

THE REGULATION OF ROAD
TRANSPORTATION IN SOUTH AFRICA

by

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FORMAL DECLARATION

I hereby declare that this Thesis, submitted for the degree of Master of Laws in the Faculty of Law of the University of Natal, is my own unaided work and that all my sources of information have been acknowledged.

To my knowledge neither the substance of this Thesis, nor any part thereof, is being submitted for a degree in any University.

Dated at East London on the 10th day of January 1986.

Signed ...

PREFACE

The South African road transportation industry has been regulated by means of an administrative tribunal system since 1930. Despite 55 years of regulation legal writers have ignored this aspect of the law to a large extent. The law reports, on the other hand, contain more and more reported decisions. The importance of these decisions is twofold: they provide insights into the functioning of the regulatory system itself and they play a part in the development of South African administrative law in general. This work is aimed at examining the structures and the legal principles which govern road transportation in South Africa. In doing so various aspects of administrative law have been dealt with in what I hope is an accurate and fair manner.

I started work on this thesis at the University of Natal, Pietermaritzburg and completed it at Rhodes University. A number of people at both institutions have been of great assistance to me, although I, of course, remain responsible for errors: Prof Lawrence Baxter of the School of Law, University of Natal, Pietermaritzburg was my supervisor. I would like to thank him for his patience, encouragement and useful criticisms throughout my work on this topic; Prof John Milton, Director of the School of Law, University of Natal, Pietermaritzburg read a draft of the section dealing with criminal liability and I thank him for his thorough and helpful criticism; Mrs Sarah Christie of the Faculty of Law, Rhodes University read some of the chapters and I am grateful to her for many suggestions for improvements; Mr Dillon Naidoo, Librarian at the School of Law, University of Natal, Pietermaritzburg provided me with great assistance in finding research material for which I am most grateful.

A number of typists have been involved in the preparation of this work. In particular I owe a debt of gratitude to Mrs J Gauche, Mrs Y Arbuthnot and Mrs V Rencken of the School of Law University of Natal Pietermaritzburg and Mrs A Collis of the East London Division of Rhodes University.

Finally I wish to thank my parents, Ron and Helen Plasket, for their support and concern during the time I spent completing this work.

The Road Transportation Act 74 of 1977, its predecessor, the Motor Carrier Transportation Act 39 of 1930 and the Transport (Co-ordination) Act 44 of 1948 are referred to repeatedly in this work. No reference has therefore been made, either in the text or in the footnotes, to the number and date of promulgation of these statutes. Cases reported in, and prior to, 1985(2) of the South African Law Reports have been considered. Where possible later cases of importance have been included.

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PART ONE

HISTORICAL AND ECONOMIC PERSPECTIVE

CHAPTER 1

THE DEVELOPMENT OF ROAD AND RAIL TRANSPORTATION IN
SOUTH AFRICA UNTIL 1930

INTRODUCTION

[I] GENERAL FACTORS AFFECTING TRANSPORTATION DEVELOPMENT

[II] THE EVOLUTION OF ROADS AND RAILWAYS IN SOUTH AFRICA

[A] ROADS

[B] RAILWAYS

[III] THE BEGINNINGS OF COMPETITION

INTRODUCTION

The topography of a country plays an obvious and important role in determining the modes of transportation that are used or are dominant in its communications network.¹ In South Africa the country's physical features tended to favour rail- and, later, road transportation: the absence of navigable rivers made the exploitation of inland waterways for the purpose of conveyance impossible;² the interior of the country is fairly flat and so is suited to railway and road construction. This characteristic increased the possibility of speedy conveyance over large distances;³ the interior region, especially the Witwatersrand, is the hub of economic life, so conveyance of persons or goods between the major centres is economically viable, and indeed vital.⁴

Initially, all inland conveyance was undertaken by animals or animal drawn vehicles. The advent of railway systems and the steam locomotive had the effect of replacing less sophisticated transport, certainly on main routes,⁵ but in the years immediately following the First World War the supremacy of rail was itself challenged by road transportation.⁶ Rail and road conveyance have been the most accessible forms of transport over the years, and have carried the largest number of people and the highest mass of freight. At the same time they compete with one another for essentially the same market.⁷ Before dealing with this rivalry in more detail, certain general factors affecting transportation development will be examined and a brief discussion of the historical evolution of the two modes will be undertaken.

GENERAL FACTORS AFFECTING TRANSPORTATION DEVELOPMENT

The geographical characteristics of South Africa have been considered in explaining why certain modes of transportation predominated. This factor also played a part in the development of a transportation system. The size of the country when considered against its relatively sparse population tended to be a negative factor.⁸ Prior to the advent of road transportation, rail transportation was the speediest means of conveyance over long distances. At the same time it was a very costly operation, requiring the laying of lines, the purchase and maintenance of locomotives, carriages and other rolling stock, the construction of stations and supply depots⁹ as well as the employment of large numbers of persons. The railway system could therefore only venture into areas where the return could be expected to cover the immense input of capital and resources.

The discovery of diamonds near Kimberley in 1869 and gold on the Witwatersrand in 1886 overcame, to a certain extent, the disadvantages which rail transportation experienced.¹⁰ Vast numbers of people converged on these areas and lucrative markets were created. The new found wealth provided an incentive for the development of transportation systems, not only from the coast to the interior, but also from rural agricultural areas to the newly formed urban centres.

Political factors were also of great importance.¹² The political structure of South Africa was initially a hindrance to growth, but later was able to provide the framework for the rapid evolution of a national, co-ordinated transportation network. The entity which now forms the Republic of South Africa consisted, prior to 1902, of two British

colonies and two Boer republics. The period from 1870 to the start of the Anglo Boer War was a time of aggressive imperial expansion.¹³ Co-operation between the opposing parties never reached great heights and mistrust was an ever-present feature of relations between the British officials and their Boer counterparts.¹⁴ Prior to Union in 1910 therefore, the concept of a uniform policy to co-ordinate transportation was nothing more than a dream, although various customs agreements were reached during this period.¹⁵

After Union, serious consideration was given to the transportation needs of the country. The formation of a Roads and Bridges Committee in 1925 was one product of the move towards rationalization.¹⁶ In 1930, motivated by the same considerations, Parliament passed the first Act aimed at controlling the development of transportation and regulating competition between road and rail transportation.¹⁷

[III] THE EVOLUTION OF ROADS AND RAILWAYS IN SOUTH AFRICA

[A] ROADS

The first roads to be 'built' by European settlers in South Africa were those which Van Riebeeck's exploring parties cut. Thereafter, as the settlement at the Cape expanded inland, a road system of a primitive nature grew up on an ad hoc basis. Certain maintenance powers and functions were vested in the Board of Heemraden in the 18th Century but it was not until the second British occupation in 1806 that road building began in earnest.¹⁸

Roads were initially constructed by the military authorities. In 1826 provision was made for the levying of tolls over

certain roads and passes. In 1843 the building of roads was taken over by the colonial authorities and the first roads policy was initiated under the guidance of John Montagu, the Colonial Secretary. The chief aim of the policy was to establish major lines of communication throughout the colony. The project resulted inter alia in the easier and speedier distribution of agricultural produce, an important benefit for the Cape which had an agriculturally based economy. Planning for the project was undertaken by a Central Road Board.¹⁹

The granting of responsible government in 1853 saw a re-arrangement of road organisation. A Chief Commissioner of Roads was appointed along with other Commissioners. Funds for maintenance and improvements were granted by the Cape Parliament. Later, Divisional Councils were given certain powers and duties in respect of the maintenance, improvement and construction of roads. By the time of Union, therefore, the Cape had not only integrated road construction and maintenance into the structures of the State but had also developed policies.²⁰

The earliest roads in the colony of Natal stretched from Port Natal westwards to the Orange Free State border, north to Zululand and south to the Cape Colony. With the increase in the White settler population, townships were planned and at the same time roads were built, primarily as a means of communication. The sparsity of the population, lack of finance, rugged terrain and climatic conditions were, however, factors which retarded road building in the colony.²¹ Road development evolved on a more ad hoc basis in both the Orange Free State and the Transvaal. It was only in

1871, in the former, and 1876, in the latter, that the central governments of the Boer republics became
22
involved in roads in any substantial way.

After Union in 1910 the integration of a road transportation network became possible for the first time. A Roads and Bridges Committee was established in 1925. Its function was to investigate the condition of roads and bridges in the Union with special reference to their suitability for
23
motorized road transportation. As a result of its report the government voted large sums of money to the provincial administrations for the construction of roads. These grants were conditional upon the proposed roads being either
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developmental roads or roads suitable for motor services. In this way the stage was set for the rivalry between road and rail transportation which later became the prime reason for the promulgation of the Motor Carrier Transportation Act.

[B] RAILWAYS

The first railway services in South Africa were operated by companies from the private sector. This form of transportation was introduced for two major reasons: to cater for the needs of the steadily growing white population and as a result of the agricultural development of the two British
25
colonies. The railway companies did not operate for very long. It became clear at an early stage that the colonial governments of the Cape and Natal would have to take them
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over if they wished the services to continue. After the take overs the railway networks were able to expand in a relatively short period of time. Two causes may be found for this phenomenon: the increased capital which became

available and the discovery of diamonds at Kimberley.²⁷ The benefits which rail transportation yielded as a result of easier and speedier contact with the diamond fields clearly illustrated the importance of the railway to the economic development of the region. By 1885 the railway network of the Cape Colony consisted of 1 599 miles of track.²⁸ Twelve years later a line joining Vryburg and Bulawayo was completed.²⁹ The most important economic result of railway construction in Natal was the 'opening up' of the coalfields in 1899 by means of a railway that reached Glencoe.³⁰ Prior to that time coal had been moved by wagon which militated against the viability of its exploitation.

The land-locked Orange Free State did not own any railway lines until 1897. Completed lines had been in existence for 7 years prior to that time, but had been constructed by, and were operated by, the Cape Colony. The latter had been quick to realize the importance of a rail link between the Free State and the coast as well as the economic benefits which such a line would produce.³¹

The Transvaal had, as early as 1875, initiated plans to give itself access to the port of Delegoa Bay. For various reasons it was only in 1894 that this line was completed.³² In the meantime, the most important event in the economic history of South Africa had taken place: gold was discovered at Barberton in 1884 and on the Witwatersrand in 1886. The building of railways was immediately boosted by the new found prosperity of the Transvaal.³³ By 1895 it had three rail routes to the coast: to Delegoa Bay, to Natal and to the Cape.³⁴

Especially rapid growth took place in the evolution of rail-
ways when production of gold resumed after the Anglo Boer
War. ³⁵ A large market had to be supplied by the rural areas
on the one hand, and the miners required a more effective
means of acquiring coal from the Transvaal coalfields on the
other. The result was a railways bonanza, not only from the
rural areas of the Transvaal to the Witwatersrand, but also
between the interior and the coast. ³⁶ After Union, with the
pooling of resources into a unified Railways Administration,
the railway system in South Africa began to change. Policy
was decided on the basis of the perceived good of the country
as a whole with the need to protect sectional interests
diminishing in importance. ³⁷ The Page Commission, ³⁸ in summa-
rizing transportation developments and, more especially, the
extent to which railways had expanded, observed:

'Broadly, it may be said that at the time of Union the
industrial areas and the larger urban centres had been
fairly well provided with railway communications, and
from then on new construction was for the most part
designed to serve agricultural areas and in particular
those where irrigation schemes had made or were making
closer settlement possible.'

[III] THE BEGINNINGS OF COMPETITION

The Railways Administration initiated a road motor transport
operation as early as 1912. ³⁹ The aim of the service was
to act as a link between outlying areas and railway lines.
It was intended to be no more than a feeder service, either
carrying persons or goods from a railway station to a more
remote area or in the reverse direction. The use of road
transportation in this way proved to be most advantageous to
the Railways Administration. One important benefit was that
uneconomic branch lines did not have to be built, because

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remote areas could be serviced in a much cheaper way. The beginnings of competition between rail and privately operated road transport may be traced to the early 1920's. The technological improvements made to the internal combustion engine during the First World War no doubt played a major part in the emergence of road transportation as a serious challenge to the supremacy which rail transportation had enjoyed. ⁴¹ Van Biljon ⁴² observes:

'The development of private motor carrier systems was phenomenal during the ensuing five years (i.e. from 1925), as a glance at the relevant import statistics clearly shows. Indeed, whereas it took the railroads thirty five years (1860 - 95) to supersede animal drawn vehicles as the chief means of inland locomotion, the four years, 1925 - 29, were adequate for the motor carrier to establish itself as a permanent feature of the South African transportation system.'

The areas in which competition between the two modes of transportation was most keen were: the conveyance of general merchandise, in which road transportation was far superior for shorter distances; omnibus services in the more densely populated urban areas; transportation between proximate towns with big populations; and the conveyance of black workers from locations on the outskirts of towns to the towns themselves. ⁴³

Agitation by the Railways Administration against private carriers began in earnest in the 1925 - 26 Report of the General Manager. The complaint centred around the fact that, whereas railway tariffs were fixed, private carriers could adjust their tariffs at will. Later criticism, which was linked to calls for protective legislation, was based on the argument that the overriding motive of private carriers (individual profit) was to the detriment of the community as a whole. ⁴⁴ It was therefore argued that the Government: ⁴⁵

'...should be empowered to control and regulate the introduction and operation of private road motor services so as to ensure that such undertakings are not allowed to operate indiscriminately and to cater for the same public needs as are already adequately met by the State's Railways.'

As a result of these representations the Road Motor Competition Commission was appointed in 1929 under the chairmanship of Mr J C Le Roux. Its terms of reference were to investigate and report upon:

- '(1) the whole problem of road motor competition and its bearing upon road motor and railway services of the South African Railway Administration having regard-
 - (a) to the fact that the main transport system of the country is State owned, in which vast sums of public money are invested, and
 - (b) to the country's needs for its economic development;
- (2) all the measures, if any, which should be adopted for better regulation, co-ordination, and control in the public interest.'

The commission reported in December 1929. It recommended reasonable control and regulation of public road transportation, but expressed itself against a monopoly on the ground that a measure of competition is healthy and desirable

The Motor Carrier Transportation Act was passed as a result of the Le Roux Commission's report. This legislation followed the recommendations contained in the report very closely and it provided for the control of motor carrier transportation within areas and on routes which were to be defined at a later stage. The sparsely populated areas were left untouched because there was no need for control in these areas. The Act also did not apply initially to the conveyance of persons by motor car, which was defined as a vehicle seating not more than eight persons.

FOOTNOTES

1. See for example the Le Roux Commission, para 15; Verburgh, 4.
2. Verburgh, 13 (footnote); Marais Commission, para 216: 'Efficient rail transport is of particular importance in the Republic because of the fact that South Africa does not have the benefit of river, canal or lake transport facilities, and is in this respect in an almost unique position among industrial countries'.
3. But see the Marais Commission *ibid*, in which structural and operational problems are pointed out. These result from gradients and curves which are part and parcel of reaching the plateau from the coast.
4. *Ibid*.
5. But see Van Biljon, at 265-6, who discusses the re-emergence of animal drawn vehicles as a direct result of the promulgation of the Motor Carrier Transportation Act. This re-emergence was brief, as he points out. The Railways Administration readjusted its branch line rates and so made transport riding uneconomical.
6. Le Roux Commission, para 67; this phenomenon was also evident in Britain. See J Phillimore Up-to-Date Motor Road Transportation for Commercial Purposes, 1 - 9; K G Fenelon The Economics of Road Transportation, 37 - 9; C I Savage An Economic History of Transport, 118 - 9: 'On the western front, however, motor transport was increasingly used as the war progressed, so that when war ended a considerable number of men with experience of driving and running vehicles were demobilized from the Armed Forces. The Government was also disposing of large numbers of lorries and buses at very low prices. The way was open for many individuals to enter the road transport business, often using their war gratuity to purchase one vehicle and running the business on a family basis. Technical improvements in engine and vehicle construction during the war, together with the growth of the newly stimulated demand for bus travel, including long-distance services, also encouraged the expansion of existing motor omnibus undertakings'.
7. Le Roux Commission, para 72; see too Ch 2 below.
8. Le Roux Commission, para 16.
9. Le Roux Commission, para 44. This was the prime reason for State interference in railways.
10. Le Roux Commission, paras 45 and 54.
11. Marais Commission, para 246.
12. See generally, J Van der Poel Railway and Customs Policies in South Africa, 1885 - 1910.
13. See T R H Davenport, South Africa - A Modern History, 120 - 146.
14. See Davenport *op cit* 134 - 5 for two examples; first, the efforts by the Cape Government to entice the South African Republic into a customs union after the discovery of gold on the Witwatersrand. The latter resisted, 'fearing that economic co-operation might lead to loss of independence'; secondly, the confrontation between the Cape Government and the South African Republic over the allocation of traffic on the three lines to the coast which the Republic had at its disposal by 1895.

15. Ibid; Davenport points out that prior to the discovery of gold on the Witwatersrand, presidents Brand and Kruger tried to interest the Cape in a customs union: 'The Boer Republics, for all their anti-Imperial fervour in the early 1880's, desired closer economic liason with the coastal Colonies, and, above all, a share in the customs duties collected at the ports, to help stimulate their struggling economies'. After 1886 the boot was on the other foot, certainly in relation to the South African Republic. The Cape pursued the aim of a customs union but, while the Orange Free State joined it, the South African Republic remained aloof. The most far reaching customs union was created after the Anglo Boer War. It, along with the establishment of the Central South African Railways in 1903, formed part of Lord Milner's reconstruction program. The experiment did not work. The Transvaal withdrew in 1907 and inter colonial competition, made possible by railway expansion initiated by Milner, was the cause of immense friction on sectional lines. The above led to pleas 'for political federation as a means of staving off economic catastrophe'. See further Davenport op cit 149 - 150, 162 - 3.
16. Le Roux Commission, para 32.
17. The Motor Carrier Transportation Act 39 of 1930. This statute, and its amendments, are dealt with in Ch 3 below.
18. Le Roux Commission, paras 5 - 7.
19. Le Roux Commission, paras 8 - 9.
20. Le Roux Commission, paras 10 - 12.
21. Le Roux Commission, paras 13 - 22.
22. Le Roux Commission, paras 23 - 31.
23. Le Roux Commission, para 32.
24. Le Roux Commission, para 38.
25. Le Roux Commission, para 41.
26. Le Roux Commission, para 44.
27. Le Roux Commission, para 45.
28. Ibid.
29. Le Roux Commission, para 46.
30. Le Roux Commission, para 47.
31. Le Roux Commission, para 48.
32. Le Roux Commission, paras 49, 51, 52.
33. Le Roux Commission, para 50.
34. Le Roux Commission, para 52.
35. Davenport op cit 149, says: 'Mining returned to its pre-war production level by 1904, and expanded steadily thereafter, the value of gold mining rising from fractionally over one million pounds in 1901 to 20.9 million pounds in 1905 and 32 million pounds in 1910.' This was in keeping with Milner's plans for te reconstruction of the former Boer republics. It involved, inter alia, getting the mines into full production, getting the farmers back on the land and building up railway communications.
36. Le Roux Commission, paras 53 - 6.
37. Le Roux Commission, para 57.
38. Para 36.
39. Le Roux Commission, para 66; Van Biljon, 262, footnote 5.
40. Van Biljon, 263.
41. Le Roux Commission, para 67; Van Biljon, however, at 262, says: 'The motor carriers have without doubt taken some of their goods and passenger traffic from the railways. But a large proportion of the traffic was newly created because the advent of the road motor carrier enhanced the economic utility of areas which were previously inaccessible

- by increasing the mobility of the inhabitants and of their goods and chattels."
42. Ibid.
 43. Van Biljon, 264.
 44. Van Biljon, 264 - 5.
 45. 1927 Report of the General Manager, quoted from Van Biljon, 265.
 46. The Le Roux Commission.
 47. Le Roux Commission, para 1.
 48. Para 95 (a).
 49. Para 84.
 50. Page Commission, para 14.
 51. See Ch 3 below at 60 for details on the amendments to the Act to provide for the regulation of taxis; see too R v Ramatlo 1955(2) SA 331 (A), 335 D - 336 D.

CHAPTER 2

THE ECONOMICS OF REGULATION

INTRODUCTION

[I] THE ORGANIZATION AND FUNCTIONING OF THE SOUTH AFRICAN TRANSPORT SERVICES (SATS)

- [A] INTRODUCTION
- [B] THE ORGANIZATION OF SATS
- [C] THE FUNCTIONING OF SATS
- [D] SATS TARIFF POLICY

[II] REGULATION

[A] COMPETITION IN TRANSPORTATION

- (1) Introduction
- (2) The Advantages and Disadvantages of Road Transportation
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- (4) Intermodal Competition and Co-Ordination
 - (a) Competition
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[B] THE ARGUMENTS IN FAVOUR OF REGULATION

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[III] DEREGULATION

[A] INTRODUCTION

[B] PRECONDITIONS FOR DEREGULATION

[C] THE EFFECTS OF DEREGULATION

 (1) **SATS Rating Policy**

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[D] CONSEQUENCES OF DEREGULATION

INTRODUCTION

The issue of state interference has always been one which has created heated debate. The regulation of transportation in South Africa is no exception. Craig, dealing with governmental regulation in general, outlines the problem:¹

'Whether we decide to regulate at all, and if so how, is a question on which there can be considerable difference of opinion. Such divergence can be partly the result of differing political perspectives, and partly the consequence of varying beliefs as to the efficacy of the particular type of regulatory device which has been chosen.'

The 'whether' of transport regulation will be examined below,² while the method of regulation will be dealt with later.

First it is necessary to outline the way in which the South African Transport Services (SATS) function. The original motivation for regulation was based on the assertion that the then Railways Administration, because of the duties imposed on it by legislation, operated under special disadvantages while private carriers, in an unregulated environment,³ experienced none.

[I] THE ORGANIZATION AND FUNCTIONING OF THE SOUTH AFRICAN TRANSPORT SERVICES (SATS)

[A] INTRODUCTION

The historical process by which ownership of the South African railway network came to vest in the State has been explained above.⁴ Railway operations, by their very nature,⁵ tend to lead to monopolistic situations. Because of their strategic and developmental potential they are seen in many countries as unsuited to private ownership:

'In most countries railways are operated as public enterprises since a private firm would have the potential to exercise its monopoly power to restrict output and raise prices and would be unlikely to provide socially desired services if it was unprofitable to do so.' (6)

South Africa is no exception in this regard. The state owned SATS is the central figure in the debate concerning the deregulation of transportation. Indeed, as has been explained, Railways Administration agitation was to a large degree the root cause of the promulgation of the Motor Carrier Transportation Act. The statute was primarily designed to protect rail transportation against uncontrolled road transportation.⁷ Because of the importance of SATS to the regulation debate it is necessary by way of introduction to examine the body in more detail.

[B] THE ORGANIZATION OF SATS

SATS, while being a separate entity to the Public Service, is nonetheless a department of state. It, along with the Department of Posts and Telecommunications, has always been treated as a sui generis organization, primarily because of its entrepreneurial function.⁸

The political head of SATS is a cabinet minister, the Minister of Transport Affairs. He is responsible for two independent departments: SATS and the Department of Transport Affairs.⁹ The organization's control and administration is exercised by the Minister and a board of three commissioners. Its professional head is the General Manager, who is assisted by three deputy general managers and eight assistant general managers.¹⁰ The railway network is divided into ten separate regions, each of which is run by a systems manager. These divisions are seen as necessary

because of the size of the country and the extensive nature
of the rail system.¹¹

[C] THE FUNCTIONING OF SATS

Wallis describes SATS as a multimodal organization which 'operates and provides a wide range of transport services on a closely integrated and co-ordinated basis'.¹²

It provides the following services: a nationwide rail service, the running of harbours, the provision and functioning of pipelines for the conveyance of crude oil, petroleum and related products, and the provision of an airline (South African Airways) which operates both internationally and domestically.¹³ For present purposes the rail service of SATS is most important. Therefore the manner in which it functions will be dealt with below.

As a state owned public enterprise SATS is given powers, and duties are imposed on it, by Parliament. Parliament, in this way, plays an important role in determining policy of an overall (and fairly static) nature.¹⁴ This policy dates back to the formation of the Union in 1910 and for present purposes has not changed. The legislature's place for SATS in the transportation and economic life of the country is described in the following terms by Van

¹⁵
Biljon:

'In the course of contemplating the long-term railway transport policy, the National Convention agreed that the railway monopoly should be administered on business principles - using the term, no doubt, in reference to economy in expenditure, and at the same time sanctioning the practice of discriminatory monopoly (at which all monopolists aim). But, recognising that cheap transport is indispensable for agricultural and industrial development, including the promotion of inland settlement and development which was

specially enjoined, it was also agreed that the railways and harbours are not to be operated as a profit making venture nor to be dependent on grants from the Central Government in order to ensure solvency; but, in order to avoid periodic tariff changes because of the effect on railway finances of seasonal or cyclical variations in traffic, revenue might be appropriated for the maintenance of a rates equalisation fund'.

[D] SATS TARIFF POLICY

Tariff policy is based on four principles which will be briefly dealt with. These principles are: that the organization be managed on business lines, that the socio-economic needs of the country be taken into account, the 'collective principle', and tariff differentiation.¹⁷

The injunction that SATS be managed on business principles has been taken to mean that 'an equilibrium between revenue and expenditure must be attained in the long term'.¹⁸ In other words, it must balance its books without recourse to the State Revenue Fund.¹⁹ Two consequences flow from this interpretation: first, annual surpluses are transferred into a Rates Equalisation Fund and deficits are met from this Fund; secondly, cross subsidization is used whereby losses incurred on one service will be met by a subsidy from another service which has been run at a profit.²⁰

Wallis sees cross subsidization as being essential to the second principle affecting tariff policy: the need to take into account the socio-economic needs of the country.²¹ This aspect of transport policy is clearly indicated by the passenger service operated by SATS. The service is offered at rates which do not cover its cost, despite a large subsidy which is given to SATS by the Government, out of the State Revenue Fund.²² Surpluses from the more profitable

freight and harbours and pipelines services have therefore been used in the past to make up the shortfall on the passenger service.²³

Wallis outlines the third policy determinant, the 'collective principle' as follows:²⁴

'According to the "collective principle" the same rate per tonne/kilometre or passenger must be charged on traffic of the same class over the same distance and under the same conditions and circumstances notwithstanding the fact that different rates may be justifiable on similar traffic over different sections of lines due to say, differences in the density of traffic, empty running of trucks, standard of track, gradients and curves.'

The adoption of the 'collective principle' also leads to cross-subsidization, but between different routes served by the railway system.²⁵

The final principle upon which tariff policy is based is that of tariff differentiation. This is of particular importance in the regulation debate because it creates an artificial picture of the cost of the service. The rationale of tariff differentiation is that the utilization of facilities will be stimulated and that total revenue will thereby cover total costs and the losses incurred in running unprofitable social services. It is thus based on 'charging what the traffic can bear' rather than the cost of the service.²⁶

To achieve the differentiation SATS has created a tariff scale which comprises of 15 classes which fall into two groups: tariffs 1 to 10 are high rated goods and tariffs 11 to 15 are low rated.²⁷ As a general rule, high bulk and low value goods will fall into the low rate while low bulk and high value goods will fall into the high rate. SATS sees it as

essential to convey as much high rated traffic as possible, since this is more profitable than the low rated traffic. This is precisely the area in which road transportation is suited. Road carriers are therefore seen to be taking the more profitable goods from SATS, which is left with the least profitable commodities, which are conveyed at prices which do not reflect costs.

[III] REGULATION

[A] COMPETITION IN TRANSPORTATION

(1) Introduction

The place of transport in the economy and its importance to a country has been expressed by Verburgh in the following terms:

'Via Vita: transport is the lifeblood of any form of activity, and therefore also of economic activities, whether they take place on a remote farm or in big mining or industrial concerns. Transport is vital, not as an end in itself, but because no undertaking whatsoever can do without the services which only transport can give. There is no substitute for transport, it is absolutely essential. Although the same can be said for agriculture or other branches of activity the essentiality of transport is certainly different. Whereas an insufficiency in say local wheat production can be remedied by importation, a shortage of transport facilities cannot so easily and speedily be put right, especially where railway facilities are concerned.'

Because of the factors which Verburgh has mentioned, wider issues are at stake than the individual's assertion that he should be able to pursue profit in whatever way he sees fit. Transport policy is seen as necessary to bring about a balance between the desire of the individual to offer transportation services unhampered by restrictions on the one hand, and the needs of the country on the other, which demand

an efficient and effective transport network which caters for wider needs ³⁰ e.g. one which takes into account socio-economic and developmental factors. Transportation policy should therefore ensure 'that there is an efficient allocation of traffic between the different modes. This means that each mode should specialize in the carriage of those traffic flows in which it has a comparative cost advantage'. ³¹

103 32

The problem of competition in transport would not arise if the various modes of transport were perfectly complementary. In other words, no conflict of interest would emerge if, for instance, the sphere in which road transportation operated did not overlap with the sphere in which rail transportation operated. ³² This simplistic model is not found in any transport network: overlapping, and consequent intermodal competition, is found wherever roads and railways operate. While road transportation is not suited to the conveyance of all goods which a train can convey and vice versa (for the reasons discussed below) the overlap, in general, occurs in that area which is most profitable to both modes: the conveyance of low bulk and high value freight. Before dealing with the pros and cons of regulation, it is therefore necessary to examine the spheres in which each mode is superior to the other, the areas of overlapping and the factors influencing the choice (if such exists) which the user must make in deciding on the mode of conveyance.

(2) The Advantages and Disadvantages of Road Transportation

The motor vehicle has a distinct advantage by virtue of the fact that it is more mobile than a train. Verburgh says that while railway construction is of a uniformly high

standard, roads are often built to a standard which does not
meet a satisfactory technical level.³³ This factor may reduce
the overall efficiency of road transportation but at the same
time South Africa's road network is sufficiently developed to
give motor vehicles access to most areas. Such vehicles are
obviously restricted to the roads (unlike those modes which use
freely available media such as water or air) but this does
not operate as a restricting factor to any marked degree at
present. Fenelon, speaking of the English situation, may
just as easily have been making an observation about the
present day South Africa when he said that 'road transport
possesses the great advantage of flexibility, for in this
country the road leads everywhere'.

Indeed this flexibility gives rise to a second major
advantage of the motor vehicle: it can go to the goods. It
does not depend, as does rail transport, on the goods going
to the means of conveyance. Motor vehicles can therefore
offer a door to door service and are able to pick up and
deliver goods under diverse conditions.³⁵ This is well
illustrated by the rapid growth of the express parcel
delivery industry which sprang up as a result of the
exemption contained in s1(2)(1) of the Road Transportation
Act.³⁶ While the industry's development has been hampered by
the amendment of that section,³⁷ its initial success was
based, in addition to its flexibility, on a third major
advantage: the speed of service which road transportation is
able to provide. Wallis explains this factor in general
terms:³⁸

'The main intermodal service difference is speed,
with trucks being faster than trains on any given

arc since trains often have to collect traffic at intermediate points and may be slowed down by the periodic stops of other trains in the system, whereas trucks can carry smaller loads over the entire arc without any lengthy stops.'

Related to the above, is the fact that motor vehicles do not
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have to transload freight as often as trains.

The size of motor vehicles (and consequently their carrying capacities) can often be an advantage. Whereas a train has to wait until its trucks are fully loaded before it can operate with the potential of profiting, this process is shorter in the case of motor vehicles. A faster service can therefore be rendered without sacrificing profit potential because the vehicle's operating costs (and infrastructural costs) are proportionally smaller than that of a train. Thus Fenelon summarized the advantages of road transportation as
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follows:

'As compared with the railways, mechanical road haulage possesses distinct advantages for the transport of moderate loads where the distance to be covered does not exceed, say, 30 to 50 miles. Where traffic is light, the road is the more economical form of transport, since a railway to achieve financial success requires a regular and fairly dense traffic, as otherwise sufficient revenue will not be earned to meet the heavy capital cost involved.'

Compared with the advantages of road transportation which have been outlined above, the disadvantages tend to be insignificant. Most of these have been dealt with in passing but warrant specific mention: first, motor vehicles are restricted to movement on roads, which is a minor disadvantage bearing in mind that the main competitor does not operate in a freely available media; secondly, motor vehicles cannot convey the variety of merchandise which

~~trains can transport.~~ Although it may be physically possible for lorries to carry most types of freight, from an economic point of view it would be futile, for example, to engage in the conveyance of coal from mines in the interior to the coast. The physical limitation of motor vehicles (and no doubt, the technical specifications of roads) would not allow for such an undertaking. Time and cost factors would certainly make it foolhardy; thirdly, the potency of road transportation diminishes over long distances. The vehicle is limited in its travelling speed not only by its design specifications but also by laws which impose speed restrictions for the safety of other road users. The longer a vehicle is on the road, the costlier the conveyance becomes. Because of the large scale on which rail conveyance is undertaken, the cost of this mode increases at a slower rate.⁴¹ Thus road transportation depends, to be viable, on a high turnover of freight, while rail relies more on the bulk (and value) of the freight conveyed.

(3) The Advantages and Disadvantages of Rail Transportation

The following may be seen as general advantages of rail transportation: the size of the transportation unit, the train, makes bulk transportation possible from both a physical and economic perspective; related to size is the low cost of conveyance which rail transportation can achieve over long distances;⁴² trains operate on established networks which, while they are expensive to construct, are relatively cheap to maintain;⁴³ the rail network is built to a common high standard because 'for technical reasons there is not much scope for lower standards as is the case in road construction'.⁴⁴ The result is that traffic can be conveyed⁴⁵

smoothly and speedily; finally the size of the rail service has led to standardization. It is designed to satisfy the largest number of users. ⁴⁶

Looked at from a different perspective some of the above may be seen as disadvantages. For instance, the fact that trains are confined in their operation to rails which are laid at great cost means that it is not as easy for the rail system to spread out in the way in which the road system has. ⁴⁷

Related to this is the disadvantage that rail transportation is not as mobile as road transportation. It is unable, on its own, to provide a door-to-door service. ⁴⁸ This means that it cannot cater for individual needs (hence the standardization of its service) ⁴⁹ and that a greater number of transloadings are required when goods are to be transported by rail. Finally the size of the transportation unit can be a disadvantage. The train can only operate efficiently when all of its trucks are loaded and brought together. In addition the line on which it operates must be free. ⁵¹

(4) Intermodal Competition and Co-ordination

(a) Competition

Verburgh sees the essence of intermodal competition in the following way: ⁵²

'In the economic system we find that the various modes of transport such as railway, road, ship and air transport are each able to carry a variety of articles. In a technical sense each mode of transport can carry practically any kind of goods, in an economic sense, however, there are certain classes of traffic which can be carried more cheaply, more speedily or more conveniently by only one mode of transport. For a wide range of articles, however, the superiority of one mode of transport over the other is not big enough to

prevent other modes of transport from competing for this traffic. As will be seen later the characteristics of the cost and tariff structures of the various modes of transport enable them to compete for a great variety of goods, instead of being compelled to give a complementary service in line with their special function.'

