve adequate compliance with constitutional principles, such as procedural fairness, by government officials.

Keywords: procedural fairness; environmental law; protected area; ministerial authorisations; South Africa

1 INTRODUCTION

This analytical note considers and reviews the judgment of the North Gauteng High Court in the case of *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs*.[1] In light of this case, the note assesses the importance of the right to procedural fairness as provided for by section 33 of the Constitution of the Republic of South Africa, 1996 and also detailed further in sections 3 and 4 of the Promotion of Administrative Justice Act.[2] The case was brought before the court by a coalition of eight civil society organisations challenging a range of issues regarding the mining and environmental authorisations that permitted underground coal mining in a declared protected area in Mabola. In the main, the Court had to determine the lawfulness of the ministerial approval of proposed coal-mining projects in the Mabola Protected Environment (MPE) near Wakkerstroom in Mpumalanga.[3]

In deciding the matter, the Court considered both the procedural and substantive grounds of review and eventually ruled overwhelmingly in favour of the coalition of civil society organisations,[4] advocating for environmental justice.[5] The *MEJCON* judgment, as will become evident later, is significant in many respects. Among others, it adds significantly to a longstanding nexus between mining rights and environmental rights.[6] It also sets a ground-breaking precedent on issues relating to authorisations required to lawfully conduct mining activities in declared protected areas. This clarification is timely and commendable. It supports the trite integrated approach towards environmental management by affirming the constitutional imperative of the interdependent and interconnected relationship between various organs of state responsible for water, environmental affairs, mineral resources and, to a great extent, land-use planning.

The case note begins by explaining the concept of procedural fairness, since it features at the very core of this judgment. It then proceeds to discuss the *MEJCON* case in detail. This is followed by a critical evaluation of the judgment and then a conclusion.

2 PROCEDURAL FAIRNESS DEFINED

Procedural fairness is a loaded concept in legal scholarship. It often appears in administrative law and labour law literature.[7] For this note, the term is considered in its administrative law construct and/or formulation. In that regard, Hoexter defines the concept as:

> a principle of good administration that requires sensitive rather than heavy-handed application. The content of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all or nothing approach to fairness that characterised our pre-democratic law, an approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.[8]

Another legal scholar, Quinot has stated that the imposition of procedural fairness standards is particularly important because these standards serve to uphold principles and values such as accountability, responsiveness and openness,[9] that underpin the Constitution. These are known as section 195 principles.[10] Moreover, the post-1994, democratic and constitutional dispensation envisages a participatory democracy in which the right to speak and be heard is part and parcel of the right to be a citizen in the full sense of the word.[11] In *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*,[12] the Constitutional Court went further in its articulation to say that the right to have a voice on public affairs is constitutive of

1 Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs 50779/ 2017 2018 ZAGPPHC 807 (MEJCON judgment).
2 Promotion of Administrative Justice Act 3 of 2000 (PAJA).
3 This was done in terms of s 52 of the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA).
12 *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (1) BCLR 1 (CC).

dignity.[13]

In the same breath, Burns has reiterated that a fair procedure ensures accurate and informed decision-making that is legally defensible and justifiable.[14] An integral part of such a fair procedure is that any person affected by the decision must be given the opportunity to be heard on the matter or to present his or her side of the story before any decision is taken.[15] There is no universal definition of fair procedure. Whether a specific procedure followed is fair or not should be determined on a case-by-case basis.[16]

Regarding the *MEJCON* case, there is no doubt that the decisions that were taken by both ministers, as explained below,[17] all amounted to administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[18] Maybe to do justice to this note, it is important that this case note makes reference to the long definition of administrative action in terms of the PAJA.[19] The PAJA defines "administrative action" as a decision of an administrative nature, by an organ of state or a natural or juristic person, exercising a public power or performing a public function in terms of any legislation or an empowering provision, that adversely affects right(s) and has a direct, external, legal effect; and that does not fall under any of the listed exclusions.[20]

The following discussion explores and assesses the right to procedurally fair administrative action through the lens of the decision in *MEJCON*.