He says that even if road transportation was the only mode of land conveyance, 'free competition'⁵³ would break down. The reasons for this submission are the varied and localized services offered by road carriers, and the impossibility of self-regulation.⁵⁴ When rail transportation is introduced into the model, the picture becomes more complex, mainly as a result of the tariff system used by SATS which is based (unlike road tariff systems) on the value of the service⁵⁵ rather than the cost of the service. He concludes that in land transportation:

'....automatic regulation by the market mechanism of the competition between individual hauliers and between hauliers and the railways has never worked sufficiently because of the many imperfections in competitive relationships. Neither has self-regulation on its own been able to bring about a form of workable competition in land transport.' (56)

While Wallis, on the other hand, recognizes the structural inequalities between road and rail transportation, he sees competition as a means of improving the efficiency of the transport system. If entry into the industry is unrestricted the user will be given a proper choice of which mode to make use of. This in turn will be a strong inducement for the suppliers of services to improve their competitiveness in terms of cost and quality.⁵⁷ It should be noted that he does not favour deregulation without adjustments (e.g. by means of road user charges) so that the resultant⁵⁸ competition reflects equality between the competing parties.

Various commissions of enquiry have examined competition
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within the industry. The Le Roux Commission for instance
found, as early as 1929 that most road transportation
undertakings competed with (rather than supplemented) the
rail service offered by the Railway Administration. It
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reported:

'The competition assails mainly the higher-rated
goods and the short-distance passenger traffic of
the South African Railways; it, naturally also
affects the tramway undertakings of certain
municipalities and long-established public
transport companies. The incidence of road motor
competition has created a transport problem of
considerable magnitude.'

It saw a number of disadvantages in a system of free
competition. Chief among these was the destabilizing effect
of 'rate wars' (which, it said, would be inevitable) in which
the survivors would increase rates in order to recoup
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previous losses. It also saw free competition as being
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detrimental to development:

'The tendency is for competition to increase in the
more populous areas, most of which are already
adequately served by the agencies which developed
them - some are over-served - whereas new fields,
which could be beneficially exploited, and in time
with reasonable reward, are neglected.'

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The Marais Commission expressed itself in favour of
'controlled competition' rather than 'free competition'. It
defined the term to mean that real competition should exist
wherever possible, but that the extent of the competition, or
the number of competing suppliers in a given situation,
should be controlled by being confined to a reasonable number
of competitors, depending on the demand or needs of the
public.

It will be seen that the system of regulation embodied in the Road Transportation Act aims at 'controlled competition'. Entry into the industry and the operating practices of carriers are controlled by the regulatory machinery which the Act contains. Boards decide, in accordance with various factors (including the desirability in the public interest and the existing transport facilities) whether an applicant should be allowed to compete with other operators and ⁶⁴ SATS. Once the application has been granted, the operator may only convey in accordance with the provisions of his ⁶⁵ permit, including conditions that may be attached thereto.

(b) Co-ordination

The co-ordination of facilities should be one of the main objects of transport policy. In other words, the co-ordinating agency should endeavour to ensure that an efficient allocation of traffic between the different modes ⁶⁶ is achieved. This proposition was enunciated by the Le Roux ⁶⁷ Commission in the following terms:

'Railway and road transportation each has its peculiar and different functions, and the object to be aimed at is to co-ordinate rail and road motor operation in such a manner that each form of transport will render service in the sphere of its greatest economic usefulness - in the sphere where it can render the greatest measure of useful service to the community at large. The one form of service should be complimentary to, rather than competitive with, the other, and every effort should be made to co-ordinate the two as far as is practicable, and to foster the development of each.'

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The Van Breda Commission was aware of the difficulties of achieving the ideal division of traffic between the various modes and said that, because of the complexities

involved in the costing of transportation, this ideal was probably beyond reach. While regulation, the means adopted since 1930, was itself incapable of achieving perfect coordination ⁶⁹ the commission found that free competition would ⁷⁰ not be able to attain the goal either.

(c) The Aim of Regulation

Eckaus says that when market structures do not or cannot regulate themselves the necessity for imposed regulation (by public economic policy) becomes essential. ⁷¹ He says: ⁷²

'The rationale for regulation by the federal commissions is to avoid "chaotic competition", to maintain high standards of safety and to ensure the use of natural "resources", such as broadcast channels and airspace, in the public interest.'

It is evident that in South Africa, the dominant approach to the transportation problem has been based on the above premise. Without exception the commissions of enquiry have held that the industry cannot regulate itself and the fact that the largest provider of transport services, SATS, is state owned and required to provide developmental and social ⁷³ services, necessitates control of some sort. It is against this background that the economic theories of regulation will be discussed.

Phillips and Zecher have identified two theories of regulation: the market failure theory and the public choice ⁷⁴ theory. They outline the two theories as follows:

'The market failure theory provides an economic rationale for what regulation ought to do - improve economic efficiency by correcting market failures - while the public choice theory provides an economic rationale for understanding why regulatory agencies and programs often do not deal effectively with the economic problem of inefficient allocation of resources.'

Market failure may occur in many ways. Perhaps the most striking example of such a failure is found when a natural monopoly comes into existence: in this instance the supplier of services is able to manipulate prices and production in such a way that profits can be maximized. Deviations in price or production from those which would occur in a fully competitive market would be seen as a market failure, and would provide the justification for regulation in the public interest:

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'It defines the most desirable state for securing the public interest as fully competitive prices and outputs; it provides means for assessing when market outcomes deviate substantially from competitive norms; it provides a set of regulatory goals against which the success of the regulatory program can be gauged; and it can provide for an ongoing assessment of the costs and effectiveness of the regulatory program.'

It is evident from the commissions of enquiry into transportation that the rationale for state interference is based squarely on the market failure theory. Verburgh's analysis of goods transportation by road too is based on this theory: he says that regulation became necessary as defects in the working of free competition became evident, especially when road and rail transportation competed.

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Unlike the market failure theory (which provides an economic rationale for interference) the public choice theory seeks to explain how regulation actually works. Phillips and Zecher

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explain the latter as follows:

'The theory is based on the fact that every regulation reallocates resources and in the process makes some groups or individuals (the recipients) richer and others (the regulatory taxpayers) poorer. Naturally any proposed

regulation will attract the attention of both the beneficiaries and the payers, and they will express their support or opposition through political and economic channels.'

This theory therefore goes beyond the pure economic approach of the market failure theory: in addition to its economic base it also draws on history, political science and law.⁷⁹ It sees regulatory programs 'as a process in which individuals and groups express their preferences in a political-economic marketplace'.

In terms of the public choice theory interest groups will form. These will express, through the available channels, opposition to or support for the proposed regulatory measure. The size and organization of the groups is of great importance. The content of the regulatory measure will depend on the relative strengths of the groups who oppose and support it. Seen in this light, regulation takes on a dynamic character, rather than the static model depicted by the market failure theory. Content changes in response to the changing strengths of the interest groups. The consequences of regulation as seen in terms of public choice are: public interest is of notional importance only because the strengths of the interest groups decide regulatory content; regulation will tend to work in favour of well organized relatively small groups at the expense of large poorly organized groups.⁸¹

In applying this theory to the South African transport set up, it will be noted that the system will inevitably favour SATS although the picture is starting to change. SATS is a single organization. Its opposition to the alteration of regulatory content is well organized. Opposing it are a

great number of individual firms. Their interests may not always coincide and, to complicate the picture, there are firms who are within the regulatory system and those who are trying to get in. Over recent years private carriers and commercial associations have been able to organize more effectively. This is evidenced by the slow (and piecemeal) changes which were recommended by the Van Breda Commission and later embodied in the Road Transportation Act. ⁸²

(d) Factors Influencing Modal Choice

Wallis says that the main factors influencing modal choice are the value of the commodity, the length of haul, and the density of traffic along the route. ⁸³ Making use of these factors he concludes that if the commodity has a high or medium value it should be conveyed by road if the density of the traffic is thin. If the density is thick, road transportation should be used for short hauls (less than 200 kms) while rail transportation should be used for hauls of longer than 250 kms. If the value of the commodity is low then conveyance by road is again appropriate for thin traffic densities and, where dense, for short hauls of up to 50 kms. ⁸⁴ For hauls of over 75 kms a train is more suitable.

⁸⁵ Wallis sounds a word of warning. He says:

'The considerations reflected in this decision tree are usually taken into account by Governments in regulating intermodal competition in the transport sector. A problem with this approach, however, is that it is difficult to prescribe general rules to assist in the rational allocation of traffic since the circumstances in which a modal choice decision is made will not only vary between shippers but also over time.'

[B] THE ARGUMENTS IN FAVOUR OF REGULATION

The arguments in favour of regulation have emanated primarily from SATS.⁸⁶ They have, by and large, been accepted by the various commissions of enquiry, all of which have agreed upon the need for regulation.

The most important argument in favour of regulation is based on the special position of SATS in the transportation network of the country. Legislation has set out its objectives and operating practices. Not only is it an organization devoted to conveying persons and goods but also one which must take account of, and work towards, the economic development of the country. This socio-economic object (embodied in its tariff structure) places it in a disadvantaged position vis-a-vis private road carriers. In 1927 the General Manager of the Railways Administration was forthright in his attack on private carriers:⁸⁷

'It should be realized that private road motor services are conducted by persons whose only concern is that the returns are profitable - returns which benefit but the pockets of a few individuals to the detriment of the community as a whole.'

It has thus been argued that regulation is essential to protect SATS. Its tariff structure is devised in such a way that the cost of the service is not reflected but rather the value of the service (or what the market can bear).⁸⁸ This allows private road hauliers, whose tariffs reflect the cost of the service, to operate at an advantage, especially with regard to low bulk, high value goods.⁸⁹ SATS requires this type of freight to supplement the deficit incurred in fulfilling its developmental obligations e.g. in the conveyance of such goods as mineral ores and agricultural

produce. To allow private hauliers to skim the cream off the top therefore results in SATS being left with all of the disadvantages while road transporters enjoy all of the advantages. Regulation is seen as a means of rectifying the distorted relationship which uncontrolled competition would produce.

Infrastructural inequality is another argument used by proponents of regulation. Wallis sees this as perhaps the most important factor. He says:

'The main argument against unrestricted intermodal competition is that there is considerable inequality in the structural, institutional and legal conditions affecting each mode. For example, railway interests often argue that railways have to meet their infrastructural costs whereas road hauliers can make use of publicly provided road infrastructure.'

The infrastructural inequality of the two modes of transportation has a profound impact on the costs of conveyance by road and by rail. If this inequality is not remedied by regulation or some other means a distorted picture emerges of the cost of the services offered. Once again if no regulation exists, road transportation would enjoy an unfair advantage. Advocates of regulation argue that the overall cost of rail transportation (which includes both fixed and mobile plant) is the true reflection of the value of the service. For competition to be fair, the overall cost of road transportation must be reflected in the pricing of private carriers i.e. infrastructural costs must be levied on individual road users in a more effective way. Until that is achieved regulation will be necessary to protect SATS from unfair competition.

A third major argument in favour of regulation revolves around the purpose of each mode. While this argument was used extensively in the years leading up to the promulgation of the Motor Carrier Transportation Act, it has not been used much since then. In terms of this justification, it is said that the state owned railway system is the cornerstone of the country's transportation network. Because rail conveyance is the primary mode of transportation, it should be placed in a privileged position. Road transportation can then be used as an accessory or feeder service. Regulation in this context is seen as a means of apportioning spheres to each mode, rather than as a method of realligning inequalities in the competitive relationship between the modes.

The arguments in favour of regulation are all based on the requirements of the public as a whole (as perceived by those in favour of regulation). It is assumed that regulation is necessary because uncontrolled competition cannot adequately take into account the developmental, social and economic needs of the country as a whole. In order to do this, a global view of transportation is needed as well as a transportation policy which can allocate resources where necessary. The aim of this is to provide for the stable and rational development of a transportation network suited to the needs of the country.

[C] THE ARGUMENTS AGAINST REGULATION

The arguments against regulation are premised to a greater or lesser extent on the alleged efficiency of the free enterprise system. Consequently any attempt at regulation

will carry with it inefficiency because it will protect the
beneficiary from the competition necessary for efficiency. ⁹⁶

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Wallis says:

'Intermodal competition may improve the efficiency of the transport system as a whole if it is unrestricted since it will enable the user to choose that mode which offers the most preferred services in terms of cost, speed, safety, reliability and traffic utility. There will thus be a strong inducement for the different modes to improve their competitiveness in terms of the cost and quality of their services.'

The proponents of deregulation accept that each mode has certain spheres in which it can operate more effectively e.g. the express parcel delivery service can be handled better by road transportation while the long distance conveyance of bulk goods falls squarely into the domain of rail

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transportation. Each mode, in an unregulated system, will naturally gravitate to those areas in which it operates at an advantage. Again, this will serve to enhance the efficiency of the transportation network. Thirdly, free enterprise is based on individualism. In the transportation sphere, it is argued that the decision as to the mode of conveyance should be left to the user. In other words the person who is to pay for the service should be given a free choice i.e. no restrictions should be imposed in allowing the user to decide on the mode of conveyance. Many factors will be taken into account in this decision e.g. the speed, the cost, the number ⁹⁹ of transloadings, the safety, the chance of damage or theft. Any attempt to interfere with this process by artificially making one mode more attractive than the other will have an adverse effect for the consumer of the service.

It is often argued that deregulation would leave

smaller communities and the more isolated parts of the country without transport. This would, from a developmental perspective, be disastrous to those communities and areas. The massive losses incurred by SATS in running uneconomic branch lines or transporting agricultural produce is pointed to. ¹⁰⁰ Advocates of deregulation aver that in a free enterprise system market forces will determine whether outlying areas are worth exploiting. They also point to the American ¹⁰¹ experience after the deregulation of the airline industry:

'Prior to deregulation, small communities had been receiving subsidised service. The study concluded that instead, in some important ways, the air service network has become more integrated as a result of competition and that small communities are not being abandoned. Instead, commuter airlines have replaced trunk and local airlines to small cities.'

[IV] DEREGULATION

[A] INTRODUCTION

The Van Breda Commission ¹⁰² expressed itself in favour of gradual deregulation but the resulting legislation did not reflect this policy shift. ¹⁰³ It is clear that the deregulation of road transportation will not come easily and it will not be achieved by simply repealing the Road Transportation Act. Any attempt to lift controls must address itself to the removal of competitive inequalities as ¹⁰⁴ a prelude to free competition in transportation. Another problem that would have to be faced is a means of ensuring minimum standards of safety. While it has been argued that safety issues are best left to private ¹⁰⁵ enterprise, such assertions should, it is submitted, be treated with a degree of scepticism.

Wallis says that 'the evolution of the transport policy of the SATS can be traced through a number of stages each of which arose from the policy commitments in the previous stage'.¹⁰⁶ The initial stage was the most important because, in an era when rail enjoyed a virtual monopoly in inland conveyance, policies were adopted which were to make rail transportation vulnerable to competition from the road e.g. the policy of charging 'what the traffic can bear' which necessitated differential rates. In order to allow the Railways Administration to continue to cross-subsidize and so provide social and developmental functions, regulation was seen as necessary. Wallis says that protection of the railways was justified in 1930 on two grounds: first, the road system was relatively underdeveloped and was incapable of handling a large increase in freight; and secondly, it was considered economically sound to favour the existing rail infrastructure rather than to allow traffic to be diverted to the road.¹⁰⁷

In the years that followed, circumstances changed and factors favouring regulation waned in importance: roads improved, some rail routes became congested and it appeared that the railways could not deal efficiently or speedily with the traffic available to it. The wisdom of regulation began to be questioned, especially in the 1960's when the railways were considered by many to be an inhibiting factor in the rapid economic growth of the country.¹⁰⁸ It was in this environment that the first commissions of enquiry to give consideration to deregulation operated.

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The Marais Commission heard evidence from a number of bodies who argued strongly in favour of deregulation.¹¹⁰ While

it found that it was necessary to regulate transportation at the time, it granted that future developments could well eradicate this need:

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'The Commission recommends that, while a greater measure of freedom for the transport user should gradually develop, a form of controlled competition should remain. Such control should be dynamic, however, and should be reviewed from time to time to ensure efficient and economic services to the public.'

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The Van Breda Commission also considered deregulation and, while it accepted that South Africa had reached a stage in its economic and industrial development when it should move towards freer competition, the resultant legislation maintained the original framework with some relaxations of regulatory measures. Wallis sums up the current situation in the following terms:

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'However the deregulation that has taken place has been essentially piecemeal in character and has largely arisen as an ad hoc reaction to the fact that the system of regulatory controls had become outmoded due to the industrial and economic development which has taken place since their introduction.'

Since the promulgation of the Road Transportation Act, the pressure on the government to deregulate has become more intense. Not only has the means of control (the permit system) been criticized, but the concept of regulation itself is seen increasingly as a means of fostering alleged SATS inefficiency through protection.

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[B] PRECONDITIONS FOR DEREGULATION

Deregulation would not be a simple and painless process. It cannot effectively be achieved by simply repealing the Road Transportation Act. The Marais Commission speculated on

the disastrous effect of such a step and, while it reported in 1969, the tenor of its findings in this regard are no doubt valid today:

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'In considering the specific example, it was assumed that all restrictions on the distance of operation by road hauliers had been lifted while all other provisions of the present legislation remained unchanged. The results for this extreme case indicated that 3 154 million rail ton-miles would be diverted to the roads and that an estimated 10 000 heavy road vehicles would be required to transport this diverted goods traffic. These heavy vehicles would travel about 263 million vehicle miles in relation to an estimated 3.2 million vehicle miles travelled by heavy road vehicles in 1965. The loss of goods traffic to the Railways would mean an annual decrease of approximately R145 million in income. This amount is 31 per cent of the income reflected in the the Revenue Account of the Railways for the year ended 31 March 1965. Unfortunately it was not possible, from the available data, to make estimates of the congestion and the decrease in road life which could possibly follow on the deviation of rail goods traffic of this order of magnitude to the road system.'

It is clear therefore that certain preconditions to deregulation must be brought about. The Marais Commission considered two factors to be of importance in determining whether control of road transportation would be necessary in the future: first, if the fuel used by rail and road became substantially similar, strategic and foreign currency considerations would become irrelevant; secondly if, as has been recommended, railway tariffs were aligned more with the cost of conveyance than the value of service the need to protect SATS would fall away. The Van Breda Commission, while it said that some form of regulation would always be necessary, set out three preconditions for deregulation. These would enable SATS to compete on equal terms with private road operators. They are:

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- '(a) The Railways must be relieved of the financial burden of providing social services;
 - (b) the Railways must be placed on the same footing as road carriers as regards the cost attached to the provision of infrastructure; and
 - (c) the Railways must amend its tariff structure so that its tariffs are brought closer to the actual cost of providing the service.'

It was on the basis of the profound effect which the adjustment of tariffs (especially the lower tariffs) would have on the country's economy that the commission opted for gradual 'qualified deregulation'.
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[C] THE EFFECT OF DEREGULATION

The dangers of deregulation unaccompanied by competition equalizing have been pointed out above. Even if the preconditions enumerated by the Van Breda Commission are met, deregulation will have an effect on a number of facets of economic life which require transport facilities. The impact of deregulation on four issues will be briefly discussed.

(1) SATS Rating Policy

The rating policy of SATS is at present dictated by two factors: its protection from intermodal competition and its obligation as a common carrier, necessitating the continued operation of unremunerative lines. In a deregulated system it would have to adjust its rates to reflect costs. In other words a policy change from charging 'what the traffic can bear' to the cost of conveyance would become necessary if SATS wished to compete with road hauliers in an uncontrolled environment.
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Wallis sees the result in the following way:
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'This may be a factor promoting more efficient intermodal coordination in the transport sector. If the prices charged by the different modes of transport reflect the opportunity costs of providing them, then it is likely that consumers will choose the mode which can provide a particular transport service at the lowest cost. As a result the different modes of transport are likely to specialize in the provision of those services in which they have a competitive advantage.'

(2) Industrial Decentralization

At present rebates on outgoing traffic are granted to firms which have been established in industrial development points. SATS, as a common carrier, is obliged to convey goods from these areas and such conveyance, at low rates, is usually unremunerative. In a deregulated system SATS would not be obliged to convey this freight at all and, if it did, it would charge competitive rates. The impact of this on the policy of industrial decentralisation would no doubt be disastrous. To overcome the difficulty, Wallis has suggested that Regional Transport Authorities be set up as a means of 'reconciling conflicting regional and efficiency objectives'.¹²³ These bodies could be charged with developing an overall regional development strategy and be granted funds, for the furtherance of this aim, with which to 'offer financial compensation to any transport operator which carries traffic at special rates from underdeveloped areas'.¹²⁴ The result of such an undertaking would, in essence, be to relieve SATS of its developmental obligation allowing it to pursue a competitive pricing policy. At the same time the responsibility for equalizing regional inequalities (in terms of the decentralization policy) will be dealt with by a more appropriate body.¹²⁵

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(3) **Regional Development**

Responsibility for the promotion of regional development on the part of SATS is in direct conflict with the aims of deregulation. SATS could not be expected to operate unremunerative lines and compete with private road hauliers. At the same time it is clear that abandonment of underdeveloped regions is not a viable alternative and runs against government policy, which is to promote industrial decentralization.

Two possible complementary solutions present themselves: first, the risk of operating losses can be shifted to the parties who will benefit from the rail link. This is not a radical concept because at present a limited policy of 'guaranteed lines' is followed by SATS, whereby the organization agrees to construct and operate a line if the beneficiaries guarantee against losses; secondly, the responsibility for regional development may be shifted from SATS to a government department e.g. a Regional Transport Authority.

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Wallis concludes:

'Apart from being a vehicle for stimulating intermodal competition within a region, it can be argued that RTAs will also be able to integrate transport and regional policy objectives in a more effective way since they will be in a position to treat transport as only one factor to be taken into account in an overall regional development strategy.'

(4) **Social Services**

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The Van Breda Commission said that if deregulation was to be achieved, one of the preconditions was that SATS had to be relieved of its obligation to provide unremunerative social services. If SATS is to be expected to provide these services a method of compensation (apart from intermodal

protection) must be devised. Perhaps the most obvious means of maintaining such services is by way of state subsidies to SATS. While this is probably the most practical way of resolving the problem, Wallis points out a number of difficulties: it may result in initially painful structural readjustments for SATS; difficulties may be experienced in separating SATS's accountability for social and purely economic functions; further pressure will be placed on the Treasury; and such a solution conflicts with the trend to reduce government spending, especially on social program.

[D] CONSEQUENCES OF DEREGULATION

This discussion on the consequences of deregulation is premised on the assumption that SATS will realign its rates to reflect the cost of the service offered. If it does so it will be in a better position to compete with private road carriers. It will nonetheless have to alter its approach to the services which it provides on at least two fronts: it will have to concentrate on reducing inefficiency and it will have to move towards specialization.

Wallis says that a large public monopoly like SATS, which has its survival guaranteed by statutory protection, will have less motivation to curtail operating inefficiency than a firm which is exposed to competition. Inefficiency can arise in at least two ways: within the organization through employees shifting responsibility or through the organization not making use of the most cost effective equipment or techniques. As a result of SATS losing high rated traffic in recent years measures have been introduced to improve efficiency. Wallis says in this regard that:

'...it is clear that deregulation of the transport sector would result in the Railways being exposed to a greater intensity of intermodal competition and therefore a greater pressure to implement measures which increase operating efficiency and service quality, than it presently has to face.'

Closely linked to the improvement in efficiency is a need on the part of SATS to specialize in those services in which it has a competitive advantage. The need for specialization (e.g. medium and long hauls and the conveyance of bulk loads)¹³³ was recognized by the Marais Commission as an essential, even in a regulated environment. The ability of SATS to compete with road transportation would be severely hampered if it also handled goods in which rail was a relatively¹³⁴ inefficient mode of conveyance.

A third, and major, consequence of deregulation would be that the choice would be made directly by the user of the service.¹³⁵ Consequently transport users are likely to choose that mode 'which meets their quality and service requirements at the lowest cost'.¹³⁶ This freedom of choice will be a further incentive for SATS to seek ways of improving efficiency and¹³⁷ quality.

FOOTNOTES

1. Craig, 90.
2. See Ch 7 below.
3. Verburgh, 11-12; see too Ch 1 above at 9.
4. Ch 1 above at 6.
5. Wallis, 121-2.
6. Wallis, 122.
7. See Ch 1 above at ; Verburgh, at 18, observes that the country's long distance rail service developed in 'splendid isolation': 'As soon as the impact of the commercial vehicle on the position of the South African railways began to be felt, public control was instituted which practically had the effect of keeping the commercial vehicle away from railway routes'.

8. Baxter, 155.
9. Wallis, 137.
10. Baxter, 116-7.
11. Wallis, 138.
12. Ibid.
13. Ibid.
14. Ibid.
15. Van Biljon, 249; see too Wallis, 138
16. See generally the Le Roux Commission UG8, para 79; Wallis, 160-1.
17. Wallis, 139-145
18. Wallis, 139
19. Ibid.
20. Wallis, 139-140
21. Wallis, 140
22. Wallis, 142-3; Dr Wallis' figures show that in 1981/82 SATS's passenger service incurred a loss of R311 million despite a subsidy of R287 million.
23. Wallis, 143-4
24. Wallis, 144
25. Ibid.
26. Wallis, 145
27. Wallis, 153
28. See Wallis, at 161, for the disparity between tonnage and revenue in high and low rated goods.
29. Verburgh, 1.
30. The Van Breda Commission outlined the purpose of transportation policy as follows: 'The purpose of transportation policy ought to be to provide the most efficient transportation for the country at the lowest total cost.' (para 5.2)
31. Wallis, 125
32. This statement is made in relation to competition between different modes of transportation. Verburgh, at 6-9, says that competition in sea transportation does not provide a serious problem because of self regulation. A different picture emerges in relation to road transportation. Fierce competition within the industry can be expected because of three factors: ease of entry (if no regulation exists), the fact that most operators offer their services in a relatively small area and the fact that a large number of small firms (and relatively few big firms) make up the industry. (9-11.)
33. Verburgh, 3.
34. K G Fenelon The Economics of Road Transportation 47
35. Ibid
36. See Supplement to the Financial Mail: 'Trucks and Trucking' Oct 21, 1983, 40
37. See Ch 6 below at 146.
38. Wallis, 125-6.
39. Wallis, 126.
40. Fenelon, *op cit* 48.
41. Wallis, 128.
42. Ibid.

43. Wallis, 121; Wallis says: 'Fixed plant or infrastructure is extremely costly and long-lasting and has little alternative use so that capital invested in transport infrastructure is irretrievable for other purposes. Its operating costs are low relative to capital costs and there are usually economies of scale up to a certain plant size while there are also big indivisibilities between practical levels of capacity'.
44. Verburgh, 3
45. Verburgh, 2
46. Verburgh, 12
47. Ibid.
48. Ibid.
49. Ibid.
50. Ibid. Verburgh says the following of this aspect: 'Unless a truck load consignment goes from the private siding of a seller to the private siding of the buyer, which is more the exception than the rule, the railroad cannot offer an unbroken transport, be it for the transport of a person from his home to his work and back, or for commodities from factory to shop and from shop to client'. See too Wallis, 126, 130.
51. Wallis, 125-6.
52. Verburgh, 2.
53. Verburgh, at 6, defines 'free competition' as 'A situation of many sellers, close but imperfect substitutes, and a small fraction of total output from any firm.'
54. Verburgh, 10.
55. Verburgh, 1.
56. Verburgh, 11-12.
57. Wallis, 123.
58. See below at 38.
59. Para 72.
60. Le Roux Commission, para 74; The Page Commission was more explicit: 'There is a great preponderance of evidence and of opinion, which we ourselves share, that the end results of unrestricted competition among motor carriers are inefficiency and high cost; that the uncontrolled competition of motor carriers with railways brings about conditions which result to the detriment of the community even where, as in Great Britain and the United States, the railways are privately owned, and are still more directly harmful where, as in this country, the railways are State-owned; and that those conditions are not to be tolerated unless they bring fully compensating gain, or can be avoided only by measures which cause unjustifiable interference with public necessity or convenience' (para 180); see too the Van Breda Commission para 5.5.
61. Le Roux Commission para 79(c); The Marais Commission canvassed the same issue at para 296: 'On purely economic grounds it would be reasonable to assume that saturation in such a situation will be reached when supply exceeds demand and that the more efficient services will be patronised, the borderline services thus falling away for lack of trade. A system along these lines would, of course, be dependent upon a rigidly controlled tariff structure

- which is not found in practice, resulting in differential transport rates for a like service with detrimental effects on those undertakings prepared to operate at uneconomic tariffs in order to canvass for trade which would otherwise not have come their way'.
62. Le Roux Commission, para 92.
 63. Para 297; see too the Van Breda Commission
Para 5.5: 'Even if the choice of transportation is left solely to the transportation user, there are certain costs, mainly social costs, which are not reflected in a tariff determination, and the choice therefore cannot be left solely to the transportation users... Furthermore regulation is also necessary to ensure that competition will be on an orderly basis. With completely free competition in a country like South Africa there would be an oversupply of transportation on routes with a high traffic density, while on other routes in the outlying parts of the country there would be hardly any transportation. Such a situation of free competition would therefore not be to the country's benefit'.
 64. See the Road Transportation Act, s15 and Ch 8 below.
 65. See the Road Transportation Act, s24 and Ch 10 below.
 66. Wallis, 125
 67. Para 144; Wallis, at 125, says that allocating traffic efficiently between the different modes means 'that each mode should specialize in the carriage of those traffic flows in which it has a comparative cost advantage.'
 68. For a discussion of the commission's recommendations see Ch 3 below at 66.
 69. Van Breda Commission, para 5.3
 70. Van Breda Commission para 5.4
 71. Richard S Eckause, Basic Economics, 560.
 72. Eckaus op cit, 558
 73. See for example: Le Roux Commission, para 79; Page Commission, para 180-181; Marais Commission, para 295-301; Van Breda Commission, para 5.
 74. S M Phillips and J R Zecher, The SEC and the Public Interest, 17.
 75. Phillips and Zecher op cit 19.
 76. Verburgh, 31-2.
 76. Verburgh, 31-2.
 77. Phillips and Zecher op cit 21.
 78. Ibid.
 79. Phillips and Zecher op cit 17.
 80. Phillips and Zecher op cit 21.
 81. Phillips and Zecher op cit 21-2; at 22 the learned authors say: 'The success of a regulatory program hinges on the balancing of interests of effectively organized groups. Regulations are introduced, expanded, contracted and eliminated in response to the groups' ability to organize effectively and bid for or against regulation. Only by accident would this process lead to regulatory programs in the public interest; they are far more likely to be to the benefit of the small group - not the public interest'.
 82. See Ch 3 below at 66.
 83. Wallis, 126; Wallis, at 125, says: 'The optimal

distribution of traffic to different modes of transport depends on a large number of variables relating to the cost and service characteristics of the modes and the nature of the goods being shipped. The main intermodal service difference is speed, with trucks being faster than trains on any given arc since trains often have to collect traffic at intermediate points and may be slowed down by the periodic stops of other trains in the system, whereas trucks can carry smaller loads over the entire arc without any lengthy stops'. See too the decision tree at 129 and Fenelon The Economics of Road Transportation, 49.

84. Wallis, 126 and 130; see too the decision tree at 129.
85. Wallis, 131.
86. See for example Van Biljon, 262-8; Wallis, 123.
87. Quoted from Van Biljon, 264-5.
88. See above at 19.
89. The Le Roux Commission, para 79(b)(y) singled this out as one of the disadvantages under which the then Railways Administration operated; 'The road operator's method of fixing charges enables him to under-quote the railways on certain classes of goods. Advantage is taken of road transport service for such commodities, and of the rail for the great bulk of traffic - generally low-rated-for which road transport does not cater. This is tantamount to the selection by the road operator of the more remunerative classes of traffic and the leaving of the less remunerative to the railways'. It concluded at para 79(c) that this selectivity was not in the public interest: 'As is the practice in other parts of the world, the Railway Administration depends upon its revenue on the traffic - generally of greater intrinsic value - carried at its higher tariffs to make revenue meet expenditure, and the diversion of the high-rated traffic to the road is liable to result in an increase in the tariffs on the low-rated non-competitive traffic.'. See too the Page Commission paras 312-316; the Marais Commission paras 289-294; the Van Breda Commission para 5.5.
90. Wallis, 123; Le Roux Commission para 79(a)(iii) and 79(b)(i)-(iii).
91. Van Breda Commission para 5.5.
92. Van Biljon, 263.
93. The Page Commission para 313 defined the public interest in the following terms: 'It is clear that to allow the carriage by road of any passengers or of any goods that could be carried by rail - and would be so carried if road transportation were denied - does deprive the Railways of the revenue which would be derived from the carriage, less the additional expense which the Railways would have incurred in their transportation. It is clear, too that the loss falls on the community as a whole as owner of the Railways. But that does not conclude the enquiry. The public interest to be regarded is not only that which the people of the Union and South West Africa have in the financial stability of the Railways: it includes also that which, as being all users of transport, directly or indirectly, they have in the provision and development of efficient, speedy and economical means

- of transportation. Parliament may well set up there a breakwater to protect existing institutions against the onrushing tide of advancement and to guide it into channels of steady progress, but no more than Canute can it stay, nor should it seek to stay the tide's general onward movement'.
94. Le Roux Commission paras 72, 79(c), 80-2. 91-3; Page Commission para 291; Marais Commission para 294(c)(ii); Van Breda Commission para 5.5.
 95. Le Roux Commission paras 95, 101; Marais Commission para 289-290, 294.
 96. See the Marais Commission para 293.
 97. Wallis, 123.
 98. See above at 22.
 99. K G Fenelon, The Economics of Road Transportation, 49; Wallis, 125-6
 100. For the losses incurred by SATS on the transportation of agricultural produce, the operation of uneconomic branch lines and the operation of the South West Africa network see Management, 'Productivity is the name of the game...' 33.
 101. Free Market November 1984, 'The Transport Revolution' Vol 3 No 3, 1983, 10.
 102. Paras 4.3, 5.1 and 6.1.
 103. See Ch3 below at 66.
 104. Wallis, 123; but see Verburgh at 31-2 who does not believe that the industry can regulate itself.
 105. Free Market op cit 10.
 106. Wallis, 188.
 107. Wallis, 193.
 108. Wallis, 190-4.
 109. This was the first commission to consider evidence favouring deregulation.
 110. See the Marais Commission especially at paras 251, 261 and 293.
 111. Marais Commission para 301.
 112. See Ch 3, below, for a discussion of its findings.
 113. Van Breda Commission paras 4.2 and 4.3.
 114. Wallis, 195.
 115. See generally Supplement to the Financial Mail, 'Trucks and Trucking' Oct 21, 1983; Supplement to the Financial Mail, 'Trucks and Transport', Oct 19, 1984; Wallis, at 195, says that the measures adopted, being ad hoc reactions to outmoded regulatory controls could not allay objections indefinitely: 'The problem with the sequential approach to conflict resolution is that it tends to postpone and not satisfactorily reconcile the conflict between opposing interest groups with different objectives. It seems that there is a widening polarisation between the management of the SATS and its users and competitors. Furthermore none of these groups appear to be satisfied with the current state of the deregulation process'.
 116. Marais Commission para 249.
 117. Marais Commission para 294.
 118. Para 5.5.
 119. Ibid
 120. Ibid
 121. Wallis, 224-230
 122. Wallis, 225-6

123. Wallis, 205
124. Wallis, 231
125. Wallis, 230-2
126. Wallis, 231-2
127. Wallis, 205
128. Wallis, 207
129. Para 5.5
130. Wallis, 204
131. Wallis, 200; see Wallis, at 201, for examples of some recent technological and management developments; also see Management, 'Productivity is the name of the game' November 1984, 32-7.
132. Wallis, 202
133. Para 242
134. Wallis, 202
135. See the Marais Commission para 251, in which a strong argument was made out by representatives of commerce and industry for the modal choice to be left solely in the hands of the user: 'The case presented to the Commission emphasises that transport is a service to the rest of the economy and is not an end in itself. Seen in this light and in view of the fact that an economy is the most efficient when firmly based on the principle of individual entrepreneurship, it is only the transport user who, in the last resort, can judge what form of transport is best suited to his requirements. In practice, as submitted, however, some transport for own account may be uneconomic because of less than optimum utilisation. Stemming from these considerations, a much greater measure of freedom for the transport user will depend upon the existence of competition in transport, and the introduction of a new transport dispensation in the Republic was urged to give the user the widest possible choice in regard to the form of transport.'
136. Wallis, 200
140. Ibid.

CHAPTER 3

LEGISLATIVE HISTORY OF TRANSPORTATION REGULATION

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- (1) Regulation
- (2) Co-Ordination
- (3) Cost

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- (4) Act 15 of 1966
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- (6) Act 23 of 1974

[V] THE ROAD TRANSPORTATION BILL

[A] INTRODUCTION

[B] THE FINDINGS OF THE VAN BREDA COMMISSION

(1) New Provisions within the Existing Framework

(2) New Principles Embodied in the Bill

[VI] A BRIEF OUTLINE OF THE ROAD TRANSPORTATION ACT 74 OF 1977

THE BEGINNINGS OF REGULATION

The Motor Carrier Transportation Act was the first attempt to regulate and control transportation in South Africa. It was passed as a result of the recommendations of the Road Motor Competition Commission under the chairmanship of Mr J C Le Roux.¹ The commission reported in 1929 and most of its recommendations were given effect to.²

[A] THE LE ROUX COMMISSION'S RECOMMENDATIONS

The chief recommendations of the commission may be loosely categorized as follows: those relating to regulation, those relating to co-ordination and those relating to cost.

(1) Regulation

Some witnesses argued strongly that a monopoly of public transport provided the best solution to the problem created by competition between road and rail transportation. The commission disagreed with this view, expressing the opinion that a measure of competition was both healthy and desirable.⁴ In order to achieve reasonable control and regulation, the formation of an independent, representative and apolitical regulatory body was proposed.⁴ It would have the power to prescribe 'transportation areas' and 'transportation routes'⁵ and hear appeals (its decision being final) from decisions of subsidiary bodies.⁶

In order to participate lawfully in transportation, operators, it was suggested, should be required to possess 'public service licences'.⁷ Applications for such authorities were to be dealt with by the subsidiary bodies as tribunals of first instance,⁸ due regard being given to all

relevant factors such as the sufficiency and efficiency of existing facilities and the reasonableness of the tariffs. ⁹

It was further recommended that the regulatory body should be entrusted with formulating conditions and regulations in respect of such diverse aspects as the standards of vehicle construction, safety devices, the examination of vehicles, the prescribing of routes, the scheduling of fares, the approval of time-tables, the control of the type of vehicle to be used for goods and passenger conveyance and the setting of wages and hours for staff employed by operators. ¹⁰

(2) Co-Ordination

The commission emphasized the need for the co-ordination of the transportation facilities of the country. With this end in mind it recommended the promulgation of uniform motor laws ¹¹ and uniform motor taxation, the co-ordination of the various ¹² transportation modes as well as rail and road systems, the ¹³ formulation of a national road policy and the creation of a ¹⁴ National Road Board.

(3) Cost

The commission was of the opinion that the cost of road construction and maintenance should not be borne by motor vehicle owners alone. The benefits of road transportation were such that the general taxpayer should also be called ¹⁵ upon to contribute. Revenue from direct taxation of road ¹⁶ users should, the commission felt, be used for road purposes. In addition, the Government, as the general taxpayers' representative should make annual grants for the same ¹⁷ purpose.

[B] THE FATE OF THE RECOMMENDATIONS

Most of the recommendations which dealt with the regulation of transportation were adopted in the resulting legislation. The Act as a whole followed the tenor of the commission's findings, being premised on the need for regulation and co-ordination. The Motor Carrier Transportation Act remained in force until 1977, when it was replaced by the Road Transportation Act. The new statute is perhaps little more than a refinement of the old one, although some significant changes were made. Despite these changes the underlying assumptions and philosophy, as propounded by the 1929 commission, remain intact.

[III] MAJOR AMENDMENTS TO THE 1930 ACT

[A] INTRODUCTION

The workings of the Act will not be dealt with in any great detail because it was so similar to the 1977 Act which is summarized below. Suffice it to say that the cornerstone of the Act was the definition of 'motor carrier transportation'. If an undertaking fell within the definition, the provisions of the legislation applied. The undertaking was unlawful in terms of s9, unless it was authorized by a certificate granted either by the Central Board (now the National Transport Commission) or a local board. The Act set out factors to be taken into account by the deciding tribunal as well as facts which had to be proved by the applicant. The regulatory bodies had power to stipulate conditions relating to tariffs and time-tables. The operator could not alter these without permission. Thus, after a successful application, the operator's undertaking was subject to control by the institutions which the Act created. Failure

to adhere to the provisions of the Act or the terms of conditions was an offence.

The principal Act was amended thirteen times between 1932 and 1976.²² In addition its content was affected by the Road Transportation Boards Services Act,²³ the Transport (Co-ordination) Act,²⁴ the Native Transport Services Act,²⁵ and a General Law Amendment Act.²⁶

[B] THE AMENDMENTS

(1) Act 31 of 1932

The first amendment to the Act was effected by Act 31 of 1932. Its promulgation resulted from an allegation made by the Central Board in its first report that traders and industrialists were increasingly turning to the conveyance of their own goods. Furthermore, the Board expressed dissatisfaction at vehicle owners letting their vehicles to the owners of goods for the conveyance of those goods. This was seen as an evasion of the Act.²⁷ Parliament amended the definition of 'motor carrier transportation' to include, in addition to the carriage of persons and goods for reward, the carriage of persons or goods, whether for reward or not, in the course of any industry, trade or business, and the carriage of persons or goods in a motor vehicle the use of which had been obtained for reward.²⁸

To ameliorate the harshness of the new definition, a number of exemptions were enacted.²⁹ They excluded from the operation of the Act the conveyance of persons by means of a motor car (i.e. a vehicle designed to seat not more than seven passengers) unless the car was used regularly on a route already sufficiently served, the conveyance by farmers

of their own produce and farming requisites in their own vehicles, and the transportation operations of some so-called ancillary users.³⁰ An ancillary user is a producer, manufacturer or distributor who uses his own vehicle for the conveyance³¹ of his goods.

(2) Acts 20 of 1934 and 15 of 1937

The next two amendments to the Act tackled the same problem in different ways. The first, contained in Act 20 of 1934, was aimed at alleviating certain hardships which were adversely affecting trade and industry. It empowered the Governor-General to suspend the operation of any provision of the Act in relation to any area or any class of transport. The new provision was only used on one occasion. It was invoked to exempt trolley-buses from the operation of the Act, because prima facie they fell within the definition of a 'motor vehicle.'³² The second related amendment, Act 15 of 1937, altered the definition of a 'motor vehicle' to overcome the unsatisfactory position created by the previous amendment. It attempted to exclude trolley-buses from the definition only when they were used on approved routes. The Page Commission was of the opinion that, far from solving the³³ problem, the Legislature had merely created an absurdity:

'To provide that a trolley-bus is a motor vehicle when it is travelling in one street but is not a motor vehicle when it is travelling in another may be legally effectual but is factually absurd.'

(3) Act 15 of 1941

In its report for the year ended 31st March 1939 the Board took cognizance of various criticisms of the Act and included its own observations regarding problem areas. Its recommendations were, by and large, accepted by Parliament in

the form of Act 15 of 1941. The provisions of the statute dealt with: problems in relation to transportation routes;³⁴ an amendment to the definition of 'motor carrier transportation' which tightened the meaning of conveyance in the course of any industry, trade or business;³⁵ the deletion of the proviso excluding motor cars from control if they did not convey persons regularly on a fixed route;³⁶ the empowering of boards to require applicants or objectors to deposit up to 100 pounds from which costs could be awarded to successful parties;³⁷ and provisions for the better co-ordination of existing services.³⁸

[IIII] THE CREATION OF THE NATIONAL TRANSPORT COMMISSION

The Transport (Co-ordination) Act was passed in 1948. It amended the Motor Carrier Transportation Act by abolishing the Central Road Transportation Board. This body had functioned as an appellate tribunal for local boards and was entrusted, in addition, with co-ordination functions. The Transport (Co-ordination) Act created a new body, the National Transport Commission.³⁹ Its object was, (and still is) to promote and encourage the development in the Union and, where necessary, to co-ordinate various phases of transport in order to achieve the maximum benefit and economy of transport service to the public.⁴⁰

The Commission's function therefore was not limited to road transportation, but extended to all modes of transportation. Indeed, it took over the powers, functions and duties of the Central Road Transportation Board, the National Road Board⁴¹ and the Civil Aviation Council. It is interesting to note that one of the few recommendations made by the Le Roux

Commission which was not accepted was that the Central Road Transportation Board and the National Road Board should be merged into one body, which would be entrusted with regulatory powers.

[IV] MAJOR AMENDMENTS TO THE 1930 ACT AFTER 1948

[A] INTRODUCTION

The passing of the Transport (Co-ordination) Act may be seen as a watershed. The formation of the National Transport Commission as an umbrella body for the regulation of, and policy making in relation to, all forms of transportation integrated the South African transportation structure to an extent which was not possible prior to 1948. The amendments passed from then until 1976 may be classified under two heads: those which were ad hoc reactions to what the government perceived to be unsatisfactory judicial decisions and those of a more substantial nature by which changes were made to the fabric of the Act.

[B] THE AMENDMENTS

(1) Act 50 of 1949

Act 50 of 1949 made three major changes to the original Act. Firstly it created a new offence, now contained in s32 of the Road Transportation Act viz entering a vehicle to which a permit relates despite objection by the person in charge. The Act made provision for the forcible removal of such a person and also provided a defence for the permit holder, who committed an offence by conveying a disqualified person. The permit holder could avoid conviction if he could show that the person was conveyed without the knowledge of the driver or conductor, or in defiance of a

request to leave the vehicle.

The 1949 amending Act also enacted a new s13(bis). This section gave the Minister power to initiate a public enquiry by the Commission when he had reason to believe that it may be expedient in the public interest to withdraw a permit. The procedures to be followed in setting up the enquiry, in withdrawing a permit and in compensating the ex permit holder were prescribed.

Thirdly, the matters to be considered by a board in dealing with an application for the grant, renewal or amendment of a permit were amended and amplified. This section corresponds to the present s15 which deals with public permits.

(2) **Act 44 of 1955**

The thrust of Act 44 of 1955 was twofold: it was used to nullify the decision of the Appellate Division in Tayob v Ermelo Local Road Transportation Board and it made some substantial changes to the principal Act in relation to exemptions, appointments to boards and the powers of boards.

(a) **Race Policy and the Act**

In Tayob's case a decision by a board refusing an application for the renewal of a permit was set aside. The application, by an Asiatic, was for the renewal of a permit to operate a first class taxi (i.e. for the conveyance of 'Europeans'). The board's decision was based on a rigid policy that operators should convey persons belonging to the same race group and it was, for that reason, held to be

invalid. The amendment empowered a board to take into consideration the class of persons to which the applicant belongs and the class or classes of persons to which those
49
sought to be served belong. Similar provisions applied to other forms of public transportation: for example, boards were given the power to specify portions of vehicles which
50
could be set aside for members of particular classes.

(b) Other Amendments

The remaining amendments dealt with the following: a more detailed list of the forms of conveyance which were excluded from the provisions of the Act; the method of appointing members of boards (the Minister was required to consult the Provincial Administration and municipalities before making appointments); the appointment of experts, in advisory capacities, to boards; the power of boards to cancel permits if circumstances materially change and to vary conditions or requirements; the establishment of a Native Transport Services Account for subsidizing or lending money to persons conveying Blacks; and the power of the court to order that a vehicle used to contravene the
51
Act be forfeited to the State.

(3) Act 42 of 1959

The most important change brought about by Act 42 of 1959
52
was the result of the decision in R v Kisten and Others. S7(1)(c) provided that any permit issued by a board had to specify the nature or class or classes of persons which could be conveyed. A proviso said that if a permit excluded an operator from conveying persons of a particular class he nonetheless had a duty to do so if any other law placed such an obligation on him. Kisten was charged

because, while he was only allowed to convey 'non-Europeans', he had conveyed 'Europeans'. He argued that a by-law in force in Durban placed an obligation on all unoccupied taxi-drivers to accept as a client any person who was sober and clean. The Crown argued unsuccessfully that the by-law was ultra vires because it was repugnant to the general policy of the law requiring separation of races on the basis of colour. The Act was amended as a result of the decision by deleting the proviso in its entirety. ⁵³

(4) Act 15 of 1966

A major amendment in Act 15 of 1966 dealt with the substitution of defective vehicles. Prior to 1966 the conveyance of the defective vehicle for repair, along with its passengers, was exempted from the provisions of the Act. The amendment altered this. The exemption only applied if the defective vehicle had been used for road transportation. Thus, as Nienaber observed, the exemption would not apply to the conveyance for reward or in the course of trade or business of a pirate taxi which had broken down. ⁵⁴

A second major change altered a provision dealing with conveyance in the course of trade or business of a kind previously exempted. The exemption fell away, in terms of the amendment, if a general dealers licence was required for the trade or business. ⁵⁵ Schutz submitted that this amendment resulted from long standing friction between the owners of 'concession stores' on mining ground and neighbouring general dealers. It was aimed at preventing the latter from conveying bus loads of miners to their stores on pay-days, thus allowing the miners to circumvent ⁵⁶

the monopolies enjoyed by the 'concession store' owners.

(5) **The General Law Amendment Act 80 of 1971**

Act 80 of 1971 added two sub-sections to s14 of the Motor Carrier Transportation Act. It provided that if any person acquired a controlling interest in a company after the issue or renewal of permits the approval of a board or the Commission was required.⁵⁷ This provision is now contained⁵⁸ in s29(3)(a) of the Road Transportation Act.

(6) **Act 23 of 1974**

The government's concern at the fuel shortage experienced by South Africa in the 1970s was, in part, expressed by an amendment to the Motor Carrier Transportation Act. Act 23 of 1974 excluded lift clubs (as defined in the Compulsory Motor Vehicle Insurance Act)⁵⁹ from the definition of motor carrier transportation. Schaffer cites the following⁶⁰ reason for this provision:

'The amendment excludes lift clubs from the provisions of the Act in the hope that this will encourage the use of private motor vehicles for this purpose, thereby saving petrol and alleviating heavy traffic in the cities.'

Lift clubs are still excluded⁶¹ from the definition in terms of s1(2)(h) of the present Act.

[V] **THE ROAD TRANSPORTATION BILL**

[A] **INTRODUCTION**

In its amended form the Motor Carrier Transportation Act served as a blueprint for its successor, the Road Transportation Act. Prior to the enactment of the latter, the bill was scrutinized by a select committee under the chairmanship of Mr A. Van Breda MP. This committee was later appointed as a

commission of enquiry. Its findings are discussed below.

[B] THE FINDINGS OF THE VAN BREDA COMMISSION

The commission said that transportation legislation could not be viewed in isolation. It had to be examined in the light of transportation policy which in turn is closely linked to the level of development of the country's economy. In recommending gradual deregulation the commission said:

'However, as countries developed economically and industrially, the need for very strict control measures began to diminish and in most countries an evolutionary process of deregulation followed. The Republic of South Africa has now reached such a stage of economic and industrial development that the country should also move towards a freer competition in transportation.'

The bill was, to a large extent, a neater and more compact version of the Motor Carrier Transportation Act. At the same time it must be conceded that innovations and improvements were included. These may be classified in two broad categories: first, those aimed at allowing freer competition within the existing framework; and secondly, those provisions which were based on new principles. These categories will be discussed below.

(1) New Provisions Within the Existing Framework

While the commission said that the bill was to serve as a blueprint for deregulation, it conceded that it was not the final word. Therefore it did not feel itself able to recommend sweeping changes but was of the opinion that certain steps could be taken to achieve the goal of freer competition within the existing framework. It consequently excluded from the definition of road transportation certain types of conveyance, the aim being to create a more

flexible system and to eliminate a great deal of red tape
66
for the operator.

The most important concessions made in this way were the following: the conveyance of products by decentralized industries;
67 the conveyance by any business of its own goods in a vehicle with a carrying capacity not in excess
68 of 1 000 kilograms; the conveyance by a business of its own goods within a radius of 80 kilometres of its place of
69 business; the unregulated conveyance of goods by a
70 carrier within exempted areas and within a 40 kilometre
71 radius of the carrier's place of business; the unrestric-
72 ted conveyance of exempted goods; and the conveyance of persons or goods, by means of a motor car, in the course of any industry, trade or business, provided that no reward is asked, and the passengers are not the conveyor's employees in the process of being conveyed between their place of
73 work and places of residence.

(2) **New Principles Embodied in the Bill**

The new principles which the commission recommended are aimed chiefly at the more efficient working of the regulatory machinery and at better co-ordination of transportation facilities.

Thus, for example, provision is made for independent cost investigations when applications are made for tariff
74 increases in bus services, fairer and clearer requirements are laid down which an applicant must establish when a transportation service already operates (thus allowing
75 easier entry into the field) and provision is made for the withdrawal or amendment of permits when a railway

76
service is introduced.

Easier access by foreigners into the South African
transport system is ensured by s43 and s44⁷⁷ and more uni-
formity with provincial ordinances has been achieved by
amendments to the definitions of 'motor car' and 'owner'.⁷⁸

[VI]

A BRIEF OUTLINE OF THE ROAD TRANSPORTATION ACT 74 OF 1977

Before dealing with the regulatory machinery set up by the Road Transportation Act, it is convenient at this stage to summarize its workings. A detailed discussion of amendments will not be undertaken, because these have been dealt with below, where necessary.

Powers to act in terms of the statute are vested in the Minister of Transport Affairs, the National Transport Commission, the local road transportation boards and the State President.

The object of the Act is to 'provide for the control of certain forms of road transportation and for matters connected therewith'.⁷⁹ To attain this object the Act defines road transportation.⁸⁰ This endeavour must be undertaken in accordance with the statute. Non compliance is punishable in terms of various penal provisions.⁸¹ Penalties for contraventions of the Act are specified and in certain circumstances forfeiture of the vehicle used for the contravention may be ordered.⁸² If an endeavour constitutes road transportation as defined there are two ways in which it will be rendered lawful: first, s1(2) excludes a number of activities or situations from the definition, which prima facie fall within it; secondly, the

undertaking will be in accordance with the Act if a permit has been granted and issued to the conveyor.

Permits fall into three categories; public permits,⁸³ private permits and temporary permits. The appropriate type of permit required by a person who wishes to convey will depend on the purpose of the conveyance. In order to be granted a permit, certain requirements must be met. These relate to the form of the application,⁸⁴ the hearing of interested parties⁸⁵ and certain other factors which must be considered prior to a decision.⁸⁶ The local road transportation boards have power to hear applications and to grant them in full, in part, in full or in part but subject to conditions or to refuse them.⁸⁷ Prior to reaching a decision the board must consider a number of prescribed factors which are laid down by s15 in the case of public permits, s18 in the case of a private permit and s20 in the case of temporary permits. For example, the board must apply its mind in terms of s15(1)(a) to the extent to which the transportation to be provided is necessary or desirable in the public interest.

The Minister has certain powers granted to him in terms of s2. These powers are general in nature and he may only act upon the recommendation of the National Transport Commission. In order to bring such an act into effect it must be published in the Government Gazette. An example of a power which the Minister may exercise in terms of s2 is the power to declare any area to be a local road transportation area. Furthermore, in terms of s30 the Minister may make regulations. The regulations are of a varied nature but, in

general, provide the details to enable the proper application of the Act. For example, the Minister may make regulations with regard to the information to be submitted with any application⁸⁸ or the payment of fees when an application is made.⁸⁹

A local road transportation board is created for every local road transportation area.⁹⁰ Boards are created by s4 which also specifies the membership of the board. A board consists of a chairman and two other members.⁹¹ It has powers to investigate any matter falling within the scope of the Act within its jurisdiction, to make recommendations to the Commission, to consider and decide on applications made to it or referred to it by the Commission and to issue permits granted in terms of the Act.⁹²

The National Transport Commission was created by the Transport (Co-ordination) Act. Its object is to promote and encourage the development of transport in the Union and, where necessary, to co-ordinate various phases of transport in order to achieve the maximum benefit and economy of transport service to the public.⁹³

This body's powers and functions extend beyond road transportation and it is thus an important policy-maker in the general transportation sphere. With special reference to road transportation, one of its functions is to advise and direct local boards in the exercise of their powers and the performance of their duties.⁹⁴ The specific powers entrusted to the Commission include the following: the investigation of any matters related to road transportation; the consideration of and deciding on

applications for the grant, renewal, amendment or transfer of permits; dealing with applications referred to it by boards, referring matters to boards for consideration and decision and instituting enquiries into the financial 95 circumstances and operating practices of permit holders.

In many respects the Commission's most important function is to deal with appeals against acts, directions or decisions of boards. This power is granted in terms of s8 of the Act and is an appeal in the widest sense. In other 96 words it is a complete rehearing.

South Africa's transportation network does not exist in a vacuum and obviously conveyance must take place which cross borders. This situation is further complicated by the implementation of the so-called homelands policy which has created four 'independent' states to date and a number of 'self governing' territories. To meet the problem the State President has been granted power, exercised by means of proclamations, to bring conveyance to or from countries or territories bordering the Republic within the ambit of the statute. This power to issue proclamations is granted by s43.

The effect of the Act may be summarized as follows: if X wishes to convey either persons or goods and such conveyance constitutes road transportation, he may only do so in accordance with the Act. Unless an exemption in terms of s1(2) applies, X will have to apply for a permit. The correct tribunal to apply to is a local road transportation board. An appeal may be brought against the board's decision. The body which hears the appeal is the National Transport Commission. This body is the final

arbiter, although the Supreme Court has an inherent power to review proceedings at any stage. If X is granted a permit, his activities must comply with the relevant provisions of the Act and any conditions which the board or Commission may, in its discretion, attach to the permit. Failure to comply will constitute an offence. If the permit is not granted, X may not undertake road transportation at all. If he does convey person or goods he will be liable to conviction under the Act.

Thus the Act may be seen as a means of doing two things: first, to regulate and control transportation on an external basis i.e. by restricting the number of operators and thus regulating competition. In this way many potential carriers are simply excluded from competing because they do not have permits; secondly, the act regulates the transportation industry on an internal basis i.e. the carriers who have been allowed to compete are restricted in running their undertakings because they are subject to the provisions of the Act and any conditions which have been attached to their permits.

FOOTNOTES

1. The commission is referred to as the Le Roux Commission in this work.
2. Page Commission, para 44.
3. Le Roux Commission, para 84.
4. Para 95(a).
5. Para 95(b).
6. Paras 96 and 99.
7. Para 95(c).
8. Para 98.
9. Paras 96 and 99.
10. Para 103.
11. Para 117.
12. Paras 147 - 150.
13. Para 181.

14. Para 194.
15. Para 189.
16. Para 201.
17. Para 189.
18. Page Commission, para 44.
19. See below at 66.
20. See below at 67.
21. See below at 68. For a summary of the Act, see Verburgh, 32 - 45; W E Cooper and B R Bamford South African Motor Law, 674ff; Page Commission, paras 44 - 65.
22. No 31 of 1932, No 20 of 1934, No 15 of 1937, No 15 of 1941, No 50 of 1949, No 44 of 1955, No 52 of 1957, No 42 of 1959, No 15 of 1966, No 22 of 1967, No 82 of 1972, No 23 of 1974 and No 88 of 1976.
23. No 26 of 1945.
24. No 44 of 1948.
25. No 53 of 1957.
26. No 80 of 1971.
27. Page Commission, paras 46 and 47.
28. Page Commission, para 49.
29. See below at 67 concerning the extension of the exemptions in the Road Transportation Act and Ch 6, below, for a full discussion of the provisions of si(2).
30. Page Commission, paras 50 to 53.
31. Page Commission, para 47.
32. Page Commission, para 56.
33. Page Commission, para 58.
34. All public roads in the Union and South West Africa had been proclaimed transportation routes. The same proclamation defined transportation areas and in so doing excluded large parts of the Union. The problem which the amendment sought to remedy was described thus by the Page Commission at para 60: '... the result was that in those areas motor carrier transportation was uncontrolled so long as it did not travel on public roads, but was subject to control as soon as it ventured on such roads. The position was clearly not intended by the Act of 1930.'
35. Page Commission, para 61.
36. Page Commission, para 62. The purpose of this amendment was to secure more effective control over taxi operations.
37. Page Commission, para 59(d).
38. Page Commission, paras 59(e) and 63.
39. S3(1).
40. S7.
41. Transport (Co-ordination) Act, long title.
42. Le Roux Commission, para 208. For a discussion of the composition of the Commission see Ch 4, below, and for its powers and functions see Ch 5, below; see too Verburgh, 34.
43. 1949 A.S. 205; see too Ch 14 below at 392.
44. 1949 A.S. 205; see too Road Transportation Act, s28 and the discussion on this section in Ch 9 below.
45. 1949 A.S. 205.
46. See Ch 8 below.
47. 1951 (4) SA 440 (A).
48. Supra.
49. 1955 A.S. 39; see too Ch 8 below.
50. 1955 A.S. 218.
51. 1955 A.S. 217 - 9.

52. 1959 (1) SA 105 (N).
53. 1959 A.S. 18 - 9, 98 - 9.
54. 1966 A.S. 123.
55. Ibid.
56. 1966 A.S. 305.
57. 1971 A.S. 124.
58. See Ch 9 below at 232.
59. No 56 of 1972.
60. 1974 A.S. 133.
61. See Ch 6 below at 142.
62. Para 1.6.
63. Van Breda Commission, para 4.1.
64. Van Breda Commission, paras 4.2 and 4.3. At the same time it opposed the total abolition of statutory control (para 5.1).
65. 1977 A.S. 139 - 140.
66. Van Breda Commission, para 6.1.
67. Road Transportation Act, s1(2)(v).
68. Road Transportation Act, s1(2)(l). This sub-section was amended by Act 8 of 1983 which deleted the exemption. See Ch 6, below, at .
69. Road Transportation Act, s1(2)(y).
70. Road Transportation Act, s1(2)(w).
71. Road Transportation Act, s1(2)(x); see too S v Grindrod Transport (Pty) Ltd and Others 1980 (3) SA 978(N) and Ch 6, below, at 148-150.
72. Road Transportation Act, s1(2)(z).
73. Road Transportation Act, s1(2)(k).
74. Van Breda Commission, para 7.2; Road Transportation Act, s3(1)g).
75. Van Breda Commission, para 7.3; Road Transportation Act, s15(2).
76. Van Breda Commission, para 7.4; Road Transportation Act, s26.
77. Van Breda Commission, paras 7.6 and 7.7
78. Van Breda Commission, para 7.9; Road Transportation Act, s1.
79. Road Transportation Act, long title.
80. S1.
81. S35.
82. S36.
83. S1.
84. Reg 3.
85. See especially s9 which deals with procedure; see too Ch 11 below.
86. See ss15, 18 and 20 which are dealt with in Ch 8 below.
87. S13(1).
88. S30(1)(a).
89. S30(1)(b).
90. S4(1).
91. S4(2).
92. S7.
93. Transport (Co-ordination) Act, s7.
94. S9(ii).
95. Road Transportation Act, s3(1).
96. See Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A); see too Ch 12 below.

PART TWO

THE REGULATORY MACHINERY

CHAPTER 4

THE INSTITUTIONAL MACHINERY

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[A] GENERAL

[B] REMOVAL FROM THE COMMISSION

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INTRODUCTION

The Road Transportation Act is designed essentially to regulate competition between road transportation, which is on the whole, privately run, and rail transportation which is provided by SATS. Its first aim is to balance the requirements of the country as far as transportational needs and development is concerned against those of the state-owned railway system and the private carriers. The second aim is the rationalization of transportation facilities through the control of entry into the industry. Internal competition is to be regulated in this way with the object of avoiding the unnecessary duplication of resources.¹

In order to achieve the main object of the Act, local road transportation boards (boards) and the National Transportation Commission (the Commission) exist. The functions of both centre mainly around the regulatory aspect of road transportation. The inter-relationship between the boards and the Commission is an interesting one. The latter is an umbrella body which co-ordinates all forms of transportation and formulates policy in its field. It is to the Commission that the boards look for guidance in relation to road transportation matters. These bodies, which are formed for each transportation area, are tribunals of first instance for applications for the grant of permits. The Commission has been given wide appellate powers and has ultimate power to decide on the merits of cases before it. Its decisions are subject to review by the courts. Friedman² J described the regulatory machinery in the following terms:

'What emerges from an analysis of these two Acts is that the scheme envisaged by the Legislature was one whereby the Commission was to be charged with the administration

and control of transport services throughout the Republic. The entire transport services function, as it were, under the umbrella of the Commission. In carrying out its objects the Commission does not operate in isolation, it operates in conjunction with local boards.'

The qualifications for membership of a board or the Commission are general in nature.³ This raises the question of the desirability of the chairman (or at least one member) of boards and the Commission have a legal training.

Prior to and during the decision-making process boards and the Commission are often called upon to decide complex legal issues. Examples which spring to mind include questions of jurisdiction, the standing of parties and the powers of the tribunal itself. Lawyers frequently appear before boards and the Commission and technical matters are often argued before the merits are dealt with.⁴ Thirdly:

'Lawyers are probably more likely to ensure the observance of principles of fairness, and they will probably avoid being influenced by irrelevant and unreliable evidence, since these skills are fundamental to their training and experience.'

It is submitted that the appointment of a lawyer, either as chairman or as a member, to each board would not be unduly problematic. Very little structural alteration to the legislation would be required. A more complex amendment would be necessary to provide the Commission with legal expertise because it often sits simultaneously and at different centres around the country. The answer, if it is accepted that legal expertise is necessary, is to form a panel of lawyers from which members can be drawn for individual sittings.

[A] CREATION

The Minister is empowered, in terms of s2(a) to declare any area to be a local road transportation area. In order to exercise this power properly he must act on the recommendation of the Commission. The defined area will become a transportation area on notice being published in the Government Gazette. S4(1) provides that a board be established for each transportation area.

[B] MEMBERSHIP AND APPOINTMENT

A board consists of a chairman and two other members. They are appointed by the Minister and are required to possess wide experience of, and to have shown ability in, transport, industrial, commercial or financial matters or public affairs generally.⁵

Prior to the promulgation of Act 8 of 1983 the procedure for the appointment of the two ordinary members was laid down in s4(3). This section provided that one ordinary member had to be appointed after consultation with the appropriate Provincial Administrator. The second appointment was made after consultation with the councils of those municipalities within the transportation area having populations in excess of 20 000 people. If the transportation area did not have a municipality of the required size, the Minister was empowered to appoint a person who, in his opinion, possessed a thorough knowledge of the transportation requirements of the particular area.

The amending legislation simply deleted s4(3). As a result, the Minister is not obliged to consult before making the

appointments, being guided solely by the criteria laid down in s4(2). This change in the appointment procedure was the subject of debate in Parliament. Opposition speakers argued that the amendment gave the Minister 'unfettered' power to make appointments and that this would not enhance the status of the boards.⁶ Mr G.S. Bartlett MP said that boards had been criticized in the past for displaying bias towards SATS. With the removal of the safeguard offered by consultation, it would be more difficult to argue convincingly that, despite SATS and the boards being part of the same government department, the latter were nonetheless unbiased.⁷ The Minister argued that the duty to consult rendered the appointment of a member a practically impossible task: in order to appoint a member for Durban, consultation with six municipalities was required. He gave his assurance that as far as was possible, relevant bodies would be consulted even though the need to do so did not form part of the legislation.⁸ The Act also makes provision for the co-option of members S4(4)(a) provides that a board may co-opt one or more members at the request of the Minister during the Minister's pleasure. Co-opted members have the same powers as original members and so may participate in, and cast votes at, meetings of the board.