3 FACTUAL BACKGROUND OF THE *MEJCON* CASE

This section provides a discussion of the factual background of the case. It also outlines the issues that the courts had to determine.

3 1 The Facts

In 2011, the Minister of Water and Environmental Affairs, Edna Molewa, listed the Wakkerstroom and Luneburg Grasslands as one of the ecosystems that were threatened and thus in need of protection.[21] These ecosystems formed the significant portion of the Mabola Protected Environment (MPE) which was declared a protected area later in 2014 by the Member of the Executive Council (MEC) responsible for Agriculture, Rural Development, Land and Environmental Affairs in Mpumalanga.[22] This followed a prior notice and comment procedure which included a full opportunity for all stakeholder participation (including Atha).[23] At the same time, in February 2014, the Atha-Africa Ventures (Pty) Ltd was already in possession of a prospecting right in respect of the farms, some of which fell within the area covered by the notice declaring MPE as the protected environment.[24] The Ministers of Environmental Affairs (DEA) and Mineral Resources (DMR) respectively, authorised Atha-Africa Ventures to conduct underground coal mining activities within the MPE.[25] The estimated lifespan of the mine, according to the mining permit, was fifteen years.[26] One of the requisite procedures that had to take place in preparation for the actual mining activities was the dewatering process that

13 See *New Clicks* case para 627.
14 Burns *Administrative Law* 4th ed (2013) 411.
15 See *Mdwaba v Nonxuba* A5051/2015 2018 ZAGPJHC 44 paras 1 and 2. See also *Masethla v President of the Republic of South Africa* 2008 1 BCLR 1 (CC) paras 184 and 187.
16 See Burns (2013) 411.
17 See a detailed discussion of facts in part 3 of the note. These are the Ministers of Mineral Resources and Water and Environmental Affairs.
18 See s 1 of the PAJA. See also Currie and De Waal *The Bill of Rights Handbook* 6 ed (2013) 655.
19 Section 1 of the PAJA.
20 See s 1 of the PAJA.
21 The listing was done in terms of s 52 of NEMBA.
22 The MEC was empowered to do so in terms of s 28(1)(a)(i) and (b) of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA). The MPE comprises of wetlands and grasslands which have been largely classified as "Irreplaceable Critical Biodiversity Areas" and "Optimal Critical Biodiversity Areas" and numerous organs of state and other stakeholders have previously recognised the fundamental ecological and environmental importance of the area comprising the MPE. See *MEJCON* (High Court) para 5.
23 See *MEJCON* (High Court) para 5.
24 See *MEJCON* (High Court) para 5.2. It was for this reason that the mining company went further to make an application seeking to exclude the farms in question from the protected area.
25 This is said to have been done in terms of s 48 of the NEMPAA.
26 See *MEJCON* (High Court) para 6.2. The proposed mining project was an underground coal mine titled the Yzerfontein Underground Coal Mine.

posed a major threat to the surrounding biodiversity.[27] The Atha-Africa Ventures had already acknowledged and considered this threat when conducting its compulsory environmental impact assessment (EIA).[28] The two ministers (for DEA and DMR) respectively, cited several reasons for granting the required environmental and mining authorisations to Atha-Africa Ventures.[29]

First, the two ministers both argued during the hearing in *MEJCON* that the proposed underground coal mine followed all the required processes in terms of the enabling legislation,[30] which qualified the project to receive the requisite authorisations from relevant organs of state which have jurisdiction in respect of the activity, including the water use license, the mining right, and approved Environmental Management Plan (EMP), as well as the environmental authorisation.[31] These then informed the ministers' key submission to conclude that having considered all the foregoing factors,[32] there was no reason to deny the authorisation to mine in a protected area (MPE).[33]

Second, it was also argued in the ministers' submissions that the mining operations were not going to have any significant adverse effect on the management objectives of the MPE as noted in the approved EMP.[34] Third, the ministers claimed that all the potential impacts were clearly highlighted and the proposed mitigation strategies of those impacts were identified and thoroughly assessed in the environmental impact report dated January 2014.[35] Lastly, the ministers argued before the court that the mining operations were to be conducted in an orderly and ecologically sustainable manner as required by section 24 of the Constitution and the Biodiversity Guidelines of 2013, supporting the development of the country's resources in a manner that will minimise the impact of mining on the country's biodiversity and ecosystem services.[36]