In the event of the resignation, removal or temporary absence of a member the Minister may appoint a replacement to act for a period not exceeding twelve months.⁹ Members who are full-time state employees hold office subject to the Minister's pleasure, while the appointments of other members last for a period not exceeding two years.¹⁰ Different periods of appointment or conditions may be set down for various members

of the same board or of different boards. All members are eligible for re-appointment on the expiry of their terms of office.¹²

Under normal circumstances, when the Minister makes an appointment, prior consultation with the Commission is required.¹³ The need for consultation falls away in two situations: when the Minister appoints a replacement for a member who has vacated his office, has been removed or is temporarily absent,¹⁴ and when an appointment is made pursuant to the recusal of a member.¹⁵

[C] MEETINGS AND DECISIONS

Two members form a quorum for any meeting of a board.¹⁶ Subject to the proviso mentioned below, the decision of any two members present at a meeting constitutes a decision of the board.¹⁷ S6(2) provides, however, that if one or more co-opted members take part in proceedings, the decision of the majority, including the co-opted members, shall be the decision of the board.¹⁸ In the event of an equality of votes, the chairman may exercise a deliberative and a casting vote.¹⁹

[D] THE CHAIRMAN

When the Minister appoints members of a board, he makes a specific appointment of a chairman. This person may be the chairman of any other board.²⁰ If the chairman is unable to attend a meeting he may appoint any member, including one appointed in terms of s4(7) and s4(7A), to act as chairman for the meeting.²¹ S4(8) provides for the appointment of a member when the chairman has resigned, been removed, is temporarily absent or has recused himself. S4(8)(a) deems a

person appointed to replace a chairman in terms of s4(7) to be the chairman of the board or boards specified by the Minister. Similarly s4(8)(b) deems the appointee in terms of s4(7A) to be the chairman of the board for the matter in question

[E] REMUNERATION

Remuneration and other conditions attached to appointments is determined by the Minister with the concurrence of the
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Minister of Finance.

[III] THE NATIONAL TRANSPORT COMMISSION

[A] CREATION

The National Transport Commission was established, as a body corporate capable of suing and being sued, by s3 of the Transport (Co-ordination) Act. Its mandate is to promote and encourage the development of transportation and to co-ordinate various phases of transportation with the object of
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deriving maximum benefit and economy. The creation of the Commission was motivated by a desire to rationalize the control of all forms of transportation under the auspices of an all-embracing body. It took over the powers and functions of the National Road Board, the Central Road Transportation Board and the Civil Aviation Council, all of which were abolished by the Transport (Co-ordination) Act. The
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Commission is deemed to be the successor to these bodies for all purposes.

[B] MEMBERSHIP AND APPOINTMENT

The Act grants the State President the power to appoint the members of the Commission. The chairman is the Director General: Transport. The members may not total more than ten, excluding the chairman. Of that number the President

25
may only appoint a maximum of four public service employees.
From among the members of the Commission he must appoint
commissioners for the following portfolios; road transporta-
tion, civil aviation, national roads and urban transport.²⁶
Of the remaining members one must possess, in the opinion of
the State President, a thorough knowledge of aviation
matters. This person is appointed after consultation with
the Civil Aviation Advisory Committee.²⁷ Another member
requires, in the State President's opinion, a thorough
knowledge of railways matters. This appointment is made
after consultation with the General Manager of SATS.²⁸ If
this member is a servant of SATS he may not be present at, or
vote at, meetings of the Commission or take part in
discussions of the Commission which deal with either the Road
Transportation Act or the Aviation Act.²⁹ Neither may he
attempt to influence the vote or opinion of any other member.³⁰
The remaining members of the Commission must possess wide
experience of, and have shown ability in, transport or aviation
or in the conduct of public affairs.³¹

Members of the Commission (excluding those who are public
servants or employees of SATS) may be appointed for up to
five years, subject to any conditions imposed by the State
President. Individual members may be appointed for different
periods of time and upon different conditions.³² In addition
to his other powers of appointment the State President may
appoint a person nominated by the Minister of Defence.³³ This
appointee may take part in proceedings but has no right to
vote.³⁴

[C] MEETINGS AND DECISIONS

Meetings of the Commission take place when and where the chairman decides.³⁵ Generally a quorum consists of three members. In certain circumstances the Minister may direct that, when dealing with matters specified by him, a quorum shall consist of either four or five members. When the majority of those present at a meeting are members of the public service a quorum will only exist if the chairman is satisfied that the members from the private sector who are absent are unable to attend the meeting.³⁶ The Defence Force representative may not be regarded as a member for the purpose of determining whether a quorum exists or not.³⁷ Decisions of the Commission are decided by majority vote, the decision of the majority being the decision of the Commission. The chairman has a casting vote in addition to a deliberative vote.³⁸

[D] THE CHAIRMAN

It has been noted that the chairman of the Commission is the Director General: Transport.³⁹ Provision is made for the appointment of an acting chairman or chairmen: the chairman may, for some reason, not be able to attend a meeting and more than one meeting of the Commission may take place simultaneously.⁴⁰ Therefore s4(7) empowers the chairman to appoint any other member to act in his place or any other members to act for the purpose of additional meetings. As the post of chairman is filled automatically by a particular official, there can be no question of a temporary appointment on the death, resignation or removal of the chairman. The new Director General: Transport fills the position automatically. Such a person would be chairman, as opposed to acting chairman, even if he was

acting Director General.

[E] REMUNERATION

The remuneration of members, excluding those who are public servants or employees of SATS, is determined by the Minister in consultation with the Minister of Finance.

Payment is made out of the Consolidated Revenue Fund. ⁴¹

Members who are public servants or SATS employees are not entitled to any remuneration apart from their salaries.

Furthermore they may not be given travel and subsistence allowances which are more than they would be entitled to from their employers. ⁴²

[IIII] DISQUALIFICATION FROM APPOINTMENT TO, OR FROM MEMBERSHIP OF THE COMMISSION OR A BOARD

[A] INTRODUCTION

The attributes of competence and fairness are as important in the administrative process as they are in the judicial process. The Transport (Co-ordination) Act and the Road Transportation Act have sought to provide for these qualities in two complementary ways: first, by prescribing qualifications of a general nature and secondly, by excluding from eligibility certain categories of persons. These devices are aimed at achieving a level of competence, a degree of impartiality (which nonetheless allows for the appointment of experts) and a measure of credibility.

[B] THE GROUNDS

(1) The Commission

The State President may not appoint as a member of the Commission persons who fall into at least one of the

categories discussed below. Similarly, if a member becomes subject to one of the disqualifications he may not continue to serve as a member.

(a) Unrehabilitated Insolvents and Person Convicted of Offences in Certain Circumstances.

Unrehabilitated insolvents as well as persons convicted of crimes and sentenced to imprisonment without the option of a fine are disqualified. The principles relating to the former class are set out in the Insolvency Act. With regard to the latter class, it is clear that a prison sentence ordering actual incarceration unaccompanied by the option of a fine will be a disqualification. It is established too that the fact that such a sentence was either wholly or partly suspended is irrelevant. It was held, in Jaga v Donges N.O. and Another that the term 'sentenced to imprisonment' included a sentence either wholly or partly suspended. The court's reasoning (per Centlivres JA) was that a sentence of imprisonment, the whole of which is suspended on a specific condition, is as much a sentence of imprisonment as a sentence of imprisonment none of which is suspended. The issue is not the severity of the punishment but its nature. While Jaga's case involved the deportation of immigrants, it is submitted that the same reasoning would apply in deciding on the disqualification of a member of the Commission. There are two reasons for this submission : first, from the wording of the Act it is clear that the nature of the punishment is the decisive factor ; secondly, any other interpretation would introduce a test involving questions of degree which would be impractical and unworkable.

(b) **Persons Having a Financial or Other Interest**

A person who has a financial interest in, or who is involved in any activity connected with road transportation, the manufacture or sale of aircraft or the operation of an air service is disqualified from appointment to, or membership of the Commission. The section provides, furthermore, that if a near relation of a proposed appointee or member has such an interest, this too will be a ground for disqualification. In both of these situations the bar to appointment or membership is not absolute : it only operates if the State President is satisfied that the person's involvement in the undertakings will interfere with the impartial discharge of his duties.⁴⁹

The same section allows for the member of the Commission appointed after consultation with SATS to be one of its employees. It does so by exempting him from the provisions of s4(1)(d)(i) (financial interest) and s4(1)(d)(ii) (other interest). If he, in his personal capacity, or a near relation has a pecuniary or other interest in one of the undertakings mentioned in s4(1)(d) he will be subject to disqualification.

(2) **Boards**

S5(1) of the Road Transportation Act deals with the grounds which disqualify persons from being appointed to a board. S5(2) provides that if a member becomes subject to a disqualification mentioned in subsection 1, he shall vacate his office.

The grounds for disqualification are substantially the same as those contained in the Transport (Co-ordination) Act.

Included in identical terms are the disqualifications relating to unrehabilitated insolvents and persons convicted of offences and sentenced to a term of imprisonment without the option of a fine.

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The remaining provisions of the subsection manifest two major differences to the corresponding section of the Transport (Co-ordination) Act: s5(1)(d), which deals with financial or other interests, is not as wide as s4(1)(d) of the Transport (Co-ordination) Act. It only disqualifies a person if he, or a near relation has a financial interest in, or is engaged in any activity connected with road transportation which, in the Minister's opinion, will interfere with the impartial discharge of his duties. Secondly, s5(1)(c) says that no employee of SATS may become a member of a board. If a member becomes an employee of that organization s5(2)(a) imposes a duty on him to resign from the board. This contrasts sharply with s4(1)(d) of the Transport (Co-ordination) Act which specifically enables such a person to become a member of the Commission.

(3) **The Validity of Decisions in which Disqualified Persons Took Part**

S4(2) of the Transport (Co-ordination) Act and s6(3) of the Road Transportation Act provide that no act, direction or decision of a board or the Commission shall be invalid simply because a person who falls into one of the disqualified categories participated in it.

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The effect of these sections and the changes, if any, which the Acts make to the common law will be dealt with below.

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[IV] THE RESIGNATION OR REMOVAL OF MEMBERS

[A] GENERAL

A positive duty is placed on a member of either a board or the Commission, who becomes subject to any disqualification,⁵³ to vacate his office forthwith. In addition, a member may⁵⁴ resign from office by giving the Minister written notice.

[B] REMOVAL FROM THE COMMISSION

The State President has the power to remove members of the Commission from office. Three grounds for removal are set out in the Transport (Co-ordination) Act. These grounds are: (1) where a member has failed to comply with a condition of⁵⁵ his appointment; (2) where he has, in the State President's opinion, been guilty of improper conduct or habitual neglect⁵⁶ with respect to his duties; and (3) where he is, in the State President's opinion, unable to perform the functions of⁵⁷ his office efficiently.

[C] REMOVAL FROM A BOARD

The terms of the Road Transportation Act are virtually identical to the above but two differences warrant mention: s5(2)(b) uses wider and, it is submitted, clearer language than that of s4(3)(b) of the Transport (Co-ordination) Act. The former section says that a member shall vacate his office if he dies or is removed from office under subsection 3 or resigns by notice in writing addressed to the Minister. Subsection 3 sets out the grounds for removal. The grounds for removal are identical in both acts save for the fact that in the Road Transportation Act the Minister, as⁵⁸ opposed to the State President, is given the power to remove members.

FOOTNOTES

1. See Ch 2 above.
2. Roberts v Chairman, Local Road Transportation Board and Others (2) 1980 (2) SA 480 (C), 492 D. See Ch 13, below, on the review of decisions of boards and the Commission.
3. See below at 79 and 82.
4. Baxter, 247; see too Baxter 248, footnote 374.
5. S4(2).
6. House of Assembly Debates 1983 cols 1026-1027.
7. House of Assembly Debates 1983 cols 1027-1028.
8. House of Assembly Debates 1983 cols 1029-1030.
9. S4(7).
10. S4(6)(a).
11. S4(6)(b).
12. S4(9).
13. S4(10).
14. S4(7).
15. S4(7A).
16. S6(1).
17. S6(2).
18. S6(2)(a).
19. S6(2)(b).
20. S4(5).
21. S4(5).
22. Ss4(4)(b), 4(6)(a), 4(7), 4(7A).
23. S7.
24. S8.
25. S3(2).
26. S3(3).
27. S3(5)(a)(i).
28. S3(5)(a)(ii).
29. No. 74 of 1962.
30. S3(5)(b).
31. S3(4).
32. S3(6). This section also provides that members shall be eligible for re-appointment upon the expiry of their terms of office.
33. S3(8)(a).
34. S3(8)(b).
35. S6(1).
36. S6(4)(a).
37. S6(4)(b).
38. S6(5).
39. S3(2).
40. S6(6).
41. S5(1).
42. S5(2).
43. Transport (Co-ordination) Act, s4(3)(a).
44. Ss4(1)(a) and 4(1)(b).
45. No 24 of 1936. For a discussion on rehabilitation see C Smith The Law of Insolvency (2 ed) Ch 13.
46. 1950 (4) SA 653 (A).
47. At 658.
48. Supra.
49. S4(1)(d).
50. Road Transportation Act, ss5(1)(a) and 5(1)(b).

51. The wording of s6(3) of Act 74 of 1977 is different to s4(2) of Act 44 of 1948 but has the same effect. The former section reads : 'No act, direction or decision of a board shall be held to be invalid by reason only of the fact that, when such act was performed or such direction or decision was given, a casual vacancy existed on the board or a person disqualified under section 5(1) from being a member or co-opted member of such board was such a member thereof, whether or not such person's concurrence was necessary to the performance of that act or the giving of that direction or decision'.
52. See Ch 5 below at 121.
53. Transport (Co-ordination) Act, s4(3)(a); Road Transportation Act, s5(2)(a).
54. Transport (Co-ordination) Act, s4(3)(b); Road Transportation Act, s5(2)(b).
55. Transport (Co-ordination) Act, s4(4)(a).
56. S4(4)(b).
57. S4(4)(c).
58. Road Transportation Act, s5(3).

CHAPTER 5

THE FUNCTIONS OF EMPOWERED BODIES

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INTRODUCTION

In order to achieve the aims of the legislation, powers in terms of the Road Transportation Act and the Transport (Co-ordination) Act are vested in four functionaries: the National Transport Commission, the various local road transportation boards, the Minister of Transport Affairs and the State President. The above bodies are given a wide variety of functions to which their powers relate. Generally a separation of functions exists (apart from consultation in many instances) but a certain amount of overlapping is found in the functions of the Commission and the boards. This is in keeping with the purpose of the Commission as both an overall policy-maker and an appellate tribunal. The powers and functions of the above functionaries will be discussed separately in this chapter.

[I] THE POWERS AND FUNCTIONS OF THE BODIES

[A] THE NATIONAL TRANSPORT COMMISSION

(1) Introduction.

The functions of the Commission are not restricted to road transportation. It plays a central role in the formulation of transportation policy in that it has powers in relation to civil aviation and national roads, in addition to road transportation.¹ Its object is to 'promote and encourage the development of transport in the Union and, where necessary, to co-ordinate various phases of transport in order to achieve the maximum benefit and economy of transport service to the public'.²

In general terms, the functions of the Commission, with special reference to road transportation, include the

following: considering, in the performance of its tasks,³
existing and contemplated transportation facilities;
advising and directing boards in the exercise of their powers⁴
and the performance of their functions; and generally
promoting the development of transportation with an eye to
securing the greatest public benefit.⁵ So, in addition to
adjudicative functions, the Commission regulates the boards
which fall under it, and wields great influence on a national
level in its special field.⁶

The powers and functions of the Commission will be dealt with
under three heads: those of an investigatory nature,
those of an adjudicatory nature and those of a delegatory
nature. The general powers of the Commissions are contained
in s3 of the Road Transportation Act.

(2) Investigatory Functions

The Commission has been granted investigatory powers relating
to road transportation in terms of which it may make
investigations either on its own initiative or at the request
of the Minister. In the first instance its powers are widely
framed: it may investigate 'any matter relating to road
transportation in the Republic'.⁷ In the second it may, at
the request of the Minister, investigate 'any other matter
falling within the scope of this Act'.⁸ In both instances the
Commission must report to the Minister on its findings. It
should be noted that in the annual report submitted by the
chairman special mention must be made of any recommendations
made by the Commission, in terms of s3, which have not been
acted upon.⁹ In addition the Commission has far reaching
powers to enquire into the financial affairs and operating
practices of holders of permits authorizing the conveyance of

persons by means of a bus. If the holder is a company the enquiry may look into the affairs of any company in the same group or any subsidiary company of the holder. S3(1)(f) grants a wide power to take any steps deemed necessary for the proper administration of the Act. The approval of the Minister is required before such steps may be taken. The Minister may cause a public enquiry to be instituted if he believes that the withdrawal of a permit or permits will bring about an improvement in transportation facilities. This, as in the case of an enquiry instituted by the Commission under s3(1)(g), is undertaken by the Commission or a member thereof. Certain procedures must be followed: notice of the enquiry must be given in the prescribed manner; all interested parties must be heard; and due regard must be taken of s15(1), which deals with the matters to be taken into account when dealing with an application for a public permit. On completing the enquiry the Commission or the member of the Commission appointed to make the enquiry must submit a report to the Minister. He may then direct that the permit be withdrawn or that it be withdrawn and others be issued to another person or persons in lieu thereof. The Minister has the power to determine the date upon which the direction will come into effect, provided that it is more than a month after the affected person is notified, but less than a year after notification.

(3) Adjudicatory Functions

(a) As a Tribunal of First Instance

S3(1)(c) contains provisions which vest what may be termed adjudicatory functions in the Commission. It acts, in such cases, as a tribunal of first instance. The section gives

the Commission the power to consider and decide on (or otherwise deal with) any application for the grant, renewal, amendment or transfer of a permit, as well as any application referred to it by a board in terms of s7(2).

It is submitted that a clear distinction is envisaged between ss3(1)(c)(i) and (ii) on the one hand and s3(1)(c)(iii) on the other. In the first case, the Commission may deal with applications brought directly to it, while in the second, the Commission has directed the application to be referred to it by a board. In terms of a policy decision the Commission has decided that it alone should hear applications for permits which relate to the tourist industry.¹⁶ Thus a tour operator will be able to approach the Commission directly. If on the other hand the tour operator first approached a board, the matter would be referred to the Commission in terms of s7(2). The reason given for the different treatment of applications for permits to convey tourists is the necessity for high standards to be maintained in the industry. If the Commission deals with all such matters a uniform standard can be maintained. A second possible reason is that many tour operators would want a very wide authority, covering a large area of the country. The Commission, as an umbrella body for all types of transportation, will be best able to assess needs in this regard and to co-ordinate services.

When the Commission exercises its powers in terms of s3(1)(c) it must do so in accordance with the provisions of the Act. In other words, it must adhere to the procedure provided by s9, complemented by the audi alteram partem rule,¹⁷ publish the required particulars in the Gazette¹⁸ and take into

consideration, in making its decision, those matters contained in s15 (if the application is for a public permit). It is bound by the same rules that a board in a similar situation would be bound by. Its decision can be attacked on review on the same grounds on which a board's decision may be challenged.¹⁹

Action by the Commission in terms of s3(1)(c) has an effect on the applicant's remedies: the right to an appeal falls away. This point is well illustrated by the case of Roberts v Chairman, Local Road Transportation Board and Others(2),²⁰ in which the application of the audi alteram partem rule to a direction by the Commission in terms of s7(2) was in issue. It was argued that a right to a hearing existed in relation to the exercise of power because, inter alia, it had deprived Roberts of the 'two tiered procedure' which the Act provides i.e. instead of a hearing and an appeal, Roberts, because the Commission decided to hear the matter itself, was only given a hearing. Friedman J held that the deprivation of an appeal was intended by the legislature:²¹

'The right of appeal granted by s8 is one which comes into operation only when a board has given a decision. The Act envisages that, before a board gives a decision, the matter may be referred to the Commission. When that occurs s8 no longer applies. When a person makes an application to a local board, he does so subject in every case to the provisions of the Act. One of these provisions entitles the Commission to direct that the application be referred to it.'

It is clear from the above that, when the Commission acts as a tribunal of first instance, important, and possibly pre-judicial consequences for applicants and objectors follow. The power should accordingly be used in exceptional circumstances only and with the utmost circumspection.

Finally, s3(1)(e) grants the Commission the power to issue any permit granted, renewed, amended or transferred by it. The power to grant applications is closely linked to the power to issue permits. Indeed, at first blush these powers may appear to be inseparable but, it is submitted, a clear distinction exists. Thus in Reddy v African National Bus Transport Co (Pty) Ltd,²² De Wet J held:

'The granting of a certificate is a matter of discretion. That function the Commission cannot delegate in such a way as to order the Local Board to grant and issue a certificate for and on behalf of the Commission. But where the Commission has already granted the certificate in other words, where it has authorized the issue of a certificate - then the mere issue of it is a matter of a purely mechanical nature and is one which the Commission may very well delegate under s5(2).'

(b) As an Appellate Tribunal

The Commission's most important adjudicatory function is as an appellate tribunal from decisions of boards. In terms of s8, persons who have applied for the grant, renewal, amendment or transfer of permits, holders of permits and those who have supported or opposed applications may appeal against any act, direction, or decision of a board which affects them. Such an appeal is an appeal in the fullest sense. In other words it is a complete rehearing.²³ Holmes JA pointed out in National Transport Commission v Chetty's Motor Transport (Pty) Ltd²⁴ that the issue on appeal is not whether the board was right or wrong because the Commission

comes to its own decision:

'The Legislature has appointed it as the final arbiter in its special field and right or wrong, for better or worse, reasonable or unreasonable, its decision stands'.

(4) The Commission's Powers to Delegate

(a) Delegation in General

Steyn expresses the general rule embodied in the maxim ²⁶ delegatus non delegare potest in the following terms:

'Waar die wetgewer iemand met 'n mag beklee by die uitoefening waarvan 'n gesonde oordeel of 'n mate van oordeelkundigheid van belang is, of deur die wetgewer, blykens die betrokke wetgewing, van belang geag word, kan die persoon wat deur die wetgewer vir die taak aangewys is, nie daardie mag deur iemand anders laat uitoefen nie'.

While it is true that when a power has been delegated with no authority to do so, the resulting act will be ultra ²⁷ vires, the maxim does not represent a hard and fast rule against delegation. Rather it should be seen as a presumption to the effect that the legislature intended only the indicated body or official to exercise the power ²⁸ in question. The reason for the maxim is stated by ²⁹ Baxter as follows:

'The recipient of the power has presumably been chosen for a purpose - for his accountability, expertise, seniority or advantaged position in exercising the power. Should he allow the power to be exercised by someone who was not chosen he will effectively have abdicated his own power and will not have complied with the legislation'.

Practical considerations dictate that powers should, in certain circumstances, be delegated. While the courts tend to interpret such powers restrictively, it is clear that if a statute expressly or impliedly authorizes delegation, the resulting act will be intra vires.

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(b) Delegation in Terms of the Road Transportation Act
The Commission has been granted wide powers of delegation. These powers are expressed in the clearest possible language so little doubt can exist as to the Commission's competence to delegate, the manner in which the delegee must act or who may exercise the power in question.

S3 contains two delegation clauses. The first, found in s3(1)(d), enables the Commission to refer any application, made directly to the Commission, to a competent board. The board will then consider and deal with the application in accordance with the Act. It is submitted that in such a situation the appropriate board makes the decision: it does not act on behalf of, or in the name of, the Commission. Clearly too, an appeal would lie from the board to the Commission.³¹ It should be noted that the Commission is limited, in terms of s3(1)(d), as to which board it can refer the matter to. It must delegate to a competent board i.e. one with jurisdiction.³²

The second delegation clause is contained in s3(2). It is very wide. The section reads:

'The commission may delegate to a board any of the commission's powers under this Act in regard to any matter in the transportation area for which such board was established or in any area outside that transportation area.'

It is submitted that this section is intended to cover all of the Commission's functions with the exception of those functions which only the Commission can perform i.e. a purported delegation of the Commission's appellate jurisdiction would be ultra vires because that is a function specifically entrusted to the Commission by virtue of its expertise and seniority in the hierarchy. Similarly it may not delegate its power to advise and direct boards in the exercise of their powers and the performance of their functions.³³ Two reasons are advanced for this submission: first, this advisory function is granted to the Commission by the Transport (Co-ordination) Act and not the Road Transportation Act; and secondly, it is a function which is peculiar to the Commission. As with its appellate powers, the advisory powers are unique to the Commission by virtue of its position as a co-ordinator and would be inappropriate in the hands of a board. In the light of the above, it is submitted that the powers that may be delegated in terms of s3(2), despite its wide terms, are restricted to such matters as investigations, enquiries, the referral of applications, the issue of permits, the making of recommendations and reporting to the Minister.

(B) THE LOCAL ROAD TRANSPORTATION BOARDS

(1) Introduction

After arriving at the conclusion that regulation of road transportation was necessary, the Le Roux Commission³⁴ turned its attention to a regulatory system. It recommended that a body, known as the Road Transportation Board be established.³⁵ This body would be charged with deciding the extent to which competition is desirable in the public

interest'. The Road Transportation Board's functions were later taken over by the National Transport Commission. The Le Roux Commission felt that it was necessary to create subsidiary bodies because:

'if the regulatory body were charged with the duty of dealing, in the first instance, with all applications for certificates - many of which will emanate from remote centres - delays would be unavoidable and the expense involved in travelling considerable.'

The recommendations of the commission of enquiry were given effect to by the Motor Carrier Transportation Act and the subsidiary bodies which were created were called local road transportation boards. S4 of the Road Transportation Act makes provision for the creation of boards: it says that a board shall be established for every transportation area. S7 sets out the general powers of boards.

In the discussion below on the powers and functions of boards the following outline will be adhered to: the investigatory functions, the adjudicatory functions, the jurisdiction of boards and a board's obligation to refer matters to the Commission when requested to do so.

(2) Investigatory Functions

S7(1)(a) and s7(1)(b) contain provisions dealing with the investigatory functions of boards. In terms of the former, a board may investigate any matter falling within the scope of the Act and within its territorial jurisdiction i.e. within the transportation area under its control. When it has completed the enquiry, it may submit recommendations to the Commission. S7(1)(b) empowers a board to investigate any matter in any area, at the request of the Commission. It

must report to the Commission on its findings when this process has been completed. It is clear that the second of the functions indicated above is wider than the first: the board is not limited to its area of jurisdiction and it may investigate any matter referred to it. On the other hand it is reliant on a prior grant of authority by the Commission in the second case whereas it may initiate the process in the first.

(3) Adjudicatory Functions

The exercise of adjudicatory powers is perhaps the most widely used function which boards exercise. The Act grants boards the power to consider and decide on, or otherwise deal with, any application made to it within the following
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limits:

- '(i) for the grant of a permit authorizing road transportation within the transportation area for which such board was established;
- (ii) for the grant of a permit authorizing road transportation which commences in the said transportation area and terminates but does not commence at any place or in any area outside that transportation area;
- (iii) subject to the provisions of subsection (3), for the grant of a permit authorizing road transportation which commences in the said transportation area, irrespective of where such transportation terminates;
- (iv) subject to the provisions of subsection (3), for the renewal, amendment or transfer of any permit granted by it.'

In exercising its powers under s7(1)(c) a board acts as a tribunal of first instance. In other words an appeal lies from any act, direction or decision of a board to the
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Commission in terms of s8.

The parameters set by s7(1)(c) confine the board's exercise of power to a territorial jurisdiction, and so, if a board purported to act outside of the area defined by the statute it would act ultra vires.⁴⁰ Provision is made for a board to function outside of its transportation area. This power is granted by s7(1)(d). It authorises a board to consider and decide on, or otherwise deal with, any application which has been referred to it by the Commission acting in terms of s3(1)(d). So, in order to act intra vires and outside of its territorial jurisdiction, a board must be able to point to an enabling direction from the Commission. The board would be acting as a tribunal of first instance, so an appeal will lie to the Commission.⁴¹ This procedure is the reverse of that contained in s7(2). Finally, the board has power to issue any permit which it has granted, renewed, amended or transferred.⁴²

Boards must obviously deal with applications in accordance with the provisions of the Act. Thus while a large measure of discretion is granted to boards, they are required to take a number of factors into consideration when reaching a decision⁴³ e.g. 'the extent to which the transportation to be provided is necessary or desirable in the public interest'.⁴⁴ So, while the legislature has prescribed the regulatory content, a discretion nonetheless exists when boards apply the provisions of the Act: the boards themselves must decide whether transportation is 'necessary or desirable'. This⁴⁵ allows for flexibility as regional needs may differ.

(4) The Territorial Jurisdiction of Boards

No jurisdictional problems arise when the transportation which is the subject of an application is to take place

exclusively within one transportation area. The situation is more complicated if it crosses into another area at any stage. The Act grants territorial jurisdiction (except in cases in which the Commission has extended a board's jurisdiction) to the board presiding over the transportation area in which the road transportation in question commences.⁴⁶ S7(4) says that, for the purposes of s7:

'... road transportation shall be deemed to commence at any place where goods are loaded onto or persons board any motor vehicle by means of which such road transportation is effected, for the purpose of being conveyed to any other place, and to terminate at such other place.'

In an effort to prevent jurisdictional problems arising, the Act embodies the following provision: (a) a board has jurisdiction if the entire transportation operation takes place in its transportation area;⁴⁷ (b) a board has jurisdiction if the conveyance commences in its transportation area and terminates (without commencing again) in another area;⁴⁸ (c) a board may not deal with an application in which the proposed transportation commences in its area and that of another board without obtaining the concurrence of that other board. This provision is subject to the exception contained in s3(2), in terms of which the Commission is authorized to delegate any of its powers to any board, irrespective of territorial jurisdiction.⁴⁹

(5) The Referral of Matters to the Commission

(a) The Provisions of s7(2)

S7(2) gives the Commission the power to order a board to refer any application to it for consideration and decision. The Act draws a distinction between two specific situations,

both of which fall within the scope of s7(2). On the one hand the Commission may order the referral of a particular application to it and, on the other hand, it may order the referral of an application for 'any permit belonging to a category indicated by the commission'. A referral in the first sense will be dealt with below, while an example of a referral in the second sense was given above: if an application to convey tourists is made to a board, it must, in accordance with a policy decision taken by the Commission, refer the matter to the Commission.⁵⁰ The importance of s7(2) from the perspective of an applicant is that it circumvents the 'two tiered' procedure of the Act: instead of having a right to a hearing and an appeal, the applicant, after s7(2) has been invoked, only has the right to a hearing.

(b) A Discussion of s7(2)

Certain key issues involving s7(2) were dealt with in the cases of Roberts v Chairman, Local Road Transportation Board⁵¹ and South African Transport Services v Chairman, Port Elizabeth Local Road Transportation Board and Others.⁵²

⁵³
In the Roberts case, objectors to a bus fare increase had challenged the jurisdiction of the board. With review proceedings pending, the Commission exercised its powers in terms of s7(2) after a meeting between the chairman and the bus company's managing director. The validity of the Commission's exercise of power was challenged. Two of the six grounds of review will be dealt with here.

It was argued that the proceedings before the board were sub-judice because review proceedings were pending. Friedman J held that the Commission had not been in contempt of court by ordering that the matter be referred to it: dolus was an element of contempt of court and was absent in this instance.⁵⁴ He went on to hold that, in any event, the pending review proceedings did not 'serve to freeze the situation in the sense that none of the parties were entitled to do anything that would have the result of stultifying the contemplated proceedings'.⁵⁵

Secondly, it was argued that the Commission was not entitled to reach its decision to exercise power under s7(2) without affording the objectors an opportunity of being heard. It was held that the act in question was an administrative act and not a quasi-judicial act. Consequently the audi alteram partem rule did not apply.⁵⁶

This decision has been criticized, not least for the formal use of the classification process which plagues South African administrative law. The learned judge, in deciding that natural justice did not apply, concerned himself more with the form of the Commission's proceedings rather than the nature of the decision.⁵⁷ The fact that the decision was preliminary and that natural justice would apply at the later hearing does not detract from the need for a hearing prior to the s7(2) order, for in the words of Baxter:⁵⁸

'a tariff-increase hearing before the NTC itself would have been considerably more expensive for objectors than would have been a hearing before a local board. Besides, the court failed to place significance upon the fact that the effect of the order was to deprive the objectors of a potential right of appeal. While the NTC no doubt had the power to take the decision, it should have heard informal representations from the objectors too.'

In the South African Transport Services case, the Commission had refused to exercise its powers under s7(2) despite being approached to do so by the applicant. The board had, for some time, issued temporary permits to the second respondent for the conveyance of lead acid cells. Late in 1982, the latter successfully applied to the board for six public permits. The applicant (SATS) lodged an appeal and at the same time applied for, and obtained, a directive from the chairman of the Commission (in terms of s8(3)(b)) suspending the operation of the permits pending the outcome of the appeal. Despite the suspension of the public permits, the chairman of the board continued to grant temporary permits to the second respondent.

The applicant, after trying unsuccessfully to persuade the Commission to interfere by using its powers under s7(2), approached the court. It sought an interdict prohibiting the further granting of temporary permits to the second respondent on the grounds that such grants flew in the face of the suspension under s8(3)(b) and that the grants constituted an abuse of s20 (which governs the granting of temporary permits).

Counsel for the applicant conceded that situations may arise where the second respondent should be issued temporary permits for the conveyance of the lead acid cells. He argued, however, that because the board had granted the permits on the same grounds as the public permits, the board should be interdicted from granting any more temporary permits until after the hearing of the appeal. Jennet AJ observed that this would in effect mean that if the second respondent

wanted a temporary permit it would have to approach the Commission. In other words, the applicant was asking the court to order that the Commission hear the matter despite its prior refusal to utilize its powers under s7(2). In holding that the interdict should not be granted, the learned acting judge said:

'I consider that I should be loth to make an order which has the effect of overruling the National Transport Commission's decision, if such it may be called, not to invoke the provisions of s7(2) of the Act unless there are clear grounds for me so doing.'

[C] THE MINISTER OF TRANSPORT AFFAIRS

(1) Introduction

The Minister of Transport Affairs is the political head of the Department of Transport Affairs and SATS. He is expected to co-ordinate the operations of the two bodies but as Verburgh points out:

'It is clear that this kind of co-ordination, which is largely administrative in character, cannot be expected to do much in the line of co-ordinating the actual rail and road transportation systems. This can only be achieved when measures are taken to ensure that the traffic goes to the transport form which can handle the traffic at the right time, at the required speed, conveniently and safely at the lowest cost.'

The Minister may find himself in potentially difficult situations because of his position in relation to the two bodies: as chairman of the board of SATS he takes part in policy decision-making and as head of the Department of Transport Affairs he has broad powers vested in him by the Road Transportation Act. These powers will be discussed below.

(2) General Powers

The Minister has been granted general powers which are contained in s2. These include the following: the power to declare transportation areas, exempted areas, decentralized industrial areas, exempted goods and transportation routes; the power to prohibit the conveyance of goods in certain circumstances e.g. the conveyance of a 'specific processed farm product' or a 'specified kind or category of processed farm product'; the conveyance of any goods or kind or category of goods on a specified day or at specified times in certain areas or over certain routes; and the conveyance of goods which are loaded in a specified manner.

In addition the Minister may appoint a committee for the purposes of s27.⁶³ Such a committee is formed when a railway service is to be introduced which will take over the conveyance of passengers from bus services already operating. Its function is to consult with the holders of permits in the area as well as other interested parties and generally to oversee the change-over from road transportation to rail transportation.⁶⁴

The Minister may not exercise powers in terms of s2 on his own initiative. He may only do so on the recommendation of the Commission. In order to bring the declaration or prohibition into effect, a notice must be published in the Gazette. He may amend or withdraw any notice in the same way.⁶⁵

(3) The Power to Make Appointments

While members of the Commission are appointed by the State President, members of boards are appointed by the Minister.⁶⁷ This power may only be exercised after consultation with the Commission except in cases where a member of a board has vacated his office, been removed therefrom or recused himself.⁶⁸ The Minister also has power to remove members from office, but the grounds for doing so are prescribed. They are:⁶⁹ failure to comply with conditions of appointment or co-option; improper conduct or regular neglect of duties; and inability to perform duties efficiently.

(4) The Power to Institute Enquiries and to Take Action Pursuant Thereto

The Minister's power to appoint a committee for the purposes of s27 has been dealt with above. In addition, he may cause a public enquiry to be held when he has reason to believe that it may be expedient in the public interest to withdraw certain permits completely or withdraw them and issue permits to different holders.⁷⁰ The enquiry is conducted by the Commission or a member thereof. A report must be made to the Minister who is empowered to take action either by directing that the permit in question be withdrawn or that it be withdrawn and one or more permits be issued in its place. He may not make this direction unless adequate provision has been made for the compensation of the holder who has lost his permit.

In terms of s3, the Minister has general powers to direct the Commission to investigate matters. He may ask it to investigate any road transportation matter and report thereon.⁷¹

(5) The Power to Make Regulations

(a) General

The Minister enjoys legislative power, contained in s30, which enables him to make regulations dealing with a wide variety of topics. In addition to the powers to make these regulations, he may prescribe penalties for contraventions of, or failure to comply with, any regulation. ⁷² S30(4) widens the Ministers powers. It says:

'Different regulations may be made under subsection (1) in respect of different permits, areas, places, classes of motor vehicles, forms, classes of road transportation, circumstances in which, times during which or purposes for which any motor vehicle is used in road transportation.'

The empowering provisions of s30(1) are very wide as regards their subject matter and so no purpose will be served by enumerating every aspect. Instead an effort will be made to give a general view of the areas in which the Minister can legislate.

Firstly, he may bolster the provisions of the statute by adding detailed requirements for the information which is to accompany applications and appeals, as well as the procedure which the Commission or board must follow when dealing with applications or appeals. ⁷³

Secondly, he may legislate on the payment of fees in connection with applications, appeals, the issue of permits, distinguishing marks or other documents, ⁷⁴ annual levies in ⁷⁵ respect of permits granted for longer than a year and the payment of fees to witnesses who appear before a board or the ⁷⁶ Commission. S30(2) qualifies this power. It says:

'The Minister shall not under subsection (1)(b), (c) or (n) prescribe any fee or allowance or any circumstance in which any fee shall or may be refunded or the amount of any refund, except with the concurrence of the Minister of Finance.'

Thirdly, he may prescribe certain powers in relation to boards or the Commission ⁷⁷ (e.g. the circumstances in which a distinguishing mark or duplicate may be issued without charging a fee) and requirements in relation to permit holders ⁷⁸ (eg specifications and requirements of motor vehicles to which permits relate).

Fourthly, he has power to make regulations in relation to ⁷⁹ authorized officers, inspectors and the South African Police. In terms of these provisions he may, for example, make regulations prescribing the powers and duties of authorized officers, including the manner in which, and the conditions upon which, motor vehicles that are locked or sealed, may be forced open by authorized officers in order to inspect the ⁸⁰ load.

Finally, s30(1)(p) is a general provision which empowers the Minister to make regulations for the 'better carrying out of the provisions and objects of this Act'.

(b) The Ultra Vires Doctrine and Regulations

The power to make regulations derives, as has been seen, from s30 of the Act. Consequently when the Minister acts, his purported exercise of power must fall within the enabling provisions of the statute. Any enactment which does not, ⁸¹ will be held to be invalid. Thus in S v Grindrod Transport ⁸² (Pty) Ltd and Others, the Minister promulgated a regulation which purported to restrict hauliers to only one of two ⁸³ exemptions which the Act contained. In a prosecution based

on the alleged contravention of the regulation, its validity was challenged. The court held that the Minister had exceeded his authority because he had 'sought to amend the Act by regulation' which he was not empowered to do. The regulation in question was accordingly held to be invalid.

(6) The Power to Enter into Agreements

The present government's apartheid policy has created four so-called independent homelands to date and, if the policy is maintained, more will come into existence in the future. The scheme envisages present day South Africa consisting of over ten separate states. In the absence of legislative interference this situation would create immense problems and multiply the red tape involved in permit applications, especially in cases where more than one border is crossed. To overcome these problems, s44 has been enacted. It empowers the Minister to enter into agreements with the governments of other countries or territories in relation to permit applications by inhabitants of those countries or territories, the procedure to be followed by boards or the Commission on receiving such applications and the circumstances in which, and conditions on which, permits may or shall be granted. When an agreement has been reached all applications contemplated by the agreement must be dealt with in terms of it, despite any contrary provision contained in the Act.

(D) THE STATE PRESIDENT

(1) Introduction

The State President wields powers of two kinds under the Acts: ⁸⁷ the power to make appointments to the Commission (and to remove members), and the power to issue proclamations in relation to trans-border transportation.

(2) The Power to Make Appointments ⁸⁸

The State President has the power to appoint the members of the Commission. He is not responsible for the appointment of the chairman: that post is automatically filled by the Director General: ⁸⁹ Transport. From among the ten appointees the President must designate four of them as commissioners for road transportation, civil aviation, national roads and urban transport. ⁹⁰ Of the other members two must be appointed after consultation with the Civil Aviation Advisory Committee and the General Manager of SATS. ⁹¹ In addition he may appoint an extra member who is nominated by the Minister of Defence. ⁹²

The President may remove commissioners from office on three ⁹³ grounds: failure to comply with conditions of appointment, improper conduct or habitual neglect of duties and inefficiency.

(3) The Power to Issue Proclamations

The President's powers to issue proclamations, and the limits of those powers, are contained in s43 of the Road Transportation Act. To come into effect, a proclamation issued in terms of this section, must be published in the Gazette. The powers conferred by the Act may loosely be categorized into two groups: the power to authorize

provisions of the Act to apply to cross-border conveyance in cases where it would have no application, and the power to prohibit provisions of the Act being used in cases where it would apply.

(a) The Power of Authorization

S43(1)(a) empowers the President to declare that the provisions of ss17 and 18 apply to any application (for a private permit) by a person who carries on an industry, trade or business in a country or territory which borders on South Africa.⁹⁴ He may specify 'additions, exceptions, amendments and adjustments' and proclaim that the grant be subject to conditions or requirements. Furthermore, the proclamation may be general in the sense that it applies to any industry, trade or business, or specific in that it applies to a particular class or category of industry, trade or business.

S43(1)(b) empowers the President to direct a competent board⁹⁵ or the Commission to grant an application for a public⁹⁶ or temporary permit for the conveyance of persons or goods despite the provisions of the Act. The conditions which must exist for this exercise of power are: the route must be specified in the proclamation, the conveyance must take place between a specified railway station inside South Africa and a port of entry as defined in the Admission of Persons to the Republic Regulation Act,⁹⁷ and in the case of the conveyance of persons, the persons must be proceeding to or from the neighbouring country or territory while in the case of the conveyance of goods, the goods must be destined for or be emanating from that country or territory. The grant of a permit in such a case is subject to such conditions or

requirements as the proclamation may contain or those which the board or the Commission decides to impose.

(b) The Power of Prohibition

The President has power to prohibit a competent board or the Commission from considering any application for a permit for 'the conveyance of persons, goods or a category of goods to or from a specified place or area or between specified places or areas as specified in the proclamation'.⁹⁸ In the same way he can prevent a permit holder for conveying persons or goods despite authorization in the permit.⁹⁹ The powers of prohibition granted to the President are very wide indeed: he may exercise them despite the fact that the resulting proclamation conflicts with the Act. In this situation, the provisions of the proclamation are superior to those of the Act. Consequently any right granted under the statute can be rendered meaningless by the issue of a proclamation. It should be stressed, however, that the exercise of the President's powers are subject to the principle of legality, which applies to all administrative action.

[II] ASPECTS OF NATURAL JUSTICE WITH SPECIAL REFERENCE TO
BOARDS AND THE COMMISSION

[A] INTRODUCTION

The common law contains principles which are aimed at achieving as high a degree of impartiality and fairness as possible, not only in courts but also in administrative and domestic tribunals. These principles are collectively known as the rules of natural justice and are expressed by the maxims *nemo iudex in sua causa* and *audi alteram partem*

[B] NEMO JUDEX IN SUA CAUSA

The often quoted dictum of Lord Hewart CJ that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'¹⁰⁰ is central to the rule that no man may be a judge in his own cause. It is possible that a person may judge a matter fairly despite having a pecuniary or other interest in the outcome, but in terms of the rule, the end result is immaterial. The decision will be struck down simply because he had an interest and should not have heard the matter at all.¹⁰¹ The reason for this seemingly harsh approach is perhaps best expressed by Lord Denning MR who said that 'justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking : "the judge was biased"¹⁰².'

(1) **Financial Interest**

A distinction is drawn between a pecuniary interest and bias.¹⁰³ Any direct pecuniary interest is sufficient to disqualify a decision-maker from taking part in an enquiry. The size of the interest is irrelevant.¹⁰⁴ Failure by a person to recuse himself when he has an interest in a matter is a reviewable irregularity.¹⁰⁵ The courts will set the decision aside irrespective of its merits.¹⁰⁶

The case of Rose v Johannesburg Local Road Transportation Board¹⁰⁷ provides an example of a pecuniary interest by a person entrusted with decision-making powers. In this case the interest was obvious and, no doubt, substantial. The chairman of the board was a director of three companies belonging to the Alpha Group, which opposed Rose's application. This financial interest disqualified him.

(2) Bias

When bias (or prejudice), as opposed to a financial interest, is alleged the question is one of degree. Only certain types of bias are sufficiently serious to merit disqualification. ¹⁰⁸

Rose-Innes says in this regard : ¹⁰⁹

'Two questions are to be asked in every case. The first, whether the member had an interest in the proceedings and so was biased. The second, whether there was a real likelihood of bias, that is to say : were there circumstances affecting him that might reasonably create a suspicion that he was not impartial? If the answer to either of these questions is in the affirmative, he is disqualified from taking part in the proceedings, and if he does there is a reviewable irregularity.'

¹¹⁰
Rose v Johannesburg Local Road Transportation Board was a case in which these principles were applied. It will be remembered that the chairman of the board was disqualified on the basis of his financial interest. In dealing with the remaining members, Lucas AJ decided that they too should not have heard the matter: ¹¹¹ when the issue of the chairman's eligibility arose they manifested strong feelings against the applicant, thus giving the impression of partiality.

In City and Suburban Transport (Pty) Ltd. v Local Road Transportation Board, Johannesburg, ¹¹² Greenberg J held that the test to be applied in such cases is whether the member whose eligibility is challenged 'so associated himself with one of the two opposing views that there is a likelihood of bias or that a reasonable person would believe that he would be biased'. ¹¹³

In determining the degree of bias required to necessitate disqualification, a considerable amount of stress is placed on the need for decisions to appear to be just. ¹¹⁴ Three tests

have been used : the 'mere suspicion' test, the 'reasonable suspicion' test and the 'real likelihood' test. The first has never met with general acceptance because it sets too high a standard. It is submitted that there is no real difference (save in terminology) between the remaining two tests, but it has been suggested that the former is more appropriate when bias is alleged against an untrained judicial officer.¹¹⁵ It is interesting to note that in the latest South African case on point, Omega Freight Services (Edms) Bpk v Voorsitter Nasionale Vervoerkommissie en 'n Ander,¹¹⁶ Fagan J applied the 'reasonable suspicion' test.

(3) Does Statute Restrict the Common Law Rule?

(a) Introduction

S4(2) of the Transport (Co-ordination) Act provides:

'Notwithstanding anything contained in sub-section (1) no act, direction or decision of the Commission shall be invalid solely by reason of the fact that any member of the Commission was by virtue of the said sub-section disqualified from serving on the Commission.' (117)

Wade points to the strict application of natural justice as one reason for the enactment of provisions of similar effect in England. He says that justices of the peace often had more than one public function and so found themselves disqualified because of this increased involvement. Statutory validity clauses were used to prevent undue interference with the adjudicatory function of justices.¹¹⁸ Whether these considerations are relevant to transportation regulation is doubtful.¹¹⁹ At the same time it must be conceded that the relevant sections would have the effect of contributing towards the quicker and, perhaps, smoother operation of

boards and the Commission. Not all of the grounds of disqualification go to the impartiality of the members. For example the fact that a member is an unrehabilitated insolvent will not affect his competence to decide, or his impartiality. S4(2) will thus prevent litigation on the validity of acts, directions or decisions to which such a person was party.

While this is undoubtedly an advantage in relation to the functioning of the Act, the wide terms of the provision are worrying, especially when the disqualified member has a financial or other interest. In other words, in situations where the rules of natural justice are most needed, the Act may succeed only in allowing irregularities which, under normal circumstances, would be set aside. In order to ascertain whether natural justice is excluded by s4(2) it is necessary to examine the treatment of similar provisions by the English courts because there is no South African case law on the effect of a validity clause.

(b) The English Law

The approach taken by the English courts to a provision which validates a decision made by a disqualified member of a tribunal is well illustrated by the case of R v Barnsley Licensing Justices: ex parte Barnsley and District Licensed Victuallers Association and Another.¹²⁰

In this case, a spirits licence was granted to a co-operative society by seven licensing justices. Six of them were members of the society and the seventh was the wife of a member. The validity of the decision was attacked on the basis of the pecuniary interest which the justices had in the

society: members were entitled to a 'dividend', the size of which was dependent on the value of their purchases. (The court found that the 'dividend' constituted a pecuniary interest.) S48(4) of the Licensing Act 1953 said that no justice could act in a case which concerned any premises if he had an interest in the profits of those premises (except as a trustee), but s48(5) provided for the validity of such act. It read as follows:

'No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification.'

In interpreting s48(5), the court held that it did not oust the rules of natural justice completely. The sub-section was limited in its application to only those disqualifications
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contained in the Act. Lord Evershed MR concluded that:

'It comes back then to this, as I see it: If the disqualification is limited to a disqualification according to the terms of one or other of the subsections, and nothing more, then that alone will not invalidate the licence which has been granted. Applying that conclusion to the facts in this case it follows, in my judgement, that, if the only disqualification is that these justices had in fact an interest in the profits of the business carried on or intended to be carried on at this particular drug store, that fact alone would not be sufficient to invalidate the licence. But if it was shown that in addition to having that interest in the profits there was evidence of a real bias, the matter might go the other way.'

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The court based its decision on R v Tempest which dealt with the predecessor of the Act under consideration. The
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ratio of the court in the Tempest case was that the validity clause contained in the statute was of no relevance
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in cases in which 'actual bias' was raised.

In a concurring judgement in R v Barnsley Licensing

Justices, Lord Ormerod examined the effect of s48(5) on the principle laid down in R v Rand, a case which held that any direct pecuniary interest in a matter, however small, was sufficient to disqualify a person from judging the matter. The learned Lord Justice held that if the justice had a pecuniary interest in the premises under consideration, other than an interest in the profits of the premises, s48(5) would not be relevant and the principle in R v Rand would apply. On this approach therefore, the court will only turn its back on natural justice if the legislature makes it abundantly clear that natural justice is excluded. Furthermore, the common law will only be held not to apply to the extent that the legislature has indicated in the clearest possible terms. This restrictive interpretation is, it is submitted, in accordance with the principles of statutory interpretation: statutory provisions should be interpreted in such a way, and where doubt exists, so as to affect the common law as little as possible.

In Lord Devlin's judgement, the test to be applied, in deciding whether the decision was invalid, was set out. The learned Lord Justice held that the applicant was required to satisfy the court that a real likelihood of bias was present. While he acknowledged that the matter before the court was a borderline case, he held that bias was not present, a conclusion which was also reached by the rest of the court.

In conclusion, the principles which emerge from the Barnsley Licensing Justices case may be summarized as follows: the principles of natural justice are not completely inconsistent

with a validity clause; natural justice is only excluded to the extent to which it is inconsistent with the statutory provision; certain types of bias, but not all, are excluded from review; the court is able to test the validity of a decision where a real likelihood of bias, which falls outside the scope of the statute, is alleged.

(c) The Suggested South African Position

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Rose's case is of no assistance in interpreting the validity clauses in the Transport (Co-ordination) Act and the Road Transportation Act. They were inserted as a result of that decision. An interpretation will be ventured here using the Barnsley Licensing Justices case as a guide.

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If a member who was an unrehabilitated insolvent took part in a decision of the Commission, it is clear that s4(2) would provide for the validity of that decision. If, on the other hand, the same member associated himself with a party to an application to a degree which the common law does not countenance, the decision will be set aside. It is clear that s4(2) has no application: the validity of the decision is being attacked, not because the member is an unrehabilitated insolvent, but because a real likelihood of bias or actual bias is alleged. The same considerations will apply to the second category of disqualified persons viz those convicted of offences and sentenced to a term of imprisonment without the option of a fine.

It is submitted that the same reasoning applies to the third and fourth categories. If a member of a board is an employee of SATS, that alone will not invalidate a decision in which he has taken part. If, in addition to being so employed the

member showed bias, or a reasonable likelihood of bias (apart from that which may be inferred from his employment) could be shown, the technical validity provided by the Act will be of no application.¹³⁶

In the case of a member disqualified by virtue of a financial or other interest, the distinction between the permitted statutory bias and that which the common law disallows is perhaps not as clear. Despite this difficulty, it is submitted that certain decisions will be invalid. The facts in Rose's case¹³⁷ may be used by way of illustration: Huddle, the chairman of the board was disqualified, and the board's decision was set aside, because Huddle was a director of the Alpha Industrial (Exploration) Company which was the largest taxi operator in Johannesburg. Huddle therefore had a financial interest in road transportation. An application of s6(3) of the Road Transportation Act would, it is submitted, have the following result: the board's decision would not be invalid solely because Huddle had an interest in road transportation; if he showed actual bias (eg by alligning himself with one of the parties) or, apart from his interest, a real likelihood of bias could be established, the decision would be set aside. S6(3) would have no application because, wide as its terms are, they do not extend to validating actual bias or apprehended bias which the common law recognizes as unlawful. In short, on this approach, the court will say to the disqualified person: 'You may have an interest which would normally invalidate the decision without further ado, but in this case we will only invalidate the decision if you let that interest affect your decision'.¹³⁸

In terms of the maxim audi alteram partem, a duty is cast upon a decision-maker to hear all parties to a dispute. The purpose served by this aspect of natural justice is two-fold: in the first place, it leads to a greater possibility of fairness, and in the second, it increases the possibility of a 'correct' decision being made because the decision-maker has been presented with all sides of the issue. It is therefore as much a part of justice as of good administration. ¹³⁹

(1) Conceptualism and Fairness

It has been pointed out above that when our courts are called upon to decide whether the audi alteram partem rule applies they classify the function in question. If it is held that the function exercised by the administrative official or tribunal was quasi-judicial then the rule applies. If the function is held to be administrative, no obligation rests on the deciding authority to hear the other side. Despite the warning sounded by Schreiner JA in Pretoria North Town Council v Al Electric Ice Cream Factory (Pty) Ltd, ¹⁴⁰ that care should be taken not to 'ellevate what may be no more than a convenient classification into a source of legal rules', our courts have tended to do just that. In the words ¹⁴¹ of Baxter:

'But South African courts still insist that administrative acts should qualify for membership of the mysterious "quasi-judicial" club before they will require these acts to comply with the principles of natural justice. They search for the trappings of a court in order to identify "quasi-judicial" acts. They have even called administrative acts of devastating effect, such as expropriation, "purely administrative", thereby relieving the expropriators of the duty to comply with natural justice.'

The English courts and the courts in other Commonwealth

countries have moved away from the conceptualism which is found in the South African decisions. They have done so by using the 'duty to act fairly', a doctrine which has been further developed since the case of Ridge v Baldwin.¹⁴² The doctrine ignores the classification process: the enquiry revolves around whether the official or body in question acted fairly. The duty to so act always exists but the content of the duty will vary with the circumstances. Lord Ormerod equated natural justice and fairness in the following terms:¹⁴³

'Natural justice is but fairness, writ large and judicially. It has been described as "fair play in action". Nor is it leaven to be associated with judicial or quasi-judicial occasions.'

The high water mark of the fairness doctrine was perhaps the case of In Re H K (An infant).¹⁴⁴ In this case, entry into Britain was refused to a boy who claimed to be under the age of sixteen, and thus automatically allowed to enter with his father. The immigration officer refused to allow the boy in because he was clearly older than sixteen. In holding that the nature of the function exercised by the officer was irrelevant, Lord Parker CJ went on to say:¹⁴⁵

'This is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly.'

(2) The Second Roberts Case and Fairness

One of the major issues before the court in Roberts v Chairman, Local Road Transportation Board and Others(2)¹⁴⁶ was whether the Commission was under a duty to act fairly, even

if the act in question was an administrative function. It is encouraging to note that the court appeared to accept that the Commission was under such a duty. Unfortunately not much time was devoted to the question. In view of the improvements which the fairness doctrine has made to English and Commonwealth administrative law this omission must be seen as a lost opportunity. Furthermore, the authority of the case for the proposition that administrative bodies are under a duty to act fairly is doubtful: after accepting that the duty exists, Friedman J proceeded to classify the function exercised by the Commission.

It is submitted that a proper application of the fairness doctrine may well have resulted in a different outcome in ¹⁴⁷Roberts (2). ---It would have meant that the Commission was duty bound to hear representations as to why the board should have heard the application. These could have been as convincing as the reasons given by the representative of the bus company. Even if the Commission had decided, after considering the representations, that it should nonetheless exercise its powers in terms of s7(2), procedural fairness would have been observed. Consequently the possibility of its decision being a correct one would have been greatly ¹⁴⁸enhanced, for as Baxter has aptly pointed out:

'In John v Rees Megarry J said that natural justice would ensure accurate results, and that "those with any knowledge of human nature who pause to think for a moment" would not be "likely to underestimate the feelings of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events".'

FOOTNOTES

1. Transport (Co-ordination) Act, s8; see for an example of the nature of the subject matter falling under the Commission's jurisdiction, the Report of the Department of Transport and of the National Transport Commission for the period 1 April 1982 to 31 March 1983 RP73/1983.
2. Transport (Co-ordination) Act, s7
3. S9(i).
4. S9(ii).
5. S9(iv).
6. Baxter, 171, 183.
7. Road Transportation Act, s3(1)(a).
8. Road Transportation Act, s3(1)(b).
9. Transport (Co-ordination) Act, s10(1).
10. Road Transportation Act, s3(1)(g).
11. Road Transportation Act, s28(1); see Ch 11 below on the procedure for such an enquiry and Ch 9 for a general discussion on the withdrawal of permits.
12. Road Transportation Act, s28(3).
13. Road Transportation Act, s28(2).
14. Road Transportation Act, s28(3).
15. Road Transportation Act, s28(4); the Minister's decision-making process is dealt with in Ch 9 below.
16. Telephone conversation with Mr P Geringer of the National Transport Commission, 3 December 1984.
17. See Ch 11 below; see generally Main Line Transport (Pty) Ltd v Durban Local Road Transportation Board 1958(1) SA 65(D), 70A.
18. Road Transportation Act, s14.
19. See Ch 13 below.
20. 1980 (2) SA 480(C).
21. At 494H - 495A.
22. 1951(2) SA 518(N), 522H; see too Bangtoo Bros and Others v National Transport Commission and Others 1973(3) SA 275(N), 278H.
23. Golden Arrow Bus Services (Pty) Ltd v Central Road Transportation Board and Others 1948(3) SA 918 (A), 924.
24. 1972(3) SA 726(A), 735 D-E.
25. At 735 E. Appeals to the Commission are dealt with fully in Ch 12 below.
26. Steyn, 222. Also see Baxter, 432.
27. Baxter 434. It is ultra vires because it is a form of abdication of authority.
28. Baxter 433; Wade, 319; Evans at 301 treats the maximum delegatus non delegare potest as a rule which allows certain exceptions. Steyn at 223-4 adopts the same approach.
29. Baxter, 434; Evans 298
30. Baxter, 432-442; Wade 320. At 319 Wade says: 'An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable'.
31. Roberts v Chairman, Local Road Transportation Board and Others(2) 1980 (2) SA 480 (C), 494H - 495A.

32. The jurisdiction of boards is discussed below at 105.
33. Transport (Co-ordination) Act, s9(ii).
34. See further, Ch 3 above.
35. Le Roux Commission, para 95(a).
36. Le Roux Commission, para 96.
37. Le Roux Commission, para 98.
38. Road Transportation Act, s7(1)(c).
39. See Ch 12 below.
40. Herbst v Dittmar en 'n Ander 1970(1) SA 238(T),242H - 243A.
41. Roberts v Chairman, Local Road Transportation Board and Others(2) 1980 (2) SA 480 (C),494H - 495A.
42. See Reddy v African National Bus Transport Co (Pty Ltd 1951 (2) SA 518 (N),522H.
43. See Road Transportation Act, ss15, 18 and 20 which deal with public, private and temporary permits respectively.
44. Road Transportation Act, s15(1)(a).
45. See Ch 8 below on applications.
46. For the reasons why territorial limits are imposed on boards see Herbst v Dittmar en 'n Ander 1970 (1) SA 238 (T), 242C 243C.
47. Road Transportation Act, s7(1)(c)(i).
48. Road Transportation Act, s7(1)(c)(ii).
49. Road Transportation Act, s7(3) read with ss7(1)(c)(iii) and (iv).
50. See footnote 16 above.
51. 1980 (2) SA 480 (C)
52. 1984 (1) SA 236 (E)
53. Supra
54. The case of Li Kin Yu v Superintendent of Labourers 1906 TS 181 imposed strict liability on the respondent for contempt of court when he had repatriated a Chinese labourer despite notice that the applicant's attorneys were about to secure a writ of habeas corpus for his release. Friedman J (at 488 E) held that this case had been wrongly decided and instead followed the decisions of Fein and Cohen v Colonial Government (1906) 23 SC 750 and Yamamoto v Athersuch and Another 1919 WLD 105. The former held that mala fides on the part of the respondent was required while in the latter De Villiers JP held that dolus in the form of an intention to interfere with the course of justice was an element.
55. Roberts(2) supra 488 D.
56. Roberts(2) supra 493 F.
57. See Baxter 'Busfare Increases and Administrative Irregularities' (1981) 98 SALJ 308, 314
58. Baxter, 584.
59. 1984 (1) SA 236 (E).
60. The South African Transport Services case supra 241 D.
61. Baxter, 120.
62. Verburgh, 34.
63. Road Transportation Act, s2(h).
64. See Ch 11 below at 278.
65. Road Transportation Act, s2(i).
66. For a more comprehensive discussion on appointments to boards see Ch 4 above at 79.
67. Road Transportation Act, s4(2).
68. Road Transportation Act, s4(10).
69. Road Transportation Act, s5(3).
70. Road Transportation Act, s28.
71. Road Transportation Act, s3(1)(a).

72. Road Transportation Act, s30(3); for a discussion of the criminal offences created by regulation see Ch 14 below at 393.
73. Road Transportation Act, s30(1)(a); for examples of the exercise of these powers see regs 3, 4, 7, 8, 9 and 10.
74. Road Transportation Act, s30(1)(b); see too reg 18.
75. Road Transportation Act, s30(1)(c); see too reg 18(3).
76. Road Transportation Act, s30(1)(n); see too reg 18(6).
77. Road Transportation Act, ss30(1)(cA), (d) and (e); see too regs 3(2), 3(5), 7(2), 7(4), 9(2), 9(3) and 16.
78. Road Transportation Act, ss30(1)(f) and (g); see too regs 5 and 13.
79. Road Transportation Act, ss30(1)(c), (k) and (l); see too reg 26.
80. Road Transportation Act, s30(1)(k).
81. Rose Innes, at 89, defines the ultra vires doctrine as follows: 'The ultra vires doctrine is based upon the axiom that a person or body which owes its legal existence to and derives its powers from a statute or an agreement or the common law can do no valid act unless thereto authorised by the statute or other source of its powers. Furthermore any limitations upon the exercise of power which are prescribed by the statute must be observed'.
82. 1980(3) SA 978(N); see too Ch 6 above at .
83. The exemptions in question are contained in ss 1(2)(w) and (x). The regulation which was challenged (reg 2(5)) read as follows: 'A carrier wishing to convey goods in terms of s1(2)(x) of the Act shall undertake such conveyance only if it is done in the following manner exclusively within an area with a radius of 40 kilometres from such carrier's place of business:
- (a) From any place situated within a radius of 40 kilometres from the carrier's place of business where the goods are offered for conveyance for delivery to the final destination of the goods if such final destination is also situated within a radius of 40 kilometres from the carrier's place of business; or
- (b) from any place situated within a radius of 40 kilometres from the carrier's place of business where the goods are offered for conveyance, direct to the nearest or most suitable railway station which is also situated within a radius of 40 kilometres from the carrier's place of business, if the final destination of the goods is situated outside a radius of 40 kilometres from the carrier's place of business'.
84. S v Grindrod Transport (Pty) Ltd and Others supra 983
85. For other cases in which the validity of a regulation was challenged see R v Karrim 1951 (4) SA 385 (N); R v Ramatlo 1955 (1) SA 14 (T); 1955 (2) SA 331 (A); SA Meubelvervoer (Eiendoms) Bpk v Plaaslike Padvervoerraad, Bloemfontein, en 'n Ander 1967 (2) SA 612 (O).
86. Road Transportation Act, s44(1).
87. The State President's powers to make appointments derive from the Transport (Co-ordination) Act and his powers to issue proclamations derive from the Road Transportation Act.
88. For a more comprehensive discussion of appointments to the Commission see Ch 4 above at 82.

89. Transport (Co-ordination) Act, s3(2).
90. Transport (Co-ordination) Act, s3(3).
91. Transport (Co-ordination) Act, s3(5).
92. Transport (Co-ordination) Act, s3(8)(a).
93. Transport (Co-ordination) Act, s4(4).
94. For a discussion on private permits see Chs 7 and 8 below
95. For a discussion on public permits see Chs 7 and 8 below
96. For a discussion on temporary permits see Ch 7 and 8 below
97. No 59 of 1972: the Act defines a port of entry as follows:
'(a) any place on the coast of the Republic; or
(b) any railway station or place within the Republic
at or near any border thereof; or
(c) any airport or aerodrome.'
98. Road Transportation Act, s43(1)(c).
99. Road Transportation Act, s43(1)(d); s43(1)(e) gives
the State President power to prohibit conveyance which
otherwise would have been excluded from the definition
of road transportation by s1(2)(1). This provision no
longer has any effect because s1(2)(1) permits ceased to
exist on the 31st December 1983. Persons who wish to
convey passengers or goods by means of a vehicle having
a carrying capacity which does not exceed 1 000
kilograms now have to apply for a permit in the same way
as any other operator.
100. R v Sussex Justices : ex parte McCarthy [1924] 1 KB
256, 259.
101. Dimes v Grand Junction Canal Co Proprietors (1852) 3 HLC
759, 793. Wade, at 421, says of this case : 'But the
classic example of an offence against this rule in the
regular courts of law is that of Lord Chancellor
Cottenham in 1852, who in a Chancery suit had affirmed a
number of decrees made by the Vice-Chancellor in favour
of a canal company in which Lord Cottenham was a
shareholder to the extent of several thousand pounds.
Lord Cottenham's decrees were set aside by the House of
Lords on account of his pecuniary interest; but the
House then itself dealt with the appeal on its merits,
and affirmed the decrees of the Lord Chancellor. It was
not shown that Lord Cottenham's decision was in any way
affected by his interests as a shareholder; in fact it
was clearly not affected at all....'
102. Metropolitan Properties Co Ltd v Lannon [1969] 1 QB
577 (CA), 599.
103. Rose v Johannesburg Local Road Transportation Board
1947 (4) SA 272 (W); Barnard v Jockey Club of South
Africa 1984(2) SA 35 (W).
104. R v Rand (1866) LR 1 QB 230, 232; Rose v Johannesburg
Local Road Transportation Board supra; R v Barnsley
Licensing Justices : ex parte Barnsley and District
Licensed Victuallers' Association and Another [1960]
2 QB 167(CA), 174 : Barnard v Jockey Club of South
Africa supra 47 G.
105. Rose-Innes, 173.
106. See Dimes v Grand Junction Canal Co Proprietors (1852) 3
HLC 759 as a good example of this rule.
107. 1947(4) SA 272 (W).
108. City and Suburban Transport (Pty) Ltd. v Local Road
Transportation Board, Johannesburg 1932 WLD 100, 104.
109. Rose-Innes, 173.
110. Supra
111. This enquiry was, strictly speaking, unnecessary because

- the chairman had already been disqualified. In R v Barnsley Licensing Justices [1960] 2 QB 167 (CA), 186, Lord Devlin held as follows: 'I do not think in this sort of case that if one or more members of the bench were found to have a real likelihood of bias, it would be right or proper to count heads and say there was a majority of unbiased members. One cannot tell as the judgment in that case (R v Hertfordshire Justices (1845) 6 QB 753) points out, to what extent the bias of even one magistrate, especially if he be the chairman, may influence the decision of the rest.'
112. Supra.
113. City and Suburban Transport supra 106.
114. Obvious examples of this are the dicta of Lord Hewart CJ and Lord Denning MR respectively in R v Sussex Justices: ex parte McCarthy [1924] 1 KB 256, 259 and Metropolitan Properties Co Ltd v Lannon [1969] 1 QB 577 (CA), 599, which are quoted above.
115. A Pearce 'The Test for bias in the Administrative and Judicial Process' (1982/83) 3 NULR 24, 38-40; but see Baxter at 560 (footnote 160): 'It is argued here that these "tests" are in fact part of the same test, but that the apprehension of a "real likelihood" of bias is less likely to arise in the case of trained judicial officers.'
116. 1984 (3) SA 402 (C), 419B-420A; see too 1984 AS 48.
117. For the corresponding section of the Road Transportation Act, see s6(3). (Quoted in Ch 4, footnote 51).
118. Wade, 428.
119. The provision can only validate one act, direction or decision. The member would be immediately disqualified thereafter. See R v Barnsley Licensing Justices [1960] 2 QB 167 in which the decision was held to be valid by virtue of a provision similar to s4(2), but the court made the point that all seven justices would have to vacate their offices immediately. Lord Evershed MR said in this regard (at 181): 'All these justices are disqualified and though the acts done in the past by them, if my view is the right view, should be treated as valid, that result, of course, does not suffice to validate for the future anything which they may think they can do or propose to do.'
120. [1960] 2 QB 167 (CA).
121. R v Barnsley Licensing Justices supra 178.
122. (1902) 86 L.T. 585.
123. Supra.
124. R v Tempest supra 587.
125. Supra.
126. (1866) L.R. 1 QB 230
127. Supra.
128. R v Barnsley Licensing Justices supra 182.
129. HR Hahlo and E Kahn The South African Legal System and its Background, 202.
130. R v Barnsley Licensing Justices supra 186.
131. R v Barnsley Licensing Justices supra 187.
132. Supra.
133. 1947(4) SA 272 (W).
134. The section in its present form was enacted by s4 of Act 44 of 1955. The observations of Lucas AJ in Rose's case supra at 290 on the absence of legislation are worthy of repetition here. It was argued that the rules of natural justice should be relaxed because it was

difficult, if not impossible, to find suitable members for boards who did not have an interest in road transportation. The view taken of this submission by the learned acting judge was as follows: 'Whether or not there would be any difficulty in getting them, the position is that, by virtue of the principles of our law, only persons who are so unconnected and disinterested are to be entrusted with the powers which are exercised by such a board as the respondent, until Parliament, by legislation, decides otherwise. Persons interested in the business of public transportation must be enabled to feel assured that their applications to enter or to continue in that occupation will be considered and decided according to the rule of reason and justice.'