Against this backdrop, the application for review of the above ministerial authorisations were then brought before the North Gauteng High Court for determination.[37] This application was filed by a coalition of civil society organisations referred to as the Mining and Environmental Justice Community Network of South Africa (MEJCON).[38]

3 2 Contended Issues

The High Court was called upon to determine numerous grounds of review raised by the applicants. Principal to these were two broad points of inquiry. First, whether the two ministers (of DEA and DMR) have complied with the provisions of sections 3 and 4 of the PAJA when they were taking the decisions to approve a mining right;[39] environmental management programme

27 This point here, among others, formed the primary argument by the coalition of civil society organisations.
28 See *MEJCON* (High Court) paras 6.3 and 7.1 respectively.
29 These reasons were apparently cited in the document titled "Annexure 1" that was attached to a letter directed to Átha's Senior Vice-President, dated 20 August 2016, and signed by the late Minister of Environmental Affairs. Some three months later, the same letter was addressed to (and signed by) the Minister of Mineral Resources on 21 November 2016. The MEC was copied on the letter.
30 See ss 28 and 48 of NEMPAA; s 23(1) of the MPRDA; s 24 of NEMA and s 22(1) of NWA.
31 *MEJCON* (High Court) para 7.5.
32 That, first, the mining operations will not adversely affect the management objectives of the MPE; second, that the mining operations must be conducted in an orderly and ecologically sustainable manner in terms of s 24 of the Constitution; third, that the mine in question had received other authorisations on water use, the mining right, the environmental authorisation and an approved environmental management plan; fourth, that the Mining Biodiversity Guidelines, signed by both ministers, propagate the utilisation of the country's natural resources that limits the impact of mining on the environment; lastly, that the potential environmental impacts had been identified and adequate measures had been proposed which would sufficiently address them. See *MEJCON* (High Court) para 7.5. See also Vinti "The Right to Mine in a 'Protected Area' in South Africa: *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs*" 2019 *South African Journal on Human Rights* 312.
33 *MEJCON* (High Court) para 7.5.
34 *MEJCON* (High Court) para 7.5 *(b).*
35 *MEJCON* (High Court) para 7.5 *(d).*
36 *MEJCON* (High Court) para 7.5 *(e).*
37 In terms of s 48 of NEMPAA.
38 See general introductory part of *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs* 50779/ 2017 2018 ZAGPPHC 807.
39 In terms of s 23(1) of the MPRDA. See *MEJCON* (High Court) para 4.11.1.

(EMPR);[40] an environmental authorisation for listed activities;[41] a water use licence;[42] and a permission for a change of land-use.[43] Second, whether those impugned decisions complied with section 48 of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA), the relevant statutory provision governing the requisite approval of the ministers.[44] It bears mentioning that this case note will only focus on the first issue,[45] namely; whether the decisions of the respective ministers complied, wholly or in part, with sections 3 and 4 of the PAJA.

3 2 1 Procedural Issues

The two main procedural issues that had to be determined by the court were transparency (non-compliance with sections 3 and 4 of PAJA)[46] and procedural unfairness (non-compliance with sections 3(1), 3(2), 3(3) and 4(1), 4(2) and 4(3) of PAJA).[47] In terms of transparency issues, which is fairly straight-forward, the court alluded to the fact that sections 3 and 4 of the PAJA prescribes the components of procedurally fair administrative action which require either adherence to direct *audi alterem partem* rule or the traditional method of public participation respectively.[48] These two routes, according to the court's interpretation, demanded and would have resulted in transparency if they were followed by the ministers.[49] This was not done in this case. On the second issue, procedural unfairness, the court ruled that the ministers' justification for non-compliance with the prescripts for procedurally fair administrative action under sections 3(1), 3(2), 3(3) and 4(1), 4(2), 4(3) of the PAJA did "not hold water".[50] The court criticised this non-compliance in strict terms, stating that "it resulted in an unjustifiable and unreasonable departure from the PAJA prescripts and [led] to procedurally unfair administrative action which should be reviewed and set aside on this ground alone." The key focus of this note is on the latter issue of procedural fairness and this is dealt with below.