135. Supra.
136. R v Barnsley Licensing Justices [1960] 2 QB 167 (CA), 182-3.
137. 1947(4) SA 272 (W).
138. Wade, at 429, speaking of the English decisions, says: 'By a subtle interpretation the courts confine this provision to what they call "the technical disqualification created by the Act". They will uphold the order if it is shown merely that one or more of the justices fell within the disqualifying provision; but they will quash it if, in addition, it is shown that there was a real likelihood of bias in the particular case.'
139. See generally on the audi alteram partem rule: Rose Innes, 147-172; Wade, 441-512; Evans, 156-247, Craig, 253-290; 1 LAWSA, para 82; Wiechers, 210-228; Baxter, 542-557, 573-593.
140. 1953(2) SA 1(A), 11; see too Baxter at 574 who says: 'As we have seen in so many parts of administrative law, giving something a label leads sooner or later to the label acquiring a life of its own; and what was no more than a term of convenience soon came to be treated as a mysterious category of administrative acts that were set apart from all others.'
141. Baxter, 576.
142. [1964] AC 40.
143. Lewis v Heffer [1978] 3 All ER 354 (CA), 367.
144. [1967] 2 QB 617.
145. In Re HK (An Infant), supra 630 B-C.
146. 1980(2) SA 480 (C).
147. Supra.
148. Baxter 'Fairness and Natural Justice in English and South African Law (1979) 96 SALJ 607, 638.

CHAPTER 6 --

PRIVILEGED FORMS OF ROAD TRANSPORTATION

INTRODUCTION

- [I] THE REASONS FOR EXCLUDING CERTAIN FORMS OF TRANSPORTATION.
- [II] THE EXTENT TO WHICH ROAD TRANSPORTATION IS REGULATED
- [III] THE EXCLUSIONS
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 - [D] CONVEYANCE OF HOTEL GUESTS, SCHOOL CHILDREN, MEMBERS OF LIFT CLUBS AND RECIPROCAL CONVEYANCE AGREEMENTS.
 - [E] SUBSTITUTION OF VEHICLES
 - (1) Conditions to be complied with.
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 - (1) General.
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 - [H] EXEMPTED AREAS AND THE 40 KILOMETRE RADIUS.
 - [I] THE 80 KILOMETRE RADIUS.
 - [J] EXEMPTED GOODS.
 - [K] DECENTRALIZED INDUSTRIES
 - [L] WITNESSES AND SOLDIERS.

INTRODUCTION

The aim of the Road Transportation Act is to regulate and control the conveyance of persons and goods. To achieve this aim, s1(1) of the Act defines the term 'road transportaion' as:

- '(a) the conveyance ¹ of persons or goods on a ² public road (3) by means of a motor vehicle (4) for reward (5);
- (b) the conveyance of persons or goods on a public road by means of a motor vehicle in the course of any industry or trade or business; (6)
- (c) the conveyance of persons on a public road lby means of a hired bus; (7)
- (d) the conveyance of goods on a public road by means of a hired motor vehicle; (8)

This definition sets out the types of conveyance which the Act is designed to regulate. If the undertaking in question falls within the definition, the provisions of the Act apply to it. To convey lawfully the conveyor must do so in accordance with the terms of a permit granted in terms of ss 13, 18 or 20 and issued in terms of s21,. A failure to do so will entail criminal liability in terms of s31.

[1] THE REASONS FOR EXCLUDING CERTAIN FORMS OF TRANSPORTATION

There are a number of situations or activities which, on the face of it, fall within the definition of road transportation, but which have been excluded by s1(2). The effect of this section is either to provide a complete exemption or to exclude the undertaking in question from the provisions of the Act when stipulated requirements have been met. The Van Breda Commission, referring ⁹ to the policy behind the then Road Transportation Bill, said that it was a blueprint for gradual deregulation. In keeping with this policy of moving towards freer competition, the exemptions contained in s1(2)

are designed to make road transportation flexible and adaptable and to eliminate a great deal of red tape.

The reasons for excluding forms of transportation from the definition of road transportation are varied: decentralized industries operate far from markets and sources of supply and so a relaxation of the Act is seen as an essential encouragement; farmers too should be given easy access to their markets and the relaxations are offset by the fact that vehicles used for conveyance may be limited in their utility by seasonal demands (i.e. a natural advantage exists in favour of state transportation services); it is seen as advantageous for educational development that unrestricted use of vehicles be allowed to schools, technicians and universities; and restrictions on vehicle use by local authorities is regarded as being detrimental to the 'primary function of a local authority and would not be in the interests of the ratepayer.'

[III] THE EXTENT TO WHICH ROAD TRANSPORTATION IS REGULATED

It has been explained above that any form of conveyance which falls within the definition of road transportation requires the authorization of a permit, in order to avoid criminal consequences embodied in the Act. On the face of it, the definition is wide, including not only conveyance for reward but also so-called conveyance on own account and conveyance by means of a hired motor vehicle. S1(2), however, contains a list of thirty exceptions to the definition. Consequently, no permit is required if conveyance falls within the terms of this section.

Statistical evidence regarding the volume of conveyance which

is exempted in this way is difficult to find and those figures which have been put forward have been questioned. It would appear from the findings of the National Transport Policy Study that most of the South African road transportation industry is not regulated. This body places the figure of transportation which is controlled by the permit system at between 15 and 20 percent.¹⁷ It should be noted that this will include most long distance conveyance i.e. conveyance which ventures beyond the bounds of exempted areas and the prescribed radii within which no permits are required. It is therefore the type of transportation which is in direct competition with SATS, and the hardest hit by vehicle under-utilisation (such as empty-leg journeys).

[III] THE EXCLUSIONS

[A] FARMING OPERATIONS AND FARM LABOUR

Farmers are excluded from the provisions of the Act with regard to the conveyance of unprocessed farm products. This exemption only applies if two requirements are met: the conveyor is the producer of the goods and the conveyance takes place in a vehicle owned solely by the farmer.¹⁸ Similarly a farmer who conveys his farming requisites to a place within the Republic where he farms or intends using the equipment is deemed not to be undertaking road transportation. Once again the farmer must be the sole owner of the vehicle by which the conveyance is undertaken.¹⁹

In respect of the conveyance of farm labourers, a farmer does not require a permit in the following situations: when transporting labourers from the place of recruitment to their place of work;²⁰ from their place of employment in his farming

operations to any other place for the farming purposes of the employer or any other farmer, or to the place where they were recruited;²¹ between any place of employment and the most convenient railway station or bus stop for conveyance to any other place or place of employment;²² conveyance to and from any place for the purposes of shopping, attending church services, funerals or any sporting or recreational meetings,²³ and between the place of recruitment and the most convenient rail or bus stop for conveyance to any place.²⁴ For the purpose of this section a partnership or company carrying on farming operations is afforded the same exemption as an individual farmer. Farm labourers are deemed to include labourers employed by a co-operative society of which the farmer is a member and prisoners who either are employed, have been employed or are to be employed by the farmer in his farming operations.²⁵

[B] LOCAL AUTHORITIES, PRISONERS AND STATE EMPLOYEES

The conveyance of persons or goods, other than for reward, by a local authority by means of a vehicle owned by that authority does not fall inside the definition of road transportation. This exemption applies within the area of jurisdiction of a local authority, between that area and any other area controlled by it or where it provides any public service or carries on any undertaking.²⁶ Similarly excluded from the definition is the conveyance of prisoners who are,²⁷ have been, or are to be employed by the local authority. If an employee of the State, a State aided body or a local authority uses his own vehicle in the performance of his duty, to convey any person, he falls outside the ambit of the Act, despite being entitled to a reward from the employer.²⁸

[C] PATIENTS, COFFINS AND CORPSES

The conveyance of a patient to a place where that person is
to receive medical attention²⁹ or the conveyance of any corpse
or coffin does not require the authority of a permit except
where the purpose of the conveyance of coffins is to
supplement stock.³⁰

[D] CONVEYANCE OF HOTEL GUESTS, SCHOOL CHILDREN, MEMBERS OF
LIFT CLUBS AND RECIPROCAL CONVEYANCE AGREEMENTS

Conveyance for reward includes the situation where a carrier
does not specify the charge for conveyance but it is part of
an all inclusive charge for services rendered.³¹ Such a
situation would normally arise when a hotel conveyed guests
and their personal effects to or from the nearest or most
convenient railway station, airways terminal, airport or
port. S1(2)(j) excludes such conveyance if the motor vehicle
concerned is 'identified in the manner prescribed by
regulation' and the hotel is the sole owner thereof. Reg
2(1) requires the following information to be painted onto
both sides of the vehicle in a colour that shows up clearly
against the colour of the background: the full registered
name or style of the hotel and the full business address,
which may not be a postal address.³²

The conveyance of school children and teachers to and from
school as well as for sporting, recreational, holidaying,
sightseeing or educational purposes would normally also fall
within the 'inclusive charge' trap and constitute conveyance
for reward but s1(2)(n) excludes this from the definition of
road transportation if the school is the sole owner of the
bus or the bus is, in terms of an agreement, set apart for

the use of the school. S1(2)(nA) provides the same exemption for the students and staff of educational institutions which include universities, technikons, technical colleges and teachers' training colleges. This exemption only extends to conveyance for educational, cultural or sporting purposes. Where the use of the bus is based on an agreement, a document must be carried in which an authorized official of the institution confirms that the passengers are either enrolled students of, or staff attached to, the institution.

A 'lift club' as contemplated by s1(1) of the Compulsory Motor Vehicle Insurance Act ³³ would normally fall within the ambit of conveyance for reward. S1(2)(h), however, excludes ³⁴ 'lift clubs' from the scope of the Act. A 'lift club' for the purposes of the Act means any club of which:

- '(a) every member shall have a turn to convey or cause to be conveyed by means of a motor car the members of such club or other persons designated by such members to or from a specified place for a specified purpose; or
- (b) every member is the owner of a motor car and of which one or some of its members shall by means of a motor car of which he is the owner or they are the owners as the case may be, convey or cause to be conveyed the members of such club or other persons designated by such members to or from a specified place for a specific purpose.'

S1(2)(g) excludes reciprocal conveyance situations.

Reciprocal conveyance occurs when A conveys B's goods in a vehicle owned by A in return for B either having carried A's goods or undertaking to do so in a vehicle owned by B. This set-up is exempted if the vehicle is owned by the conveyor and, if undertaken by either party in respect of that party's own goods, would not constitute road transportation.

[E] SUBSTITUTION OF VEHICLES

(1) Conditions to be Complied With

A vehicle in respect of which a permit exists may be substituted by a vehicle for which no permit has been issued³⁵ The conditions which must be complied with to render the substitution lawful are: (a) the conveyance by the defective vehicle must have constituted road transportation as defined; (b) the conveyance undertaken by the defective vehicle must have been authorized by a permit; (c) the conveyance must have been in accordance with the provisions of the permit; and (d) the permit must be carried on the substituted vehicle for production on demand.

In the context of s1(2)(f) the term 'conveyance' includes the towing of the defective vehicle to a place for it's repair or storage. Persons or goods may be conveyed in the substitute vehicle to the place of storage or repair or to any other place. Thus the substitute vehicle may not carry on the work of the defective vehicle, except in so far as it conveys the load of the latter to it's destination. If, for instance, it picked up another load and returned with it to it's base, the owner would fall foul of s31(1)(a).³⁶

S7(1)(d) of the Motor Carrier Transportation Act provided for the substitution of vehicles. The conditions under which the substitution could take place were different to those contained in the 1977 Act. S7(1)(d) provided for substitution without any formalities except in cases where the seating capacity or carrying capacity of the substitute vehicle exceeded that of the defective vehicle by more than 20 percent, or if the substitution was to last for more than seven days. In both cases the prior written consent of a board or the Commission was required. Failure to

substitute in accordance with the terms of s7(1)(d)
37
constituted a contravention of s9(1).

(2) **The Application of s1(2)(f)**

The application of s1(2)(f) is illustrated by the case of S
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v Everson. A vehicle, OKC 12241, which belonged to the
appellant, was stopped by an inspector on the Richmond-
Hanover road. The driver showed the inspector an annexure to
a permit which was issued in respect of vehicle SW 15568, which
had broken down en route from Bellville to Nigel. Vehicle
OKC 12241 had been sent to the scene of the break-down and had
conveyed the load of the defective vehicle to Nigel. It was
in the process of conveying goods back to Bellville when it
was stopped. Jacobs JP held that the substitution, which had
not been carried out in accordance with s1(2)(f), was a clear
contravention of s31(1)(a) because the appellant had not
proved on a balance of probabilities that the permit
authorized the conveyance in question. Thus the permit which
was issued in respect of vehicle SW 15568 could only
authorize the conveyance by vehicle OKC 12241 if the
provisions of s1(2)(f) had been complied with.

[F] OWNERS OF INDUSTRIES, TRADES AND BUSINESSES WHO DO NOT
CONVEY FOR REWARD

The owners of industries, trades or businesses are exempted
from the necessity of obtaining permits in respect of the
conveyance of persons or goods by means of a motor car if no
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reward is received. This exemption does not extend to the
conveyance of employees from their places of residence to the
place of work. If an employer was to convey employees in
this way without the authority of a permit this would, it is

submitted, constitute a prohibited type of road transportation namely, conveyance in the course of industry,⁴⁰ trade or business. The conveyance of employees from any place of work to any other site for work purposes, may be undertaken by the employer without the authority of a permit provided that the employer is the owner of the vehicle in which the conveyance is undertaken.⁴¹

A similar exemption exists to allow the owners of industries, trades or businesses to convey goods. S1(2)(1A) enables such an owner to carry his own goods or goods which he has undertaken to maintain, clean, renovate, repair or alter for any other person in the course of such industry, trade or business. S1(2)(1A) only applies if the mode of conveyance (which may not be a trailer) has a gross vehicle mass which does not exceed 2 500 kilograms. The owner may also convey his spare parts, tools or defective parts to a workshop for repair in a vehicle which conforms to the specifications mentioned above.⁴²

[G] VEHICLES WITH CARRYING CAPACITIES NOT IN EXCESS OF 1 000 KILOGRAMS

(1) **General**

Originally s1(2)(1) excluded from the definition of road transportation the conveyance of goods on or in a goods vehicle having a carrying capacity not in excess of 1 000 kilograms. The legislature obviously intended to phase out this exempted category by adding to the sub-section the provision that such vehicles would be issued with public permits if the owner satisfied the Commission in writing

within one month of the commencement of the amending Act that the vehicle concerned was in use on 1 April 1979 and still operated on 4 July 1979 (the date of commencement of the amending Act).⁴³ The amendment had the effect of creating a type of public permit distinct from that issued in terms of s 13. It differed from the latter in one respect: it was not transferable.⁴⁴

(2) The Amendment of S1(2)(1)

S1(1) of the Road Transportation Amendment Act⁴⁵ provided that a permit issued in terms of s1(2)(1) could not be renewed, amended or transferred from one person to another. Furthermore, it abolished altogether special permits for vehicles with carrying capacities of not more than 1 000 kilograms, as from 31 December 1983. From that date owners of vehicles which formerly operated under the authority of s1(2)(1) permits, were required to apply for public permits as contemplated by s13.

The amendment of s1(2)(1) led to a fiery debate in Parliament. It is clear that the new provision is a move away from the policy of gradual deregulation recommended by the Van Breda Commission.⁴⁶ Government speakers cited three reasons for the amendment: that operators had abused the 'privilege' by derating vehicles with bigger carrying capacities (e.g. by reducing the axle size);⁴⁷ that operators were using the exemption for purposes that Parliament never intended, the most important being the so-called express delivery service;⁴⁸ and to protect SATS.⁴⁹ The businesses, such as the express parcel services threatened the hold that SATS enjoyed in this field.⁵⁰ Opinions were expressed by Opposition speakers that persons operating express delivery

services were in fact providing what had become an essential
service for commerce and industry.⁵¹ Furthermore it was
important that these operations carried on because SATS was
not able to provide an equivalent service.⁵² Operators now
have to apply in the normal manner, and overcome the hurdle
of s15, in order to continue.⁵³

(3) The Meaning of Carrying Capacity

The term 'carrying capacity' appears, not only in s1(2)(1),
but in a number of other sections of the Act. Problems have
arisen in relation to its meaning. Didcott J saw the
difficulty in the following terms:⁵⁴

'What in essence does one mean by the physical
"carrying capacity" of a vehicle? Does one mean the
maximum weight which it can bear and still move at all?
If so, does one measure movement uphill, downhill, or
on the level? Does one take any account of the speed
or lack of it, with which the vehicle can move with
that load? Or does one postulate the maximum load it
can bear, whilst stationary, without collapsing in some
sort of way, and, if so, in what particular way?'

Other judges have not experienced the same difficulties with
the interpretation of the term. In the case of Metro

Transport (Pty) Ltd v National Transport Commission,⁵⁵ F S
Steyn J first looked to the definitions of 'tare' and 'gross
vehicle mass' in terms of s11(1) of the Transvaal Road

Traffic Ordinance.⁵⁶ 'Tare' was defined as the mass of the
vehicle when ready to travel on the road, including such
additions as spare wheels, accessories, standard equipment
supplied by the manufacturers, permanent structures and
structural alterations of a permanent nature. Not included
are the weight of fuel and any other load. 'Gross vehicle
mass' means the maximum mass of the vehicle and it's load, as

specified by it's manufacturer, or in the absence of such specification, as determined by the registering authority. The learned judge concluded that the maximum load which a vehicle could carry in terms of its specification was the difference between the 'gross vehicle mass' and its 'tare'. In deciding whether this could be said to be the 'carrying capacity' of the vehicle the learned judge held:

'Wet 74 van 1977 is in Afrikaans onderteken en daar bestaan na my mening geen twyfel dat draagvermoë slegs verwys na die maksimum gewig van die vrag wat 'n vragvoertuig kan dra in terme van sy vervaardiger se spesifikasie of die vasstelling deur die registrasie-owerheid en dat die woord so deur die Wetgewer verstaan is soos deur alle gewone Afrikaanssprekendes.'

James JP came to the same conclusion in National Transport Commission v Airoadexpress (Pty) Ltd. He held that the term 'carrying capacity' simply meant the heaviest load which the vehicle could carry under the normal operating conditions for which it was built. For reasons of practicality, simplicity and certainty this should be arrived at by deducting the mass of the vehicle's tare from the gross vehicle mass. The case was remitted to the Commission for reconsideration because that body had not based it's decisions on the method the court set out. Instead the Commission had adopted an arbitrary practice of refusing s1(2)(1) permits in respect of vehicles with a gross vehicle mass of over 4 000 kilograms, claiming that such vehicles, in the practical experience of the Commission, had carrying capacities of over 1 000 kilograms.

[H] EXEMPTED AREAS AND THE 40 KILOMETRE RADIUS

S1(2)(w) exempts from the definition of road

transportation the conveyance of goods solely within an
exempted area.⁶⁰ An exempted area is an area declared to be
such by the Minister, acting in terms of s2(b). Notice of
such a classification is published in the Government Gazette.
A further exemption applies to conveyance of goods for reward
within a 40 kilometre radius of the carrier's business
address, provided that the place of loading and the final
destination are within the 40 kilometre radius, or the
conveyance is to a railway station within the prescribed
area.⁶¹ In S v Grindrod Transport (Pty) Ltd and Others⁶² the
validity of a regulation, promulgated under s30, was
challenged because it purported to restrict carriers
conveying goods in terms of s1(2)(x) to that exemption only.

The first appellant was the holding company of the second
appellant. Both occupied business premises in Stanger. The
charge arose out of the conveyance of goods from Mandini to
Pinetown. Mandini is within 40 kilometres of Stanger. It is
not in the exempted area of Durban. Stanger falls inside the
exempted Durban area as does Pinetown. Pinetown, however, is
further than 40 kilometers from Stanger. Reg 2(5) stated
that a carrier wishing to convey goods in terms of s1(2)(x)
could only do so exclusively within a 40 kilometre radius
of his place of business. As Stanger lay within
40 kilometres of Mandini and within the Durban exempted area,
the first and second appellants registered their vehicle
jointly in Stanger and employed a driver whose function was
as follows: to convey for the first appellant from Mandini to
the border of the exempted area, to convey jointly thereafter
until he reached a point 40 kilometres from Stanger and
thereafter to convey for the second appellant in terms of

s1(2)(w).

The court held that the regulation was ultra vires because it purported to deprive persons of a protection enjoyed under another provision of the Act. It amounted to an attempt by the Minister to amend the Act by regulation, which he was not empowered to do. In terms of the decision, it was unnecessary for the appellants to use the stratagem they resorted to. In other words in a journey from Mandini to Pinetown, s1(2)(x) applies up to the 40 km limit. Thereafter s1(2)(w) applies.

[I] THE 80 KILOMETRE RADIUS

S1(2)(y) exempts from the definition of road transportation the conveyance by a carrier of his own goods within a radius of 80 kilometres of his place of business if the conveyance is in the course of his industry, trade or business, or 'the conveyance is of goods which he has undertaken to maintain, clean, renovate, repair or alter for any other person in the course of such industry, trade or business'. The conditions upon which the exemption operates are that the carrier is the owner of the vehicle, it is registered within the area and it is identified in the manner prescribed by regulation. These conditions, it should be noted, apply to exemptions under s1(2)(x) as well.

[J] EXEMPTED GOODS

S1(2)(z) and s1(2)(zA) deal with the conveyance of exempted goods. This category of goods consist of any goods declared to be exempted by the Minister in terms of s2(d). S1(2)(z) deals with the conveyance of such goods by means of a vehicle registered in South Africa, which is owned by a person

domiciled in the country, and which is identified in the prescribed manner. If the owner of the vehicle is a company it must be registered in the Republic. The place of business of the owner must be within the country too. S1(2)(zA) extends this protection, under the same conditions, to carriers from countries which are members of the Customs Union Agreement or of 'any of those countries or territories which have entered into an agreement with the Republic with regard to the conveyance of exempted goods.'

[K] DECENTRALIZED INDUSTRIES

Decentralized industries have been granted special transport concessions.⁶⁴ Subject to conditions laid down by regulation, an undertaking proclaimed to be a decentralized industry may, without a permit, convey goods by means of a single vehicle, or trailer, the gross vehicle mass of which does not exceed 26 000 kilograms, 18 000 kilograms respectively. The industry must be the owner of the vehicle. The Minister has power, granted by s2(c), to declare on the recommendation of the Commission, any area to be a decentralized area.⁶⁵

[L] WITNESSES AND SOLDIERS

Ss1(2)(s), 1(2)(t) and 1(2)(u) deal with the conveyance for reward of witnesses in criminal cases, persons summoned to give evidence before commissions and persons proceeding to or from places where they are to undergo, or have undergone, military service. The conveyer in each of the above cases does not require a permit.

FOOTNOTES

1. See *S v Julies* 1971 (2) SA 525 (E);
S v Chetty 1975 (3) SA 980 (N) and Ch 14, below, at 369.
2. 'Conveyance of goods' was held to connote 'the conveyance of something separable from the instrument

- of conveyance' in R v Van Eck 1941 EDL 223, 226. In that case, when a boring machine had been built onto an undercarriage so that the two formed a separate unit, the undercarriage was held not to be the vehicle conveying the boring machine.
3. See Flying Lotus (Pty) Ltd v Chairman National Transport Commission and Another 1982 (4) SA 253 (D) and Ch 14, below, at 370.
 4. See R v Flettermann 1953 (4) SA 163 (T); R v Kaperi 1960 (2) SA 163 (SR) and Ch 14 below at 371.
 5. See Ch 14 below at 374 and the cases cited therein.
 6. See R v Angamia 1958 (3) SA 433 (T).
 7. See Ch 14 below at 378.
 8. See South African Railways and Harbours v Chairman Bophuthatswana Central Road Transportation Board and Another 1982 (3) SA 629 (B) and Ch 14 below at 379.
 9. See Ch 3, above at 66.
 10. See generally Page Commission, paras' 50-6 and 367-389; Marais Commission paras 57, 309-315, 338-344.
 11. See Marais Commission, paras 312, 313.
 12. Marais Commission, para 339.
 13. Marais Commission, para 334.
 14. Marais Commission, para 344.
 15. See Verburgh, 18, for a definition of conveyance on own account.
 16. See below.
 17. Supplement to the Financial Mail 'Trucks and Transport' Oct 19, 1984, 17.
 18. S1(2)(a).
 19. S1(2)(b).
 20. S1(2)(b)(i).
 21. S1(2)(b)(ii).
 22. S1(2)(b)(iii).
 23. S1(2)(b)(iiiA).
 24. S1(2)(b)(iv).
 25. S1(2)(b).
 26. S1(2)(c).
 27. S1(2)(d).
 28. S1(2)(m).
 29. S1(2)(e).
 30. S1(2)(o).
 31. W E Cooper and B R Bamford South African Motor Law 681.
 32. Reg 2(2) sets out the height, width and breadth of stroke to which figures and letters must comply, as well as the size of spaces between successive figures or between words on the same line.
 33. No 56 of 1972.
 34. See Maree and Others v SAA Mutual Insurance Association Ltd and Another 1970 (4) SA 717 (T).
 35. S 1(2)(f)
 36. S v Everson 1980 (2) SA 913 (NC).
 37. S v Essa 1978 (1) SA 1063 (N), 1066B.
 38. S v Everson supra.
 39. S1(2)(k)
 40. See R v Angamia 1958 (3) SA 433 (T), 436C-D.
 41. S1(2)(kA).
 42. S1(2)(1B).
 43. Road Transportation Amendment Act 93 of 1979, s1(b).

44. See SA Warehousing Services (Pty) Ltd v National Transport Commission 1982 (3) SA 840 (A), 846 B-D.
45. No 93 of 1979
46. See Ch 3, above, at 66.
47. House of Assembly Debates 1983 col 1011.
48. Ibid col 1017
49. Ibid col 1014
50. Supplement to the Financial Mail 'Trucks and Trucking' 21 Oct 1983, 40.
51. House of Assembly Debates 1983 col 1018.
52. Ibid cols 1009 and 1011.
53. For detailed treatment of s15, see Ch 8 below.
54. National Transport Commission v Airoad express (Pty) Ltd 1981 (3) SA 109(N). The above passage from Didcott J's judgment in the court a quo was quoted by James JP who heard the appeal. The judgment of the court a quo is not reported.
55. 1981 (3) SA 114 (W)
56. No. 21 of 1926.' The definitions of 'tare' and 'gross vehicle mass' are identical in the Road Traffic Ordinances of all four provinces.
57. At 122 C.
58. 1981 (3) SA 109 (N)
59. For a more recent example of a similar mis-direction see Ratner and Collett Agencies (Pty) Ltd v Chairman, National Transport Commission and Others TPD 20 March 1985 (case 22195/83) unreported.
60. For a list of the exempted areas see GN No 1268 in Government Gazette No 19268 of 22 June 1984.
61. S1(2)(x).
62. 1980 (3) SA 978 (N)
63. For a list of exempted goods see GN No 1267 in Government Gazette No 9268 of 22 June 1984 and GN No. 2790 in Government Gazette No 9532 of 21 December 1984.
64. S1(2)(v); for a list of decentralized industrial areas see GN No 893 in the Government Gazette of 29 April 1983.
65. S1(1) of the Act defines a decentralized area.

PART THREE

THE REGULATORY SYSTEM

CHAPTER 7

THE PERMIT SYSTEM

INTRODUCTION

[I] THE TYPES OF PERMITS AND THEIR FUNCTIONS

- [A] PUBLIC PERMITS
- [B] PRIVATE PERMITS
- [C] TEMPORARY PERMITS

[II] FEATURES OF THE PERMIT SYSTEM

- [A] THE PERMIT AS A FORM OF PROPERTY
- [B] THE TRANSFERABILITY OF A PERMIT
 - (1) The Legislative Provisions
 - (2) The Right to Transfer a Permit is a Right Dependant on Permission
 - (3) The Effect of the Alienation of a Permit if Transfer is not Granted
 - (4) The Relationship Between the Permit and the Vehicle to Which it Relates
- [C] THE VALIDITY OF AGREEMENTS TO MAKE PROTECTIVE APPLICATIONS

[III] CRITICISMS OF THE PERMIT SYSTEM

- [A] HIGHER OPERATION COSTS
- [B] THE STIFLING OF COMPETITION
- [C] THE SALE OF PERMITS
- [D] CONCLUSIONS

[IV] THE POSSIBLE REFORM OF THE PERMIT SYSTEM

INTRODUCTION

The issuing of permits to authorize some form of economic activity is a well recognized regulatory technique. Indeed the 'privileges' conferred in this way may be so far reaching¹ that Baxter says:

'These "privileges" are as important to daily existence as any rights; they have become a new form of "property". The result has been a demand for greater procedural and substantive protection for individuals when public authorities exercise their powers in relation to these benefits and concessions.'

In the leading case of Tayob v Ermelo Local Road Transportation Board,² Centlivres CJ rejected the notion that the granting of a permit amounted to no more than the granting of a privilege, a suggestion made by the chairman of³ the Commission when it rejected the appellant's appeal:

'It almost amounts to saying that the granting of an exemption is in the gift of the Commission or a local board. This is a wrong approach to adopt by a statutory board which is empowered by Parliament to grant permission to carry on a trade. It is not an exceptional privilege or a monopoly which depends on the issuing of the permission. Even the humblest citizen has the right to approach such a board and he is entitled to get the permission he requires unless there are sound reasons to the contrary.'

The word 'permit' is defined in the Concise Oxford Dictionary as a 'written order giving permission'. In the context of the Road Transportation Act, the permit system is central to the method of regulation. If an undertaking falls within the⁴ definition of road transportation⁵ and outside s 1(2), a permit is required to authorize that endeavour. The aim of the permit system in road transportation is twofold: it is a technique designed to control the volume of traffic which takes to the road and a means of protecting SATS from certain

forms of private competition. ⁶ The justification for regulation is usually said to be the protection of the public ⁷ interest:

'Na my mening was dit nie die doel van die Wetgewer om bestaande besighede te beskerm nie. Die enigste oorweging en doel voor oe was om openbare belang te bevorder en soos Murray HR, se dit is die grondleggende doel van die Wet en die uitskakeling van moontlike kompetisie "is only an element in the former!"

[I] THE TYPES OF PERMITS AND THEIR FUNCTIONS

S1(1) of the Act defines a permit as 'a public permit, private permit or temporary permit'. When the Motor Carrier Transportation Act was originally passed it only made provision for one type of permit. This permit was required to authorize conveyance for reward. ⁸ It soon was seen as necessary to widen the scope of the protection that the Act provided for the Railways Administration. Thus while the permit system was not changed, the definition of 'motor carrier transportation' was altered to include conveyance 'on own account' i.e. conveyance in the course of any industry, ⁹ trade or business. The considerations which are relevant to conveyance of this type are different to those which apply to conveyance for reward e.g. the purpose of the conveyance differs, the transport user is different and so is the nature of the competition. The Road Transportation Act formalized these areas of divergence by creating public permits and private permits as well as a third category, temporary permits.

[A] PUBLIC PERMITS

A public permit is defined in s1(1) of the Act as 'a public road carrier permit granted under section thirteen'. It is

intended to authorize permanent conveyance of persons or
goods for reward. ¹⁰ In other words, it is the type of
permit which an operator who conveys professionally requires,
unless his operations are restricted to the conveyance of
exempted goods, limited in scope to exempted areas or fall
within another exemption contained in s1(2). Most long
distance conveyance will therefore require the authorization
of a public permit. Such a permit may be issued for a
specified period or for an indefinite period. ¹¹

[B] PRIVATE PERMITS

A private permit, in the words of s1(1) of the Act is 'a
private road carrier permit granted under section eighteen'.
Such an authorization is required by a person who carries on
any industry, trade or business and who:

- '(a) wishes to convey, in the course of such industry,
trade or business, goods acquired or sold or
otherwise disposed of by him, by means of a motor
vehicle of which he is the owner, between any
places where he carries on such industry, trade
or business and any place situated outside any
exempted area mentioned in section 1(2)(y);
- (b) wishes to convey any goods which he has
undertaken to maintain, clean, renovate, repair
or alter for any other person in the course of
such industry, trade or business, by means of a
motor vehicle of which he is the owner, between
any place where he carries on such industry,
trade or business and any place where he collects
those goods in order so to deal with them or
delivers those goods having so dealt with
them.' (12)

The chief difference between a public and private permit is
that the latter is required for the transportation
requirements of the holder in the course of his business,
while the former would be required when a public transport
facility is offered by an operator.