3 2 2 Substantive Issues

Insofar as the substantive issues were concerned, the minsters' respective duties and discretionary powers to authorise mining activities were brought before the court for judicial interpretation and determination.[51] Furthermore, the meaning of the phrase "exceptional circumstances" in the context of which the authorisations were given and, in extension, the cautionary rule, were deliberated at a much deeper level.[52] Moreover, it is a well-established principle of administrative law that each state functionary operates within the purpose and ambit of its own enabling statutory provisions when taking administrative action and that the satisfaction of certain requirements of a specific provision does not necessarily equate to the satisfaction of a similar requirement in a different section or act, more especially if such decision is to be adjudicated by a different forum.[53] In the *MEJCON* case, both ministers failed to observe the latter principle.[54] For this reason, the court then ruled that "the Ministers have not appreciated their distinctive duties and neither have they fulfilled them in the manner in which they came to their conclusions. Their decisions [were] therefore … reviewed and set aside."[55]

40 In terms of s 39 of the MPRDA. See also *MEJCON* (High Court) para 4.11.2.
41 In terms of s 24 of NEMA. See also *MEJCON* (High Court) para 4.11.3.
42 In terms of s 22(1)(b) of the National Water Act 36 of 1998 (NWA). See also *MEJCON* (High Court) para 4.11.4.
43 In terms of s 26(4) of the Spatial Planning and Land Use Management 16 of 2013.
44 *MEJCON* (High Court) para 1.
45 Other aspects featured in this case were dealt with by Vinti 2019 *South African Journal on Human Rights* 311–322, where he specifically assesses the right to mine in a "protected environment" in South Africa within the prescripts of s 48 of NEMPAA.
46 *MEJCON* (High Court) para 11.1.
47 *MEJCON* (High Court) para 11.2.
48 *MEJCON* (High Court) para 11.1.1.
49 *MEJCON* (High Court) para 11.1.1.
50 *MEJCON* (High Court) para 11.2.7.
51 See *MEJCON* (High Court) para 11.3 for detailed insights into this aspect.
52 *MEJCON* (High Court) para 11.8.
53 This principle arises from the Constitutional Court decision in *Fuel Retailers Association of South Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga Province* 2007 ZACC 13; 2007 (6) SA 4 (CC).
54 See *MEJCON* (High Court) para 11.3.5.
55 See *MEJCON* (High Court) para 11.3.6.

4 THE COURT'S DECISION

The court then ruled overwhelmingly in favour of the coalition of civil society organisations, i.e. MEJCON. It set aside the ministerial decisions and referred them back to the two ministers concerned for reconsideration on the basis that the ministers did not act openly and transparently or in a way that promoted public participation, and that the decisions were therefore procedurally unfair.[56] The court ruled against the ministers' attempt of justifying their reliance on the irrelevant processes followed by other decision-makers in other capacities as a substitute for exercising their discretion under the NEMPAA independently.[57] Here the court was referring particularly to their failure to apply a cautionary approach when dealing with "sensitive, vulnerable, highly dynamic or stressed ecosystems" as "an impermissible abdication of decision-making authority."[58] These anomalies, the court ruled, rendered the ministerial decisions reviewable.[59]

In the reconsideration of their decisions, both ministers were ordered by the court to comply fully with the prescripts of sections 3 and 4 of the PAJA,[60] by taking into account the interest of the affected local communities and to observe the environmental principles contained in section 2 of the National Environmental Management Act 107 of 1998 (NEMA) with a strict measure of scrutiny and attention to details.[61] Furthermore, the court alluded to the fact that the ministers were supposed to defer their decisions on reconsideration until after, among others, the EMP and water use licence appeals have been determined.[62]