[C] TEMPORARY PERMITS

A temporary permit is 'a temporary road carrier permit granted under section twenty.'¹³ This section enables any person who wishes to undertake transport of a temporary nature to apply for a permit, the currency of which lasts for a maximum of fourteen days.¹⁴ Such a permit may be granted in relation to transportation upon a particular date or in connection with a particular occurrence.¹⁵ It is interesting to note that more temporary permits are issued than other types. In the 1983 fiscal year, for instance, while 43 488 public permits and 7 016 private permits were issued, 62 921 temporary permits were issued. In the previous fiscal year 79 553 temporary permits were issued.¹⁶ There appear to be two reasons for the large difference between the number of public permits and temporary permits: first, it would appear that a substantial number of transport undertakings have developed which operate solely on temporary permits. They were 'allowed' into the transport system when SATS was unable to handle all of the traffic and in times of economic prosperity. The drought and the harsher economic climate no doubt accounts for the drop in the number of temporary permits issued in 1983:¹⁷ secondly, boards frequently issue temporary permits to an operator after they have granted an application for a public permit but prior to the outcome of an appeal lodged by an objector.¹⁸ The Director-General: Transport has, however, sounded a warning to those operators who rely on temporary permits:¹⁹

'Temporary permits were introduced to fulfil a special requirement in the industry. It was never, and I stress never, the intention to allow prospective carriers to start and develop a road transport business on the strength of temporary permits. To allow a freer basis of issuing temporary permits would be to the detriment of existing carriers.'

FEATURES OF THE PERMIT SYSTEM

[A] THE PERMIT AS A FORM OF PROPERTY

The nature of road transportation permit was examined in Ramdaie v Ganesh and Other²⁰ in which the applicant sought an order setting aside the attachment of a permit and its sale to the second respondent. It was argued that the attachment was invalid because the permit was not a 'merchantable article': the permit and the vehicle to which it related, it was contended, constituted an indivisible entity and so the former was incapable of attachment, sale or transfer without the latter.

Jansen J held that a permit constitutes a res. The fact that permission to transfer it is required does not alter this fact. Furthermore the period of validity of the permit is irrelevant because 'there are undoubtedly valuable things that have the status of res despite the shortness of their lives.'²¹ The learned judge accordingly held that the permit was capable of attachment (separately from the vehicle) and sale in execution.²² A similar view was expressed by Fannin J in Laloo v Deputy Sherrif Durban and Another²³ in which the court held that, as a permit is a document which evidences the existence of rights, conferred by virtue of the Act, it can be attached in execution.²⁴ Van Zyl JP, in Solomon v Registrar of Deeds,²⁵ was dealing with a licence issued in terms of the Liquor Act²⁶ but it is submitted, his observations apply equally to road transportation permits when he said that 'a liquor licence is not merely a privilege but is a right of a potential commercial value which may sometimes be very considerable, and a right which is alienable and can be sold.'²⁷

The issue in Solomon's case was whether the liquor licence in question could be hypothecated. The Registrar of Deeds had refused to register a notarial bond over the licence and Solomon had sought an order directing him to register it. The court granted the order in accordance with the rule that 'whatever admits of purchase and sale also admits of pledge.'²⁹ That the same principle applied to road transportation permits is clear from Ramdaie's case,³⁰ and Durmalingham v. Bruce NO³¹ in which one Maharaj had passed a notarial bond hypothecating a Henschell bus and its permit in favour of the respondent. The competence of Maharaj to pass such a bond was not questioned, the issue being whether the bond could be rectified after the Henschell bus had been replaced by an International bus.

It is clear too that a permit is an asset in an insolvent estate. Jansen J, in Ramdaie's case,³² held that as a document evidencing rights which are to be regarded as property, a permit must be disclosed by an insolvent holder.

[B] THE TRANSFERABILITY OF A PERMIT

The permit system prescribed by the Road Transportation Act is vehicle based. A permit is issued in respect of a particular vehicle and it authorizes the conveyance of specified goods (or passengers) on a route which is set down.³³ Other conditions may be attached too, and a failure on the part of the holder (or his servants) to comply with the terms of the permit or its conditions is a criminal offence.³⁴ Public permits are transferable but a transfer is dependent on the prior permission of a board.³⁵ As a result of this quality, permits have acquired immense commercial value.³⁶

(1) The Legislative Provisions

S7(1)(c)(iv) confers on a board the power to consider and give a decision on applications for the renewal, amendment or transfer of any permits granted by it. S12(3) says that any person wishing to take transfer of a permit must apply in writing, in the manner prescribed by regulation, to the appropriate board or the Commission for such a transfer. In addition, the written consent of the holder must be submitted. This last requirement must be read subject to qualification: if the holder is insolvent, the trustee of the insolvent estate will be the person required to give consent, and where, as in Ramdaie's case, ³⁷ a permit has been attached and sold in execution, the Deputy Sheriff can give the necessary consent. Finally, reg 3(4) provides that when an application for transfer has been granted, the board must issue a new permit to the applicant and inform the transferor of its decision. The latter must return the old permit to the board within 10 days of receiving the notification.

(2) The Right to Transfer a Permit is a Right Dependant on Permission

The cases dealing with the transfer of an authority to engage in an economic activity stress that while the transferor has a right to alienate the authority, that right derives from, and is subject to, the provisions of the Act which created it. Thus, in Laloo v Deputy Sheriff, Durban and Another, ³⁸ Fannin J held that while a contract for the transfer of a permit is not illegal, the provisions of the Act must be complied with because no transfer can occur without the board's consent and the person claiming to be the transferee would have committed an offence if he undertook

road transportation without a proper transfer of the permit. Consequently where Laloo had bought a number of permits and vehicles from Local Passenger Services (Pty) Ltd, but had not applied to the board for the transfer of the permits, he was unsuccessful in his attempt to prevent the sale of the permits pursuant to the execution of a judgment debt against Local Passenger Services.

Similarly in Fick v Woolcott and Ohlsson's Breweries which 40 involved a licence issued in terms of the Transvaal Liquor Ordinance, 41 Innes JA pointed out in relation to the transfer of a licence that: 42

'...the privilege which he enjoys is purely personal; it involves the exercise by the authorities of a delectus personae, so that he would have no power to assign his licence, were there no statutory provisions for its transfer. He can only deal with it in such a manner as the Ordinance prescribes.'

Van Zyl JP expressed himself in almost identical terms in 43 Solomon v Registrar of Deeds when he said that the licensee himself has no power to transfer the licence 'because that is 44 the sole prerogative of the Licensing Board.' In short a holder has a right to sell, but the sale is subject to 45 transfer over which he has no real control.

(3) The Effect of the Alienation of a Permit if Transfer is Not Granted

Jansen J held in Ramdaie's case 46 that the fact that the transfer of the permit is beyond the control of the purchaser and the seller is irrelevant to the question of whether it can be alienated. The learned judge held that the purchaser accepts the risk that the application will not be granted, as 47 he does in the purchase of anything of a speculative nature.

In Laloo v Deputy Sherrif, Durban and Another, where the applicant had not applied for transfer, Fannin J held that his position was similar to that of a purchaser who has not yet received delivery of the subject matter where ownership passes by delivery:

'He has, in my view, at least, a personal right against the judgment debtor to compel him to take the necessary steps to transfer the certificates to him, but, until that is affected, he has no such rights as are conferred by the certificates themselves.'

(4) **The Relationship Between the Permit and the Vehicle to Which it Relates**

There is obviously a very important connection between a permit and the vehicle to which it relates, but as the court held in Ramdaie v Ganesh and Others, there is no reason why a permit cannot be attached and sold in execution (or indeed simply sold) in isolation from the vehicle.

A permit confers the right to undertake road transportation in accordance with its terms and with the vehicle specified. It also confers the right to substitute the vehicle (in accordance with the provisions of the Act) and the right to allow another to apply for the permit as a transferee. The continued existence of these rights does not depend per se on the possession, ownership or continued existence of the vehicle. The vehicle is merely the means by which the right to undertake road transportation is exercised. If the means fails, the holder can apply for substitution or simply substitute the vehicle in very limited circumstances. The purchaser of a permit acquires the right to apply for transfer and, it is submitted, the right to require the transferor to

give his written consent to the transfer. As the vehicle specified in the permit will not be available to a transferee who has only acquired the permit, he will also have to apply for the amendment of the permit to reflect its relationship to the vehicle with which he intends undertaking road transportation.⁵²

[C] THE VALIDITY OF AGREEMENTS TO MAKE PROTECTIVE APPLICATIONS

The making of protective applications is a widely used strategy in road transportation.⁵³ When a newcomer applies for a permit to operate in an area, existing operators outside of the area, together with those operating within the area band together to oppose the application, thus putting up a strong protective shield to protect their interests. In Ramnarain v Goordeen and Others⁵⁴ such an application was made by the respondents to aid the most directly affected operator, Ramnarain, to oppose an application brought by one Ramroop. An agreement that the respondents would withdraw their application when Ramnarain's application was successful was allegedly reached. Ramnarain was successful in his application for renewal and Ramroop's application was refused. The respondents' application was not withdrawn and was granted a while later, no objectors taking part in the proceedings. The respondents, who formerly operated outside of the applicant's area were consequently in direct competition with him. He therefore applied for an interdict restraining the respondents from undertaking road transportation in the area, based on the alleged agreement between them. A rule nisi had been granted and the judgment in the case under discussion was given on the return day.

It was argued inter alia on behalf of the respondents that the provision of road transportation was in the public interest and a matter of public concern. Consequently any agreement restricting an application for a permit is contrary to public policy and unenforceable: the effect of such an agreement is to remove a particular applicant from the number from which a choice can be made and so, if the application would have been successful, the agreement would be prejudicial to the public, Kumleben J rejected this argument for two reasons: first, any real need would be met by grants to other applicants and the conducting of the services so authorized would be regulated by the Act; secondly, the freedom of contract is a fundamental of public policy and the application of this doctrine superceded other considerations.⁵⁵ The agreement was accordingly held to be enforceable because it was not against public policy or otherwise objectionable.

It is submitted that the learned judge's strong support for the freedom of contract principle in an area of law involving a large degree of public policy, must be questioned. To hold, as he did, that the public interest is not affected because one is dealing with a single agreement, begs the question.⁵⁶ There may possibly be wider scope for the freedom of contract if a board could invite applications or take other steps to ensure that the transportation services offered to the public in its area are sufficient. In the present system of regulation, boards must await applications and then deal with them on their merits. Consequently, it is submitted that agreements which aid the stifling of competition should be regarded as contrary to public policy and hence be unenforceable. It is enough of a restriction on

the rights of the public that the choice of who shall convey is taken away from it and vested in statutory bodies. To go further and hold that, in addition, the operators themselves can decide, cannot be seen as desirable.

[IIII] CRITICISMS OF THE PERMIT SYSTEM

The permit system, as the appropriate regulatory technique,⁵⁷ was recommended by the Le Roux Commission. The legislature accepted the recommendation when it passed the Motor Carrier Transportation Act in 1930. It has remained in⁵⁸ operation since then, with only minor modifications and has, until relatively recently been accepted without question. The system has, of late, been subjected to severe criticism by, inter alia, such organized bodies as the Public Carriers Association, which represents a large number of road⁵⁹ transportation operators throughout the country. A number of objections have been raised against the permit system as it operates at present. Some of these will be discussed below.

[A] HIGHER OPERATION COSTS

It has been alleged that the permit system results in operators facing higher cost. One reason for this is the time spent, and the delays caused, by the decision making process. This has been attributed to the fact that SATS (and, it must be added, many other operators,) appeal against⁶⁰ a high proportion of applications. Secondly, the permit system is widely regarded as a factor which inhibits hauliers from operating as efficiently as possible, thus contributing to inflation and soaring costs: it is seen as a major obstacle to the achievement of a high utilisation of

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vehicles. It has been pointed out that in 1982 the average utilisation of vehicles involved in long hauls was 50 percent, whereas an acceptable level would be at least 75 percent. The Public Carriers Association has contended that such a level of utilisation would have the effect of cutting costs by at least 30 percent. 62

[B] THE STIFLING OF COMPETITION

It has been argued that the permit system has not changed with changing needs. This has led to practices which seek to avoid the law and a thriving black market 63 which has resulted from the restrictions which the system has imposed. 64 The chairman of the Public Carriers Association has made the point that 'there would be no illegal operators who deprive legitimate operators of business and are the bane of the authorities' lives, if there was not demand for them from commerce and industry'. 65

In addition, when operators are in a position to do so, they may agree not to oppose each others' applications or they may band together to oppose the applications of newcomers, thus carving out complementary markets for each other. Protective applications of this sort are common in the industry and if the decision in Ramnarain v Goordeen and Others is 66 correct, such agreements may be enforceable. The result of collusion of this nature is that price fixing can occur, and monopolistic practices are not prevented. It has been alleged, in any event, that the system per se tends to encourage price fixing and monopolistic practices: when a permit is issued to an operator it places him in a very strong position and may effectively lock out competition. 67

Bekker J has pointed out that while this is not the main aim
of the Act, it may be an ancilliary effect. The Financial

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Mail has concluded in this regard:

'Competition is discouraged, if not stifled by the permit system, which becomes the backbone of a company's planning. The road transportation industry in its present form has been built on permits, not competition.'

[C] THE SALE OF PERMITS

It has been explained above that permits are transferable
and, as a form of property, are capable of purchase and sale.

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Because of the immense importance of permits, they have become very valuable assets. They can command prices, on sale, of up to R100 000. The sale of permits is not a new phenomenon as the Page Commission pointed out in 1947:

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'In another case it is alleged that an operator sold thirteen buses with the certificates for more than 70 000 pounds, the thirteen buses being worth only a small fraction of that sum; and it is admitted that it is a usual practice to buy and sell certificates at high prices. The Motor Transport Owners' Association contends indeed that it is a legitimate practice, suggesting that the greater portion of the purchase price is paid for "goodwill", and that though the remainder may be regarded as "monopoly" value that is a value which properly accrues to the holder of the certificate.'

The effect of the high prices which attach to permits is that the cost of acquisition is, in the end, borne by the transport user.

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[D] CONCLUSION

It is submitted that the problems which have been outlined are not an inherent characteristic of road transportation, but exist as consequences of the regulatory system which the legislature has opted for. While it may have been adequate and desirable at its inception, it has failed to meet the

needs of transport users and operators in the economic environment in which the South African road transportation industry finds itself at present.

[IV] THE POSSIBLE REFORM OF THE PERMIT SYSTEM

Two proposed reforms have been canvassed: complete deregulation (subject, it is submitted, to adequate safety regulations) on the one hand, and a restructuring of the permit system on the other. The second alternative is, in a sense, a via media between deregulation and the present system. Deregulation has already been discussed,⁷⁴ but the reformation of the permit system will be dealt with below.

The criticisms of the vehicle based permit system has resulted in proposals that an alternative method be adopted, namely the so-called operators permit: the shift in emphasis is one from quantitative control to qualitative control. It has been suggested that while control will still be present the new system will ensure that 'only legally loaded, properly maintained vehicles driven by competent drivers use the road'.⁷⁵ All operators of commercial vehicles will be

required to possess an O-license. The Director-General: Transport outlined the criteria which would need to be satisfied before an O-license was issued:⁷⁶

'To qualify for an O-license, an undertaking will have to prove that it complies with criteria which would include the following: That it employs a competent person, a holder of a Certificate of Professional Competence (CPC), it has adequate parking facilities, it has made adequate arrangement for maintaining its vehicles and it has sufficient finance not to prejudice the safety of the operation.'

The proposed change is to be welcomed, but the extent to which the system will free itself from the problems inherent in the vehicle based system remain to be seen. The new regime, as envisaged by the Director-General, will have a vehicle based component⁷⁷ but, it is submitted, may serve as an adequate blueprint for the minimum of control in a deregulated environment.

FOOTNOTES

1. Baxter, 64.
2. 1951 (4) SA 440 (A).
3. At 449 B - C; see too Receiver of Revenue, Cape v Cavanagh 1912 AD 459, 463 in which Innes JA spoke of the grant of a liquor licence being a privilege. This dictum was qualified by Van Zyl JP in Solomon v Registrar of Deeds 1944 CPD 319, 325; see below at 152.
4. For a discussion of the elements of road transportation see Ch 14 below. The definition of road transportation is to be found in s1(1) of the Act.
5. See Ch 6 above.
6. Baxter, 171 - 2.
7. Herbst v Dittmar en 'n Ander 1970(1) SA 238 (T), 246 A - B; see too Ch 2 above at 30.
8. See Page Commission, para 44.
9. Motor Carrier Transportation Amendment Act 31 of 1932.
10. S12(1).
11. S16(1).
12. S17(1).
13. S1(1).
14. S20(4).
15. S20(1).
16. Supplement to the Financial Mail 'Trucks and Transport', Oct 19 1984, 17.
17. Supplement to the Financial Mail 'Trucks and Trucking', Oct 21 1983, 17.
18. See for example Marinpine Transport (Pty) Ltd v Local Road Transportation Board, Pietermaritzburg and Others 1984 (1) SA 230 (N); South African Transport Services v Chairman, Port Elizabeth Local Road Transportation Board and Others 1984 (1) SA 236 (SE).
19. Supplement to the Financial Mail 'Trucks and Trucking' Oct 21 1983, 17.
20. 1959 (1) SA 535 (N).
21. At 536 F.
22. At 536 D - G.
23. 1961 (1) SA 703 (D).
24. At 703 H - 704 A.

25. 1944 CPD 319.
26. No 30 of 1928. (Now Act 87 of 1977).
27. At 325.
28. Supra.
29. D 20.1.9.1.; quoted in Solomon's case supra 326.
30. Supra.
31. 1964 (1) SA 807 (D).
32. 1959 (1) SA 535 (N), 536 D - G; see too Solomon's case supra 324.
33. S21(3).
34. See Ch 10 below on conditions and Ch 14 below on offences.
35. S12(3).
36. Supplement to the Financial Mail 'Trucks and Trucking' Oct 21 1983, 16.
37. 1959 (1) SA 535 (N).
38. 1961 (1) SA 703 (D).
39. At 703 H - 704 B.
40. 1911 AD 214.
41. No 32 of 1902.
42. At 230.
43. 1944 CPD 319.
44. At 324.
45. At 325.
46. 1959 (1) 535 (N).
47. At 537F.
48. 1961 (1) SA 703 (D).
49. At 704 D - E.
50. Supra; see too Pietermaritzburg Corporation v. South African Breweries Ltd 1911 AD 501, 517; Receiver of Revenue, Cape v. Cavanagh 1912 AD 459, 463.
51. See s1(2)(f).
52. Ramdaies case supra, 537 A - F.
53. Supplement to the Financial Mail 'Trucks and Trucking' Oct 21 1983, 22 in which a protective application is described as follows: 'One company holding a permit agrees not to oppose a permit application by another, providing that the applicant company specifies goods outside those covered by the other company's permits'; Ramnarain v. Goordeen and Others 1978 (3) SA 916 (D) 918 C - E. The protective application in this case took a slightly different form to the example quoted above.
54. 1978 (3) SA 916 (D).
55. At 919 H - 920 E.
56. It is interesting to note that in auction sales where intending purchasers agree to stifle competition such an agreement amounts to fraud on the seller entitling him to set aside the sale (GRJ Hackwill Mackeurtan's Sale of Goods in South Africa (5 ed) 250).
57. See Ch 3 above.
58. An example of such a modification is the clear distinction between the three types of permits (ss 12, 17, 20), clear statements of the considerations to be taken into account by a board when deciding on the grant of an application for each type of permit (ss 15(1), 18(37), 20(3)) and clarity on the facts or circumstances which an applicant bears the onus of proving in each case (ss 15(2), 18(3), 20(1)). For an example of a case where this lack of clarity was raised see Cape Carriers Ltd v S.A.R. and H and

- Another 1958 (3) SA 482 (C), 485 C - G.
59. See Supplement to the Financial Mail 'Trucks and Trucking' Oct 21 1983, 17; Supplement to the Financial Mail, 'Trucks and Transport' Oct 19 1984, 17.
 60. Supplement to the Sunday Tribune 'Trucks and Commercial Transport' Nov 20 1983. The National Transport Policy Study found that in 1981 - 1982 SATS objected to 30 percent of all applications. (Supplement to the Financial Mail 'Trucks and Transport,' Oct 19 1984, 20).
 61. The Van Breda Commission at para 8.3 and 8.5 raised the problem of empty-leg traffic. Unfortunately it did not deal with the issue except to say that empty-leg traffic occurred because of a lack of co-ordination and: 'In the interest of the national economy, and especially in view of the international fuel position, it would save the South African economy several millions of rands annually if greater co-ordination were to be secured.'
 62. Supplement to the Sunday Tribune ibid.
 63. Supplement to the Financial Mail 'Trucks and Trucking' Oct 21 1983, 21; Supplement to the Financial Mail 'Trucks and Transport' Oct 19 1984, 20.
 64. Supplement to the Financial Mail 'Trucks and Trucking' Oct 21 1983, 22.
 65. Supplement to the Financial Mail 'Trucks and Transport' Oct 19 1984, 17.
 66. 1978 (3) SA 916 (D).
 67. Supplement to the Financial Mail 'Trucks and Trucking' Oct 21 1983, 22; Supplement to the Financial Mail 'Trucks and Transport' Oct 19 1984, 20.
 68. Herbst v Dittmar en 'n Ander 1970 (1) SA (T), 246 A - B.
 69. Supplement to the Financial Mail 'Trucks and Trucking' Oct 21 1983, 22.
 70. See above at
 71. Supplement to the Financial Mail 'Trucks and Trucking' Oct 21 1983, 16.
 72. Para 350.
 73. Page Commission, para 352; see too para 351.
 74. See Ch 2 above at
 75. Supplement to the Financial Mail 'Trucks and Transport' Oct 19 1984, 21.
 76. Quoted in the Supplement to the Financial Mail 'Trucks and Transport' Oct 19 1984, 21.
 77. Ibid.

CHAPTER 8

APPLICATIONS

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[I] APPLICATIONS IN GENERAL

[A] GENERAL

As a general rule a board with territorial jurisdiction must be approached if an applicant requires a permit. The¹ Commission acts as an appellate tribunal but it has power to entertain an application as a tribunal of first instance. It² only makes use of this power in special circumstances.

Before an application for a permit will be considered by a board or the Commission certain formalities must be complied with: the application must be lodged on the appropriate form, the fees prescribed by reg 18(1) must be paid; and clear³ answers must be given to questions relating to the application.

Neither the Act nor the regulations require the publication of information in respect of applications for private or temporary permits. This contrasts with the provisions relating to public permits; prior to dealing with any application for the grant, amendment or transfer of a public permit, a board or the Commission must publish the following particulars in the Government Gazette: (1) the name of the applicant; (2) the place where the applicant intends to conduct business; (3) the nature of the application; (4) the number and types of vehicles which are the subject of the application; and (5) the nature of the proposed road⁴ transportation. The board or the Commission may cause the above information to be published if the application in question concerns the renewal of a permit, an amendment (concerning increases in tariffs) as contemplated by s12A or the amendment⁵ to a permit authorizing the permanent replacement of a vehicles

Permits for public and private transportation may be issued for an indefinite period or for a fixed period.⁶ If a permit has been granted for a fixed period, and on the date of its expiry, an application for its renewal is pending, the permit shall remain in force until the application has been dealt with. Temporary permits⁷ may be granted for transportation on a particular date or in relation to a particular occurrence.⁸ The period of validity for such a permit may not exceed 14 days.⁹

[B] FEES

A fee must be paid by an applicant to allow him to lodge his application. The amount payable is R10.00. The sum is forfeited irrespective of the success or failure of the application.¹⁰

After a permit is granted, renewed or amended it must be issued along with distinguishing marks by the board or the Commission on the prescribed form. Before any permit is issued the fees laid down by reg 18(1) must have been paid.¹¹ The amount payable will depend on the type of permit in question. For a temporary permit to be issued a sum of R5.00 must be paid¹² per motor vehicle for each day upon which the permit is valid. R1.00 is payable if the temporary permit is granted as an interim measure pending an application for the replacement of a vehicle specified in a public permit.¹³ Prior to the issue of a public or private permit the following fees must be paid: R100.00 for the first issue or the renewal of a permit for an indefinite period;¹⁴ R10.00 per transport year for the grant or renewal of a permit for a specified period for each vehicle;¹⁵ R10.00 for the amendment or transfer of a permit¹⁶ and for the

issue of a duplicate permit; ¹⁷ and 50 cents per vehicle if the holder of a permit successfully applies for the amendment of a time-table or tariff rate. ¹⁸

[C] OBJECTIONS

The provisions dealing with objections differ in relation to the types of permits. Therefore they will be dealt with separately. Mention has already been made of the difference regarding the publication of particulars in respect of public permits on the one hand and private and temporary permits on the other. These differences, and those mentioned below, it is submitted, testify to the varying degrees of public interest involved in the three types of permits, and the widely divergent economic activities which they authorize. The type of transportation authorized by a public permit has the most profound and far reaching competitive impact on SATS and potentially carries the highest public policy component. The widest rights of objection and duties of disclosure are therefore to be found in applications for public permits. The socio-economic impact of ancilliary use are not as far reaching, and it is more difficult to justify such large scale interference with the conducting of an ancilliary user's business. Thirdly, temporary permit holders are less of a threat to SATS and less important in the broad socio-economic system because the life of the permit is short.

(1) **Public Permits**

It has been explained above that before a board or the Commission may consider an application it must, in certain circumstances, cause to be published a number of particulars concerning that application. In other situations it has a discretion as to whether it will do so or not.¹⁹ This is intended to allow any interested party the opportunity to object to, or support, an application, to prepare representations and to inspect documents.

Interested parties who wish to submit representations must do so in the manner prescribed by regulation and within the specified time:²⁰ the representations or information must be in writing and must be delivered by hand or sent by registered post to the board or the Commission not later than ten days after the details of the application are published in the Government Gazette.²¹ The representations, if submitted to the Commission, must be in quinquuplicate and if submitted to a board be in quadruplicate.²²

If SATS or a holder of a permit wishes to make representations objecting to an application, full particulars of the objector's existing transport facilities within the relevant area, on the relevant routes or between the relevant points, must be contained in the representation.²³ Such objectors may inspect free of charge, and make copies of, the applicant's application form, as well as other documents submitted by the applicant.²⁴ The board or the Commission may provide an interested person with copies of an application form or other documents on request, provided he has paid the fee prescribed by regulation.²⁵ An applicant is entitled to access to representations either supporting or

opposing his application.

Before disposing of an application the procedure laid down by the Act must be followed. S9(1)(a) provides that the board or the Commission may, in its discretion allow affected or interested parties, or their duly authorized representatives, to appear before it to give evidence or make oral representations, call witnesses and lead evidence and question any witnesses. Locus standi as an objector is specifically granted to municipal councils, city councils or town councils in certain circumstances. These bodies must be given an opportunity to make representations, before a permit is granted authorizing conveyance of persons for reward within the council's area of jurisdiction, or prior to the amendment of a permit which involves changes to 'the points between which or the route or routes upon which the motor vehicle to which the permit relates may be used in road transportation'.²⁷

SATS also has locus standi as an objector in respect of the grant of a permit authorizing the conveyance of persons for reward²⁸ or the amendment of such a permit, if the amendment relates to the alteration of points between which or on which the motor vehicle operates.²⁹ This body may, subject to compliance with the regulations, submit information concerning any new railway service either within the area to which the grant of the permit would relate, or between points which would be affected by a contemplated amendment of an existing permit.³⁰

(2) Private Permits

Interested persons wishing to either support, or object to, an application for a private permit have similar rights to those granted in respect of public permits. In other words, the interested party may inspect the relevant application and related material, make copies of them, and have copies made by the board or the Commission after paying the fee prescribed
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by regulation. Unlike the case of a public permit, when a representation is made regarding an application for a private permit, no time period is stipulated within which the representation need be made. The regulation simply states that any interested party may, prior to the consideration of the application inspect and copy the relevant form and other related documents, and lodge with the Commission or board written representations either supporting, or objecting to, the application. Delivery must be made by hand or by registered
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post.

(3) Temporary Permits

The Act and the regulations are silent on the rights of objectors to applications for temporary permits. The question of whether a person can object to such an application must therefore be answered by reference to the common law. While it is conceded that the public interest in the issue of temporary permits is less important than that in relation to public permits, a perusal of s20(3) reveals that a board or the Commission is required to take into account alternative means by which the applicant can effect the
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conveyance in question. This raises the issue of whether an operator of an existing transportation facility who thinks that it would be reasonable for the applicant to make use of his

services may object to the application.

(a) Would an Objector Have Standing?

Before dealing with the question of whether the statute's silence on objections impliedly withdraws rights of objection, it is necessary to ascertain whether a transport operator in the area would have standing to object to the application. The answer appears to be in the affirmative. Baxter says that in order for a person to have a sufficient interest (and hence standing) he must claim a legal right or recognized interest, that the right or interest is direct and that it is personal to him.³⁴ On these grounds, it is submitted, a transport operator who feels that he could reasonably provide the conveyance in question would have standing.

(b) Arguments for an Interpretation in Favour of Objections

There are three arguments which may be advanced in favour of a right to object to applications for temporary permits. First, the statute has the effect of protecting the interests of existing (lawful) operators.³⁵ The regulatory scheme locks them into the system, makes them subject to its provisions and in return protects them from undue outside competition. They should therefore be given the right to object to any decisions which have the potential of interfering with their 'privileged' position. Secondly, the Act forbids a board or the Commission from granting a temporary permit if in its opinion 'reasonable transportation facilities exist by means of which the persons or goods in respect of which such permit is sought can be conveyed'.³⁶ In order to ascertain whether those facilities exist the tribunal requires evidence. This can be acquired in the cheapest and speediest way by allowing interested parties

to state their cases in the form of objections to the
application.³⁷ Thirdly, the cases dealing with the review of
decisions of boards to grant temporary permits have all
appeared to accept the standing of the parties opposing the
decision.³⁸ If they had standing in review proceedings,
surely they had standing to object prior to the granting of
the permit.³⁹

(c) Arguments Against an Interpretation in Favour of
Objections

The strongest argument against the right to object is that
the legislature has expressly granted the right in respect of
public and private permits but is silent as regards temporary
permits. It is therefore to be presumed that the right has
not been granted in terms of the maxim expressio unius est
exclusio alterius.⁴⁰ A second argument is that the nature of
temporary permits are such that the time factor is of great
importance. Because objections would be time consuming the
right to object cannot be inferred. Thirdly, it might be
contended that because there is no duty on the board or the
Commission to publish details of applications for temporary
permits, there is no right to object. This contention rests
on the assertion that the primary purpose of the duty to
publish particulars is to facilitate objections.⁴¹

(d) Conclusion

A tentative answer to the question posed above may be made
with reference to the practice of boards. They treat
applications for temporary permits in the same way as
applications for private permits i.e. they allow objectors to
make representations but do not publish particulars prior to
the application being heard. Boards will, if the nature of

the application appears to demand it, notify at least the largest operators in the area. This policy is subject to one common-sense limitation: if the application is of an urgent nature the operators of existing services will not be notified. For the rest the onus lies on persons claiming to have an interest to familiarize themselves with the board's agenda, as they would have to do in order to object to an application for a private permit.

It would appear therefore that objectors to temporary permits have standing to make representations simply through the process of board practice. To strengthen further the argument that they have a right to object, the fact must be pointed to that parties have often taken decisions on review when boards have issued temporary permits without having to face objections to their standing.⁴² The above would tend to point away from an interpretation of the Act in which effect is given to the maxim *expressio unius est exclusio alterius*.

[D] WHO IS AN INTERESTED PARTY?

(1) The Method of Determining Who is an Interested Party

Baxter makes the following observation regarding the right to participate in the procedures of administrative tribunals:⁴³

'The range of participants who may appear before a tribunal is usually delimited in rather vague terms by the relevant statute. For example, persons "affected" by the decision and persons "interested" in the decision are usually said to be entitled to appear and call witnesses. In practice this usually includes applicants for licenses, for example, and objectors to the application; but sometimes the right of appearance is not certain. When such provisions have been interpreted in court, the courts have tended to treat the "standing" of an individual before a tribunal in the same way as they have applied the requirement of locus standi in respect of applications for judicial

review, and they have evaluated his right of appearance accordingly.'

The Road Transportation Act makes use of similar terminology. S9(1) says that a board or the Commission may allow 'any person affected by or interested in' a matter to appear before it give evidence, make oral representations, call witnesses, lead evidence and cross examine witnesses. The case of Polikor Investments (Pty) Ltd v Chairman, Local Road Transportation Board, Cape Town and Others ⁴⁴ dealt with the interpretation of these provisions, the rights of an objector to the grant of a private permit being in issue.

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In the Polikor case, the applicant had been granted public permits for the conveyance of goods. It had subsequently agreed to transport goods belonging to the third respondent. At a later stage and despite this contract, the third respondent applied for, and was granted, private permits so that he could undertake his own transportation. The applicant had communicated its opposition to the application. When it became aware of the fact that the permits had been granted it appealed to the Commission. It was argued that the proceedings before the board had been irregular in that the applicant had not been given notice of the application and had thus been denied a hearing. This objection was overruled and the applicant sought an order setting aside the decisions of the board and the Commission.

The court (per Grosskopf J) held that before granting a private permit, the board must (in terms of s18(3)) take two considerations into account: first, whether the applicant carries on the industry, trade or business for which the application is made at the place or places specified; and,

secondly, whether it would be unreasonable to expect the applicant to make use of the existing railway service for the conveyance of the goods in question. ⁴⁶

The learned judge decided on the basis of s18(3) that the Act only contemplated that the interests of SATS should be taken into account when considering an application for a private permit to convey goods. Therefore the adequacy of the service provided by other carriers, such as the applicant, need not be taken into account. Grosskopf J went on to add: ⁴⁷

'This interpretation seems to follow from the terms of the legislation itself. Moreover it seems to me to be the most reasonable one in the circumstances. On general principles it does not seem unreasonable to allow an industrialist, trader or businessman to convey, in the ordinary course of his business, his own goods in his own vehicles on public roads. Where the Act limits this liberty, it should in my view be interpreted strictly.'