5 EVALUATION OF THE COURT'S DECISION

It bears mentioning that one of the interesting features of the *MEJCON* judgment is that it was the first case to deal with the ministerial permissions and/or authorisations for mining activities in a declared protected environment. This makes it the most significant and contemporary development where administrative law, mining law, and environmental law intersect. There is no holding question about this particular point. Coming out clearly from this judgment is that public authorities and decision makers cannot simply take decisions that adversely affect the rights and privileges of individuals and the broader public without punitive consequences to that effect.[63] The decision of the court *a quo* must be commended to stress this point once more. The court was successful particularly in demonstrating how important it is to ensure that all administrative decisions are procedurally fair and not left unchecked.[64] The judgment presents a unique reminder that gone are the days whereby administrators could simply take administrative decisions willy-nilly and without proper consultation with the individuals directly affected by those decisions.[65] The hinge of the current democratic dispensation is public participation that embroils the active involvement of the public in agenda setting, key decision-making processes and public policy formulation.[66]

While the *MEJCON* judgment revives a sense of hope for the betterment of public sector administration, it is worth mentioning that the battle to achieve an absolute procedural fairness is far from being over. For as long as there is administrative power, the possibility of having it abused cannot completely be overruled and it is undeniable that abuse of state power is a long-standing fact of life in South Africa.[67] The struggle to maintain procedural fairness continues, and it is for the courts to ensure, as and when they are approached, that procedural fairness is observed. In particular, a careful eye must be kept on the executive to ensure that administrative decisions are procedurally fair. For this reason, it should not come as a surprise that the court *a quo* had to stress the importance of compliance with the legislative requirements by both ministers. The ministers conceded that they did not follow the prescripts of these two sections, but their failure to follow these prescripts was, as they argued, justified.

6 SECTION 3 OF THE PAJA UNPACKED

Central to the *MEJCON* case was the value and utility of section 3 of the PAJA. This, therefore, deserves a separate discussion. It is important for this section to begin with reference to the common law antecedent of *audi alteram partem* principle. This concept of natural justice[68] has widely been understood to simply mean "hearing the other side" of the story. The principle

68 In the case of *Minister of the Interior v Bechler* 1948 3 SA 409 (A) para 451, the court defined this concept as "the stereotyped expression which is used to describe those fundamental principles of fairness which underlie every civilised system of law."

is well-established and observed in most liberal democracies and transformed systems of law across the world and entrenches basically a great innate sense of fair play.[69] Furthermore, the principle resembles what is expected of decisions in other ordinary contexts and/or settings, including, for instance, on the sports field or in the company setting. It essentially ensures that people adversely affected by decisions of others would know about those decisions in advance and be able to "have a say" in their finalisation. In this way, the process therefore entails an adequate prior notice of intention to take a decision and a fair opportunity to state their case and in order to influence the outcome of the decision to an unbiased decision maker.[70]

In *Heartherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another*,[71] the court held that before the deputy minister could confiscate the poultry or eggs of companies engaged in large-scale chicken breeding, the companies had to be given an adequate and fair opportunity to make representations to the deputy minister.[72] As the companies concerned were not afforded such an opportunity, the deputy minister's conduct was found to be inconsistent with the principle of *audi alteram partem* and the court accordingly set aside the deputy minister's order of confiscation in respect of the companies' eggs and poultry.[73]

In the same breath, in *Yates v University of Bophuthatswana*, the court ruled that:

> Justice presupposes that a party be afforded a fair and proper opportunity to present his case. The basic test of fairness also involves the absence of bias, both parties must be given an equal opportunity to present their cases, and consequently administrative action must not be vitiated, tainted or actuated by bias.[74]

Burns further states that, at common law, the *audi alteram partem* rule, which applies to all administrative hearings, requires compliance with the following:

(a) The individual must be given an opportunity to be heard on the matter, that is, be given an opportunity to put his or her case at a hearing;
(b) An individual must be informed of considerations which count against him or her. In other words, the individual, the person affected by a decision, must be aware of the content of the case being made against him or her; and
(c) Reasons must be given by the administrator for any decisions taken.[75]

Regarding the *MEJCON* case and in light of the aforementioned, it has been very clear from the beginning that the ministers (of DEA and DMR) failed to even comply with the basic tenet of procedural fairness that:

> … have become reliable aphorisms in our legal lexicon [which] provide that persons who are likely to be affected by administrative actions should be entitled and afforded a fair hearing before a decision is taken.[76]

That said, in terms of common law, the decisions of the two Ministers were and remain invalid. Still on the case at hand, in order to meet the procedural fairness requirement in the constitutional era, administrators, in this instance the two ministers, are expected to comply with section 3 of the PAJA which provides for two sets of requirements. The first set (section 3(2)) outlines the mandatory requirements which the ministers were supposed to follow. It provides that the administrator *must* give the person referred to in section 3(1):

i. Adequate notice of proposed administrative action,
ii. A reasonable opportunity to make representations,
iii. A clear statement of the administrative action taken,
iv. Adequate notice of any review or internal appeal, and
v. Adequate notice of the right to reasons.

It is clear, by the use of "must", that the above section makes it mandatory or peremptory for the administrator to follow the legislative prescripts. According to Wiechers, a mandatory (peremptory) provision requires exact or absolute compliance, to which failure to comply

69 See generally Corder "The Content of the *Audi Alteram Partem* Rule in South African Administrative Law" 1980 *THRHR* 157. See also *Mdwaba v Nonxuba* A5051/2015 2018 ZAGPJHC 44 para 1.
70 Quinot *Administrative Justice in South Africa: An Introduction* (2015) 145–146.
71 *Heartherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another* 1980 (3) SA 476 (T).
72 See Hoexter *Administrative Law* 366 and 370.
73 See generally the order of the court in *Heartherdale Farms*.
74 *Yates v University of Bophuthatswana* 1994 (3) SA 815 para 835D.
75 See Burns (2013) 415.
76 See *Louw v The Chairman of the Disciplinary Hearing Against the Applicant* (2001) Case No: 115/2001 para 9.

would constitute the nullity of the action.[77] In *Minister of Environmental Affairs and Tourism v Smith*,[78] the court confirmed that as a general principle, an administrative authority has no inherent power to condone failure to comply with any peremptory requirement.[79] It only has such power if it has been afforded a discretionary power to comply.[80]

Again in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,[81] the applicant, dissatisfied with its fishing quota allocation in terms of the Marine Living Resources Act 18 of 1998, contended that the Chief Director of Marine and Coastal Management had failed to comply with a mandatory and material procedure or condition prescribed by the empowering provision.[82] This contention was successful in convincing the court *a quo* to conclude that the mandatory provisions of section 2 of the Marine Living Resources Act had been ignored by the chief director. This ignorance, as a result, rendered the chief director's decision flawed. However, the Supreme Court of Appeal (SCA) concluded that the chief director's decision was in a way justified and could not be set aside on the ground that he simply failed to apply his mind to the quantum of hake applied for by the applicant and its ability to catch such quantum.[83] Subsequently, the Constitutional Court arrived at a different conclusion on the matter stating that "the decision will not be in accordance with the requirements of the [Marine Living Resources] Act unless the decision-maker can show that the absence of such a step is reasonable."[84] No argument was advanced on behalf of the chief director to the effect that the absence of such a step was reasonable, thus giving the Constitutional Court a ground to rule in the negative.

We also learn more about the question of non-compliance with mandatory requirements in *African Civils (Pty) Ltd v Minister of Rural Development & Land Reform*.[85] In this case, the court had to determine the legality of a rejection of a tender bid for the construction of bulk irrigation revitalisation in the Western Cape.[86] The tender documents specified the requirements which all the tenderers had to meet.[87] However, the bid was said to be non-responsive for failing to comply with mandatory requirements for awarding the tender. The failure to comply with specifications, prescripts, requirements, or conditions included in a tender document rendered a tender unacceptable or non-responsive and bound to disqualification. The court then ruled that the non-compliance with specifications stipulated in the tender document could be condoned only in instances where the document itself conferred a discretionary power on the administrative authority to condone such non-compliance with a mandatory requirement.[88] However, the latter was not the case in this matter.

In the instant matter, unfortunately, both ministers failed to comply with the mandatory prescripts stipulated in detail under section 3 of the PAJA. The ministers had no empowering reason and/or legally bestowed discretion for that non-compliance. This is a grave concern, for those who advocate for procedural fairness of administrative decisions that affect any individual person and potentially the public at large. The court was correct to say that this flaw resulted in the invalidity of the decisions taken by the ministers.

The second set (section 3(3)) outlines the discretionary requirements that the minister *could* decide to follow. It provides that the administrator *may* in his or her discretion, also give

77 Wiechers *Administrative Law* (1985) 198.
78 2004 (1) SA 308 (SCA).
79 See generally *Smith* case (2004).
80 See *Smith* case (2004) para 31.
81 2004 (7) BCLR 687 (CC).
82 See *Bato* case (2004) para 30.
83 Study the findings in the SCA ruling reported as *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* [2003] 2 All SA 616 (SCA). See also *Bato* case (2004) para 20.
84 See the summary of the *Bato* case available online at http://www.saflii.org/za/cases/ZACC/2004/15media.pdf (accessed 18-05-2020).
85 *African Civils (Pty) Ltd v Minister of Rural Development and Land Reform and Another; In re: Asla Construction (Pty) Ltd v Head of the Department of Rural Development and Reform and Another* [2016] 3 All SA 686 (WCC).
86 See *African Civils* case (2016) para 1.
87 These requirements included among others a valid business tax clearance certificate issued by the relevant authority, i.e. South African Revenue Service and a valid registration as a contractor with the Construction Industry Development Board (CIDB).
88 See *African Civils* case (2016) para 21, referring to *Dr JS Moroka Municipality v Bertram (Pty) Ltd* [2014] 1 All SA 545 (SCA) 551g–552a paras 16 and 17 and, *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Others v Smith* 2004 (1) SA 308 (SCA) para 31.

a person referred to in section 3(1) an opportunity:

i. to obtain assistance, and in serious or complex cases, legal representation,
ii. for the affected person to present and dispute information and arguments, and
iii. to appear in person.

The discretion referred to allows the minister in question to apply his or her mind on the matter and then take a decision. By using the word "may", the minister is not obliged to follow those requirements in the strict sense. Discretionary powers are easily recognisable by the permissive statutory language that confers them. They can also be signalled by using words in empowering provisions such as "may" or "it shall be lawful". Such powers are characterised by the element of choice that they confer on their holders.[89] Also, as the court held in *Dawood v Minister of Home Affairs*,[90] the:

> discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner.[91]

In the *MEJCON* case, the two ministers decided not to comply with any of the two sections, but instead decided to depart from the provisions, thereby relying on section 3(4). The court *a quo* refused to accept the contention by the ministers that their departure from the mandatory provisions was justifiable. In any event, the ministers had failed to show how the departure was justifiable, and that brings us to the point that the ministers had failed to comply with mandatory and discretionary requirements in section 3 and still failed to justify the said departure.[92]

Furthermore, section 4 of the PAJA also gave the ministers another opportunity to ensure procedural fairness of the decision that would affect the public. This section outlines five processes that the minister could choose to follow. Section 4(1) provides that in the instance whereby an administrative action materially and adversely affects the rights of the public, the administrator must decide whether:

a) to hold a public inquiry in terms of subsection (2)
b) to follow a notice and comment procedure in terms of subsection (3)
c) to follow the procedures in both subsections (2) and (3);
d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different; or
e) to follow another appropriate procedure which gives effect to section 3.

The above shows that the PAJA has availed several avenues to follow in ensuring procedural fairness of actions affecting the public. The ministers' failure to meet their obligations has thus resulted in a gross irregularity. It was highlighted in the case of *Minister of Home Affairs v Eisenberg & Associates*[93] that:

> In each case, it is a question of construction whether a statute making provision for administrative action requires special procedures to be followed before the action is taken. In addition, whether or not such provisions are made, the administrative action must ordinarily be carried out consistently with PAJA.[94]

In this light, a convincing case can be made to the effect that the court was correct in saying that the ministers' decisions resulted in an unjustifiable and unreasonable departure from the PAJA prescripts and lead to procedurally unfair administrative action which should be reviewed and set aside on that ground alone.[95] The statement echoed above demonstrates the seriousness and intensity of procedural fairness as a critical requirement for valid administrative actions and decisions.

Sections 3 and 4 of the PAJA are basically meant to protect the rights of the adversely affected individuals and members of the public. The state yields too much power over individuals and the public. With this being the case, unfortunately, it is readily observable that there is abuse of state power. Administrative law avails deliberately sections 3 and 4 of the

89 See Hoexter *Administrative Law* 46.
90 2000 (3) SA 936 (CC).
91 See *Dawood* case (2000) para 53.
92 *MEJCON* (High Court) para 11.
93 *Minister of Home Affairs v Eisenberg & Associates In re: Eisenberg & Associates v Minister of Home Affairs and Others* (CCT15/03) 2003 (5) SA 281 (CC).
94 See *Eisenberg* case (2003) para 59.
95 *MEJCON* (High Court) para 11.2.6.

PAJA to guard against such abuse of power.[96] Another good case in point to stress this opinion is *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism*,[97] where the court suggested that the administrative action in question, namely a decision to authorise the construction of a pebble-bed nuclear reactor, "affected the rights not only of individual persons but of the public in general"[98] and should thus comply with both sections 3 and 4 of the PAJA.

Moreover, in *Allpay Consolidated Investment Holdings (Pty) Ltd, v Chief Executive Officer, SASSA and Others*,[99] the court held that the determination of the procedural fairness of an administrative decision is independent of the outcome of the decision.[100] This means that the administrative action can be found invalid based on procedural irregularities regardless of whether the action would have been the same had a fair procedure been followed. In the *Allpay* case, the Constitutional Court also rejected the contrary approach followed by the SCA in the same matter, which involved a challenge to a procurement decision, stating that the SCA's approach undermines the role procedural requirements play in ensuring even treatment of all bidders and overlooks that the purpose of a fair process is to ensure the best outcome, the two cannot be severed. The Constitutional Court held that on the SCA's approach procedural requirements are not considered on their own merits, but instead through the lens of the outcome. According to the Constitutional Court, that was a flawed approach, among other reasons, because if the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.[101]

7 CONCLUSION

In multiple senses, the decision in the *MEJCON* case is important and ground-breaking. What comes out clearly from the judgment is that the ministers' decisions are not absolute. They can be taken on review on the listed grounds and be set aside eventually if they still cannot pass constitutional muster. The judgment has once again demonstrated the disconcerting reality of impunity, bureaucracy and how decision-makers could simply decide to ignore mandatory and discretionary legislative prescripts that are meant to guide the exercise of their duties, albeit at ministerial ranks. The conduct of both ministers in this case depicts a serious state of constitutional delinquency. In the current constitutional era, it can only be anticipated that administrative authorities will from now onward desire to learn from this judgment that they are not untouchable, they must act judiciously at all times and that the courts are always ready to intervene where there is an abuse of administrative power.

The overall conclusion is that the principle of procedural fairness, in the court's mind, should be thought of as a precursor to any administrative action and/or decision. This note, it is hoped, has made an attempt to assess the importance of the right to procedural fairness as provided for by section 33 of the Constitution, 1996 and also detailed in sections 3 and 4 of the PAJA in light of *MEJCON*.

96 See generally Demir *et al* "Does Power Corrupt? An Empirical Study of Power, Accountability, and Performance Triangle in Public Administration" 2018 *International Journal of Public Administration* 1–18.
97 (7653/03) [2005] ZAWCHC 7; [2006] 2 All SA 44 (C).
98 See *Earthlife* case (2006) para 48.
99 2014 (1) SA 604 (CC).
100 See *Allpay* case (2014) para 24.
101 See *Allpay* case (2014) para 24.