The second question to be decided was whether a right to be heard could be read into the Act by virtue of the prejudice suffered by Polikor Investments. In this regard Grosskopf J began by pointing out that Polikor's own permits remained valid and that it had a contract with the third respondent which, if valid, could be relied on. It would thus not suffer any pecuniary prejudice. The only prejudice suffered would be the loss of a de facto monopoly, which was not a matter of legal right. In other words, its permits did not expressly or impliedly indicate that no competing permits would be granted.

Consequently, because the applicant was not a person contemplated by s18(3) as someone whose interests must be taken into account, and that its interest in the granting of

the permits was not sufficient, there was no obligation on the part of the board to give it notice of the hearing or a hearing.⁴⁸ The learned judge stated obiter that he was inclined to the view that Polikor was not an interested party for the purposes of s18(2) either. Therefore the board was not obliged to allow it to inspect documents or make⁴⁹ representations.

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The method adopted in the Polikor case to determine who is an interested party, and therefore entitled to object and make representations, is a test with two steps: the first issue is whether the Act, in setting out the factors to be taken into account in the decision-making process, contemplated the person claiming standing; the second issue is whether that person, apart from the provisions of the Act, has a sufficient interest. The common law principles on⁵¹ standing apply to the second leg of the test. It may be observed that in most cases, if a purported objector falls outside the scope of the first leg, he will also fall outside the scope of the second.

(2) An Application of the Polikor Test to Public and Temporary Permits

(a) Public Permits

While the factors taken into consideration in the Polikor⁵² case only apply to private permits because the Act itself restricts the persons whose interests must be taken into account, the test for standing as an objector to the grant of a public permit is a wider one. S15(1) of the Act lays down matters to be taken into account by a board or the Commission when dealing with an application for the grant of a public permit. These factors include, inter alia, the necessity or

desirability of the transport in the public interest, the requirements of the public, the available transport facilities, economy in the use of petroleum fuel, justifications for the consumption of fuel, planned or contemplated railway services, the co-ordination of all forms of transportation and the ability of the applicant to provide a satisfactory service. ⁵³ It will be noticed that the interests of the public generally are more prominent in an enquiry into the granting or refusing of a public permit. This necessarily means that a greater number of people must be able to object to or support applications than where a private permit is considered. The issues differ and the interests of the public are more directly affected. So in Roberts v Chairman, Local Road Transportation Board and Another (1), ⁵⁴ where City Tramways Ltd had applied for an amendment to its permits to authorize an increased tariff, Roberts had standing by virtue of the fact that he was a user of the bus service. Friedman J dealt with this issue as ⁵⁵ follows:

'Any person who has been adversely affected by this premature decision of the Board - has locus standi to apply to this court to set aside the Board's decision. Applicant as a user of the buses has been so affected in the sense that he is obliged to pay higher bus fares. He is therefore entitled to approach this Court for appropriate relief.'

The learned judge went on to hold that actual prejudice did not have to be proved but that potential prejudice was ⁵⁶ sufficient to give an applicant standing. In conclusion, the following points may be made regarding standing to object to, or make representations regarding, applications for public permits: (i) standing to make representations is

expressly granted to municipal councils, city councils and
town councils as well as SATS in defined situations; (ii)
the provisions of s15(1), which detail the matters to be
taken into consideration by a board or the Commission, point
to interests which may be affected by the grant of an
application. If a would be objector can show that he has an
interest in terms of this section, he will have standing. In
other words he must establish that he falls into a group of
persons which was contemplated by the legislature in the
framing of s15(1); (iii) if the would-be objector is
unable to establish that he falls within any of the groups
mentioned in (i) or (ii), above, he may nonetheless be
entitled to standing: he would have to prove that he has a
sufficient interest notwithstanding the fact that his case is
not expressly covered by the legislation. To do so he would
have to establish a legal right or recognized interest, that
the right or interest is direct and it is personal to him.
Because of the fairly wide set of interests which s15(1)
covers it would be difficult to conceive of a situation in
which standing is established in this way.

(b) Temporary Permits

The problem of whether anyone may object to a temporary
permit application has been dealt with above. If it is
accepted that some persons may have standing as objectors,
the test as laid down in the Polikor case may be applied.
On this basis it is submitted that any operator in the area
in which the proposed conveyance is to take place will have
standing. The reason for this submission is that the Act
directs a board or the Commission to take into account
existing transportation facilities. In addition, if a person

who is not an operator contemplated by the section can establish a sufficient interest he will be able to claim standing to make representations or to object.

[II] APPLICATIONS: THE HEARING

The different economic and social functions which public, private and temporary permits serve have been discussed above. It is clear that in enacting the Road Transportation Act the legislature had these distinctions in mind: a glance at the relevant sections of the Act reveal that the substantive decision-making processes bear little resemblance to each other. The widest public interest is present in the case of applications for public permits, and this is reflected by the complex machinery of s15. The relative simplicity of ss18 and 20 contrast sharply with that section.

[A] PUBLIC PERMITS

The process of applying for a public permit may be divided into two parts: ⁶³ first, certain facts must be proved by the applicant in order to make himself eligible for the grant of a permit; secondly, the board or the Commission must take a number of factors into account when making the decision as to whether to grant or refuse the application. In the result the applicant must clear the first hurdle before the board or the Commission is competent to exercise its discretion either for or against the application. These two processes will be discussed separately below.

(1) **Facts Which the Applicant Bears the Onus of Proving**

When no transportation facilities exist in an area or over a route, an applicant who wishes to provide a service has a relatively simple task. He bears the onus of proving two

things: that there is a need for a transportation facility as contemplated by the application and that he has the ability to provide the service in a manner satisfactory to the public.⁶⁴ The task of the operator who wishes to compete with existing services is more demanding. He bears the onus of proving the following: that the existing facilities are not satisfactory and sufficient to meet the requirements of the public that will be affected;⁶⁵ that he has the ability to provide a satisfactory service;⁶⁶ and either that the tariffs for existing facilities are unreasonable (SATS tariffs, however, are deemed to be reasonable),⁶⁷ that it will be expedient in the public interest to grant the permit to the applicant,⁶⁸ or that he belongs to the same class (i.e. race) as the majority of the persons to be served and that it is in their interests to grant the permit to the applicant.⁶⁹

In its original form s15(2) placed the onus on an applicant, when a transportation facility already existed, to prove:

- '(i) such existing transportation facilities are not satisfactory and sufficient to meet the transportation requirements of the public in that area or along that route or between those points; or
- (ii) the tariff at which payment for such existing transportation facilities is to be made is unreasonable: Provided that railway tariffs shall, for the purposes of this section, be deemed to be reasonable; or
- (iii) having regard to the circumstances, it will be expedient in the public interest to grant him the permit; or
- (iv) he belongs to the same class as the majority of the persons to be served by the transportation service for which the permit is sought, and that it is in the interest of such persons desirable to grant him the permit; and
- (v) he has the ability to provide in a manner satisfactory to the public the transportation for which the permit is sought'

This section was interpreted in the leading case of WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others.⁷⁰ The facts of the case were as follows: the applicant had unsuccessfully applied for the grant of permits authorizing it to transport roof bolts to mines. Evidence was led to show that storage of the bolts or more than the minimum of handling could lead to damage, which in turn could impair safety in the mines in which the bolts were used. In addition, it was impossible for the mines to assess their needs in advance, so a speedy service to the shaft was necessary. The appellant provided such a service while the Railways Administration, who opposed the application, did not. Instead, it loaded at a factory or required the factory to transport the goods to a siding where they were loaded onto a train. They were off-loaded at the siding nearest the mine requiring the bolts. The mine was required to collect the goods and convey them to the shaft. The mines were therefore bound to the time-tables of trains in the area: if no train was due when roof bolts were needed production would either have to stop or, alternatively, continue in dangerous circumstances.

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In the court a quo Van Reenen J held that paragraphs (i) to (v) of s15(2)(a) should be read conjunctively. In other words the 'or' that appears at the end of each paragraph should be read as 'and'. An applicant wishing to compete in an area or over a route would, on this interpretation, be required to prove five things. The first difficulty in this argument lies, it is submitted, in s15(2)(a)(ii): an applicant is required to prove that tariffs for existing transport are unreasonable, but the tariff charged by SATS is deemed to be

reasonable. On Van Reenen J's interpretation, no applicant can succeed when a railway service exists.

In the Appellate Division, Kotze JA (and an unanimous court) rejected the construction adopted by the court a quo for the following reasons:

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'That conclusion rests on an interpretation of s15(2)(a) with which I cannot agree, viz that paras (i), (ii), (iii) and (iv) of s15(2)(a) are to be read conjunctively. No glaring absurdity or other compelling reason for disregarding the ordinary meaning of language suggests itself for construing "or" conjunctively in the several places where it occurs in s15(2)(a). On the contrary, there are weighty considerations which, in my view, point to an intention to attribute to the word "or" its normal meaning rather than an intention to treat "and" as a substitute for "or". The first consideration is that a conjunctive interpretation would necessarily require proof of paras (ii) and (iv) in every case whereas these paragraphs concern issues which may often be irrelevant. The second consideration is this: in contradistinction to the use of "or" between para (i)-(iv) the word "and" links para (i)-(iv) with para (v) - a clear indication that the Legislature had no intention of deviating from the ordinary meaning of two words which are in daily use.'

The third reason advanced by the learned judge of appeal was that s15 should be regarded as a whole. In terms of s15(1) the board must take a number of factors into account. All of these must be considered. This envisages that the public should have a satisfactory service and if this is not being provided a service which meets this criterion should, if available, be given to the public. Thus a permit should not be refused if the refusal has the effect of protecting an unsatisfactory service and disrupting the business of the public.

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The learned judge of appeal concluded:

'It is in the light of ss(1) that ss(2)(a) must be considered. It provides in ss(2)(a)(i) that where there is in existence a service there is an onus on the applicant for a public permit. He must show that the existing service in the relevant area etc is not satisfactory and sufficient. If one has regard to the

essential requirements of s15(1) it is obvious that if an applicant does show that the existing service is not satisfactory and sufficient and (my italics) that he can provide a service "satisfactory to the public" he should (unless there are other reasons to the contrary) be granted the permit. The same considerations apply when one has regard to s15(2)(a)(iii). It provides that an applicant must discharge the onus of showing that in all the circumstances "it will be expedient in the public interest to grant him the permit." It follows, as in the case of s15(2)(a)(i), that if he does he should be granted a permit.'

With respect, the reasoning of Kotze JA seems sound and, it is submitted, reflects the intention of the legislature. The aim of the Act is to provide for control of certain forms of road transportation⁷⁵ and not simply to prevent all competition.

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The Road Transportation Amendment Act altered s15(2)(a) in form but not in substance. The amendment simply re-arranged the matters which an applicant bears the onus of proving. It deleted the old s15(2)(a)(v) and replaced it, in its entirety, as s15(2)(a)(iA) below s15(2)(a)(i). The remainder is left untouched. Boards and the Commission took the subsection to mean that an applicant must prove that existing transportation facilities are not satisfactory and that he has the ability to provide facilities in a satisfactory manner, in addition to one of the remaining three

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requirements. In Ratner and Collett Agencies (Pty) Ltd v Chairman, National Transport Commission and Others,⁷⁸ Le Roux J accepted this to be a correct interpretation. The learned judge held that it 'does not seem as though the effect of the sub-section has been materially altered from that considered by Kotze JA in the Greyling and Erasmus case'. More recently another interpretation has been given to s15(2). In Olgar v Chairman, National Transport Commission

'...requires proof of all the circumstances specified in sub-paragraphs (ii), (iA) and (ii) taken together or, as an alternative, proof of those prescribed by sub-paragraph (iii), alone or, as a further alternative, proof of those mentioned only in sub-paragraph (iv).'

The learned judge opted for this interpretation because he said, both it and the one favoured by Le Roux J are equally plausible but the former is less onerous on those wishing to seek permission to do business as carriers. ⁸¹

(2) **Factors to be Taken into Account by the Board or the Commission**

S15(1) contains thirteen factors which a board or the Commission must consider prior to granting or refusing an application for a public permit. The importance of the section in the decision-making process was emphasized by ⁸² Kotze JA in the Greyling and Erasmus case:

'Each and every one of these matters must be considered. A study of the list shows that not only must existing facilities be considered and co-ordinated but a board must also consider the requirements of the public in the particular area, over the relevant routes and between the relevant points; the extent to which the transport is necessary or desirable; the co-ordination of transportation on an economically sound basis with due regard to the public interest; the ability of the applicant to provide transportation in a manner satisfactory to the public.'

All of the factors will not be discussed. Instead some of the more important considerations will be examined in relation to their interpretation by the courts.

(a) The Public Interest

In Cape Carriers Pty Ltd v South African Railways and Harbours and Another,⁸³ the public interest requirement was the major issue. Cape Carriers had entered into a contract, reliant on the granting of permits, to convey asbestos cement pipes from Cape Town to Port Elizabeth. Despite the objection of the first respondent, the permits were granted. On appeal to the Commission, the boards decision was reversed. In review proceedings, evidence was led to the effect that a railway service existed between the two centres, the cost of such conveyance being 22 300 pounds. The cost of a shipping service was 11 166 pounds while the cost would have been 12 250 pounds if the appellant conveyed the pipes by road. Beyers J held that in the absence of evidence of an incorrect motive on the part of the second respondent the only ground open to the applicant was a failure by the Commission to apply the provisions of the Act relevant to the case. The learned judge⁸⁴ held:

'It appears to me that the question to which second respondent was by law obliged to apply itself was whether, having regard to all the circumstances of the case and having regard in the widest possible terms to national and public interest, it would allow applicant to conduct the proposed road carrier transportation or not.'

Beyers J, in deciding that this enquiry had been properly conducted, went on to say that, bearing in mind the fact that the route was serviced by rail and ship, there was no reason⁸⁵ to allow another mode of transport.

The meaning of 'the public interest' was canvassed fully in the case of Herbst v Dittmar en 'n Ander,⁸⁶ in which it was unsuccessfully argued that the protection of existing

services from competition was, per se, in the public interest. The applicant had challenged the validity of a permit granted by a board in excess of its territorial jurisdiction. In addition he sought to claim damages as a result of the first respondent's unlawful transportation activities in the area in which he (the applicant) operated. The rule in Patz v Greene and Co ⁸⁷ was invoked on behalf of the applicant. In terms of this rule if an enactment has prohibited the doing of an act in the interests of a class of persons any member of that class is entitled to compensation from the person who contravened the prohibition, without proof of special damages. It is insufficient for the applicant to show that the prohibition works to the advantage of the class of which he is a member: it must be intended to protect that class.

The applicant argued that the aim of the Act was to create an economically healthy and stable transportation industry and, to achieve this aim, boards were precluded from issuing permits which created competition with existing operations. The intention of the Act, as opposed to one of its consequences, was to protect existing transport businesses, this being in the public interest. The rule in Patz v Greene and Co ⁸⁸ would therefore apply.

Bekker J rejected this argument, holding that the first and fundamental duty of a board is to ensure that the rail and road transportation facilities of the country operate on a sound basis and that the public interest does not suffer any prejudice. ⁸⁹

'Na my mening was dit nie die doel van die Wetgewer om bestaande besighede te beskerm nie. Die enigste oorweging en doel voor oë was om openbare belang te bevorder en soos Murray HR, sê dit is die grondleggende doel van die Wet en die uitskakeling van moontlike kompetisie "is only an element in the former". Dit volg dus dat applikant slegs kan slaag indien hy nou as gewone burger bewys kan lewer dat die onwettige optrede van die respondent hom skade berokken het.'

It is submitted that Bekker J's conclusion is correct. The bar to the grant of a permit when existing facilities operate in its area of authorization is not absolute. If the facilities are not adequate a board would be bound to grant a permit to an operator who can (in its opinion) provide an adequate service. Similarly, the fact that services in an area are adequate does not mean that they cannot be improved. In dealing with these issues the board would have to apply its mind, inter alia, to the public interest which is quite clearly in opposition to the desire of existing operators for protection from competition.

(b) The Requirements of the Public

S15(1)(b) requires a board or the Commission to take into account 'the requirements of the public for transportation within the area or along the route or between the points in or over or between which the applicant proposes to operate'. This section may be distinguished from s15(1)(a) by the fact that while the latter requires consideration of the public interest in the broadest terms, the former narrows down that interest to one particular area.

The most obvious and, no doubt, easiest way of acquiring information as to the requirements of the public would be by means of evidence given during proceedings before a board. Representatives from organizations in an area or acknowledged

leaders in a community are examples of the witnesses who may be able to furnish the necessary information. The case of Port Elizabeth Local Road Transportation Board and Others v ⁹¹ Liesing provides an illustration of another method. The respondent had successfully tendered for a contract to carry mail between two small towns in the Eastern Province. He had been awarded the contract at the expense of one Hydenryck, who had carried the mail for a number of years. The respondent then applied to the board for a permit authorizing him to convey the goods. Hydenryck objected to the application and the board (and later, the Commission) refused Liesing's application.

The most important aspect of the case for present purposes is an obiter dictum dealing with the requirements of the public. The contract between Liesing and the government was entered into, on the latter's behalf, by the Postmaster-General. Munnik J assumed for the purpose of the judgment that the ⁹² Postmaster-General and the public could be equated.

The principle which emerges from this case is that where a contract is entered into between a transport operator and a public official for a service to the public in an area, the choice of operator having been made by the official, it will be assumed that the official's decision represents that of the public. This general statement must, no doubt, be subject to qualification: the official could not be seen as the agent of the public if he acted in a corrupt manner; a proper choice would have to be open to him; and the way in which a tender is awarded would have to be scrutinized. In short, the question as to whether the decision of the public official could be equated with the choice of the public would

depend on the facts of the individual cases.

(c) Existing Facilities and the Conservation of Fuel

S15(1)(c) is a blend of the old and new. The first part of the section directs a board or the Commission to consider the 'existing transportation facilities available to the public'; the latter part, introduced into the Act by the Road Transportation Amendment Act,⁹³ makes the economical use of petroleum fuel resulting from the intended conveyance a relevant consideration.

(i) Existing Transportation Facilities

It is perhaps trite to state that the deciding tribunal must ensure that transportation facilities do in fact exist if a refusal to grant a permit is based on such existence. This, however, was the mistake which the board and the Commission

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made in Liesing's case,⁹⁴ Hydenryck, the conveyor of mail prior to the tender being awarded to Liesing, had a permit for that conveyance. Liesing had the contract but no permit. His application was refused. It was decided that Hydenryck provided an existing facility which the board was required to consider.⁹⁵ Munnik J rejected this by stating that:

'...the grant of a certificate to the respondent could in the particular circumstances of this case never be a grant of a certificate in competition with an existing service, because only one carrier could carry the mail i.e. the carrier who had a contract with the Postmaster-General to do so.'

In Ratner and Collett Agencies (Pty) Ltd v Chairman, National Transport Commission and Others,⁹⁶ it was argued that the Commission had misdirected itself by not taking into account the air service between Durban and Johannesburg. Le Roux J

held that the air service should have been considered in the context of the applicant's express overnight service.

(ii) The Conservation of Fuel

Boards and the Commission must, in dealing with an application for a permit, take into account whether or not there will be a saving in the consumption of petroleum fuel resulting from the proposed transportation. If no saving will be effected any justifications for the use of fuel must be considered.

(d) Co-ordination of Services

In Maharaj v Central Road Transportation Board and Another 97
the duty of a board to consider the co-ordination of all
forms of transportation was in issue. 98 The terminals of a
route which was to be operated by the City Council, were not
connected to existing routes. It crossed two existing routes
and one terminal was within 200 yards of an existing
route. The court held (per Broome and de Wet JJ) that in
these circumstances co-ordination was not impossible.
Passengers on the route could, if it was convenient, connect
up with the other routes which crossed the one authorized, or
walk the 200 yards from the terminal to the route that passed
at that point. In the circumstances the decision of the
board was supportable as it took account of the proper
considerations. S15(5)(b) of the Road Transportation
Act seems to overcome any confusion or doubt created by the
above judgment. It says that 'transportation shall be
deemed to be capable of being co-ordinated with existing
transportation facilities if such transportation is to be
provided to or from a place or area situated on or along a

route, or included in an area, served by such existing transportation facilities'.

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In the Ratner and Collett Agencies case, consideration of the air service was argued on the basis of s15(1)(e): the service should have been considered when the Commission gave attention to the co-ordination of services:

'The various services rendered by the South African Airways, their relative cost and the possible saving to the public should, in my view be investigated and the objections, if any, of the applicant and its clients thereto should be fully investigated and considered before the Commission could be said to have exercised its discretion properly.'

(e) Previous Convictions

The weight to be attached to any previous convictions of the applicant, for offences in terms of the Act, depends on a number of factors e.g. the number of previous convictions, the regularity with which the offences were committed and the severity of the offences. ¹⁰⁰ The mere fact that the applicant has been convicted for road transportation offences is, in itself, insufficient to warrant the refusal of a permit. In Asmal's Bus Service (Pty) Ltd and Others v Local Road ¹⁰¹ Transportation Board and Others an applicant had been convicted six times for overloading buses, not being in possession of certificates of fitness, failing to issue tickets and not operating according to time-table. It had challenged the validity of the grant of permits to the fourth respondent. Miller J held that while the previous convictions and attempts to mislead the board could be taken ¹⁰² into account, they were not decisive.

(f) Representations

Not only must a board or the Commission take into

consideration 'any representations duly submitted in
connection with the application,'¹⁰³ but also any
recommendations made by a committee appointed by the Minister
in terms of s22(h)¹⁰⁴ and any report or document drawn up as a
result of a s3(1)(g) enquiry.¹⁰⁵

It should be noted that if any such representations are made,
a board or the Commission is bound to inform the applicant of
the contents of the representation so that the latter can
challenge or refute any prejudicial evidence. The Asmal's
Bus Service case¹⁰⁶ provides a clear example. The court found
that the real reason for the boards's decision to grant a
permit to the fourth respondent was not the applicant's
unsuitability, either morally or racially. Instead it had
come to its decision after the chairman had had discussions
with a Bantu Affairs Commissioner who had recommended that
the permit be granted to the fourth respondent, who was
African. Miller J's findings on this point appear from the
following extract:¹⁰⁷

'I am prepared to accept that it was not irregular for
the chairman to have discussed the matter with the
Commissioner in private, but having done so and having
come by information which might influence it against
the interests of the applicant, it was the duty of the
Board to disclose such information to the applicants
and to give them an opportunity of dealing with it.'

(g) The Race of the Applicant

When originally enacted, the Motor Carrier Transportation Act
was free of racially discriminatory provisions. The race of
the applicant became relevant when Act 14 of 1955 inserted
s13(2)(i)bis and s13(bis). These provisions are now
contained in s15(1)(j) and s15(3) of the Road Transportation
Act. The former provides that a board or the Commission must

take into account, when dealing with an application 'the class of persons to which the applicant belongs and the class or classes of persons to be served by the transportation services for which such permit is sought'.

The latter provision provides that a board or the Commission may, when dealing with an application for a public permit 'give preference to an applicant who belongs to the same class as the majority of the persons to be served by the transportation service for which a permit is sought'.

(i) The Position Prior to the Amendment

The reason for the inclusion of the racial provisions may be traced to the decision of the Appellate Division in Tayob v Ermelo Local Road Transportation Board.¹⁰⁸ Tayob operated a first class taxi, i.e. one for the conveyance of white people. During the years in which he provided this service he had received no complaints. On applying for a renewal of his permit his application was refused and in its place a permit for a second class taxi (i.e. for the conveyance of blacks) was offered to him. Three white operators had applied for, and were granted, permits for the conveyance of whites. It appeared from the reasons furnished by the board and the Commission (dismissing Tayob's appeal) that the application had been refused in accordance with a policy to grant whites permits to convey whites, and blacks permits to convey blacks. In delivering the unanimous decision of the court,¹⁰⁹ Centlivres CJ held:

'There is no statutory provision to the effect that non-European drivers should cater for non-Europeans and it is common knowledge that many Europeans employ non-European drivers. Moreover to apply the principle that non-European drivers should cater for only non-

Europeans generally and without qualification may result in very great hardship to non-Europeans. For it may well be that the holder of a second class taxi exemption may in certain circumstances find it difficult, if not impossible, to make his taxi service pay, while the holder of a first class exemption may have no difficulty in doing so.'

The learned Chief Justice went on to hold that he could find nothing in the Act which empowered the board or the Commission to act unreasonably, and to refuse the application on the basis of race was unreasonable. The granting of a second class exemption did not cure this defect.¹¹⁰ The court pointed out that the proper approach to be applied was to consider all four applications on merit and, if only three permits were required, to grant them to the three most deserving applicants. In upholding the appeal, Centlivres CJ decided that, in the special circumstances of the case, it would be inappropriate to remit the matter to the board. Instead it ordered the grant of the permit to Tayob.¹¹¹

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Tayob's case was distinguished in Dass v Durban Local Road Transportation Board and Others.¹¹³ Dass, an Indian, operated a bus service to Lamontville which is a African township. He applied for three additional permits for the route from the centre of Durban to the township. At the same time the African Transport Company, whose shareholders were African, applied for permits too. These were granted while those of Dass were refused. It appeared from the reasons given by the board, that the permits were granted to the African Transport Company because it was owned by Africans and the majority of passengers were African. The board believed that the people of Lamontville wished to be conveyed by operators of the same race.

Before the Natal Provincial Division the applicant argued that the board's decisions were ultra vires because they were based solely on the race of the applicant and third respondent. It was argued on behalf of the board that there was nothing to choose between the two applications as far as efficiency, proper running of buses, adequacy of maintenance and service was concerned. It therefore took a number of other factors into account: the third respondent had formed to convey Africans; after riots in 1949 grievances were expressed about Indian operators by African communities; it was obvious that these communities were ill-disposed towards Indian bus owners and wanted their own services; representations by the Durban City Council and the Department of Native Affairs were to the effect that Africans who showed a desire to set up transportation services should be encouraged to do so in the hope that this would satisfy the communities and diminish the risk of further rioting. On the basis of these additional factors the board granted the
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permits to the African Transport Company.

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The applicant relied on Tayob's case as authority for the proposition that, as the Act did not authorize discrimination, the board's decision was ultra vires. De Wet J distinguished that case by pointing out that Tayob was debarred from operating a first class taxi simply because he was an Indian and, in that situation the court was dealing with a multi-racial community. In the present case the issue
116
was different:

'Here we are concerned with a particular location, Lamontville, which is purely a Native Location, which is restricted to Native occupation. It does not seem to me that the Local Board, in considering the suitability of the person who is to operate in that

area, would act unreasonably if it takes into account a recommendation by the public bodies who administer the Location that buses serving the Location should belong to Africans, or, for that matter, if it took into account the views of the people in the Location itself. The differentiation here is brought about objectively, not subjectively. The race of the community that has to be served is a factor that is taken into account, just as is the state of the roads, the density of the population and other features in the particular area which are weighed up when the Board has to decide whether or not a certificate of transportation should be granted.'

The application was accordingly dismissed.

(ii) **The Present Position**

The racial qualification is now part of the Act. No longer is the issue one of reasonableness. The fixed policy, which was held to be invalid in Tayob's case,¹¹⁷ is now part of the law. This fact has not had the effect of removing problems in relation to the application of ss15(1)(j) and 15(3).

In National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd¹¹⁸ the respondent and the second appellant, the Pietermaritzburg City Council, had both applied for permits. These permits were to authorize the conveyance of passengers along a route from Pietermaritzburg to Newholme, a residential complex within an Indian Group Area. The applications were reciprocally opposed. One of the arguments put forward on behalf of the respondent was that, as an Indian company, it should be given preference in terms of s13(3)(bis) (now s15(3)) of the Motor Carrier Transportation Act.

Holmes JA pointed out that the weight to be accorded to the discretion granted by s13(3)(bis) varies according to the circumstances of each case. If, for instance, two applicants of different races applied for a permit to convey persons and

both were ably qualified to do so, the board could in its discretion prefer the operator of the same race as the potential passengers.¹¹⁹ The learned judge of appeal went on to say that when one of the applicants is a Council or local authority, the situation is different. Such a body is expected to provide transportation services for all of its inhabitants and to all areas within its jurisdiction where a service is required. Consequently Holmes JA concluded that:¹²⁰

'in the context of transportation therefore, it cannot be said that the Council, which is a corporate body, belongs to any one particular class. And it gathers beneath its transportation wing all classes throughout the entire municipality. In these circumstances the Commission, or local board, would be entitled, in its discretion, to give little weight to any preference under s13(2)(bis). To put it another way, any preference in favour of the Chetty company might well, in the discretion of the Commission, have lost much of its force in the circumstances of the present case, bearing in mind also what is said in the following paragraph hereof.'

It is submitted that a proper construction of ss15(1)(j) and 15(3) is that the board or the Commission must take the racial factor into account along with the other factors mentioned in s15(1).¹²¹ Then, having done so, s15(3) grants it a discretion to give this factor as much weight as the circumstances of the case call for.¹²² In this regard the overriding considerations should be the efficiency of the service and the public interest.¹²³ If there are no special circumstances which favour one applicant above another the discretion to grant the permit to the operator 'racially most suitable' may be employed.

[B] PRIVATE PERMITS

When a private permit is applied for the enquiry is not as comprehensive as the enquiry under s15. The reasons for this

difference are that the public interest is not as directly affected and that the transportation in question is on 'own account'. The ancilliary user therefore is required to prove a lesser number of facts than the professional carrier.

In order to be in a position to receive favourable consideration, an applicant for a private permit must discharge the onus of proving two things: first, that he carries on the industry, trade or business for which the permit is sought at the address or addresses specified, and secondly, that it would be unreasonable for him to make use of any available railway service, despite the fact that railway tariffs are deemed to be reasonable. The phrase 'available railway service', for the purpose of s18(3)(b), was interpreted in Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg, and Another. The applicant had applied for private permits to convey sugar from its mill to its customers. The nearest railway station capable of handling the freight was 105 kilometres away. It argued that the railway service was not available to it because of the distance and because it fell outside of the 80 kilometre exclusion contained in s1(2)(y). Coetzee J, in the court a quo rejected this contention, holding that the service was available even though it was not readily available and permits would have to be granted to the applicant to enable it to make use of the service. On appeal, however, Miller JA held that for the railway service to be 'available' to an ancilliary user it must lie within the 80 kilometre radius contemplated by s1(2)(y).

Once the onus has been discharged the board or the Commission only has to take one consideration into account: whether the promotion of economy in the use of petroleum fuel will be served by the grant of the permit.

[C] TEMPORARY PERMITS

Temporary permits are at the bottom in the descending order of public interest. The provisions relating to the grant of these permits are short and simple: a board or the Commission is debarred from making a grant if reasonable transportation facilities exist by means of which the persons or goods in question may be conveyed, and if no justification exists for the proposed use of petroleum fuel. The onus of proving that the proposed transportation is necessary is cast upon the applicant.

[IIII] THE DISPOSAL OF APPLICATIONS AND THE ISSUING OF PERMITS

[A] THE DISPOSAL OF APPLICATIONS

A board or the Commission has power to receive and consider applications for the grant, renewal, amendment or transfer of public permits. These powers are limited when an application is made for a private or temporary permit: in the case of the former, a board or the Commission may receive and consider applications for the grant, renewal or amendment of such a permit, while in the case of the latter, the tribunal is simply empowered to 'receive and consider any application for a temporary road carrier permit'. It may then grant the application in full, in part, in full or in part but subject to conditions or requirements, or it may refuse the application.

While a board or the Commission must receive and consider applications for public permits generally, it may refuse to do so if an application has the same, or substantially the same object as an unsuccessful application made less than six months previously. No appeal will lie to the Commission in relation to a board acting in this manner but, if it is submitted, the decision will be reviewable. If two boards have joint jurisdiction and one of them refuses an application, that refusal will not act as a bar to a similar or substantially similar application within six months.

The provisions relating to applications for public and private permits correspond in respect of two aspects: first if an application is made for the renewal of a permit granted for a fixed period, it will not be considered if the application (and the prescribed fee) has not been received before the expiry date of the permit; secondly, an application will not be considered if a public or private permit has been issued to a person other than the applicant, in respect of the vehicle to which the application refers.

Two further provisions apply to the disposal of applications for public permits. In the first place, a board or the Commission is able to refuse to deal with an application for the grant, amendment or transfer of a permit if the fees prescribed by regulation have not been paid. This rule applies not only to applicants but also to persons wishing to submit representations objecting to the application. It is submitted that the deciding body has a discretion as to whether to refuse to entertain the application or representation. This provision does not apply to applications for the renewal of a permit, which is dealt with

in s13(2)(bB). The final provision applies to the grant, renewal, amendment or transfer of a permit. It gives a board or the Commission a discretion as to whether to entertain such an application if the application form is not completed in full in accordance with the regulations. ¹⁴²

[B] THE ISSUING OF PERMITS

(1) **General**

Ss13, 18 and 20 of the Act confer powers on a board or the Commission to grant permits (either in full, in part or in full or in part, but subject to conditions or requirements) while s21 confers the power to issue permits. Clearly a ¹⁴³ distinction between granting and issuing is envisaged:

'Section 5(1)(c) (now s3(1)(c)) envisages that the act of granting a certificate is a separate act from that of issuing it. The Board cannot delegate the discretion which is vested in it of granting a certificate; accordingly it cannot order a local board to grant and issue a certificate for and on its behalf. But where the Board has already granted a certificate its issue is a matter of a purely mechanical nature which it may delegate to a local board under sub-section 2, or to any duly authorized officer.'

The maxim delegatus non delegare potest clearly has no application when the power to issue a permit is delegated by ¹⁴⁴ the Commission.

(2) **Facts Which Must Exist Prior to the Issuing of a Permit**

While the issuing of a permit does not involve the exercise of a discretion, it may only be done after certain facts are found to be present. Before being in a position to exercise this power (and after a permit has been granted), the issuing body must satisfy itself as to two facts: first, that the vehicle involved is suitable for the class of road ¹⁴⁵ transportation for which it is to be used and secondly, that

a certificate of fitness, issued by the licensing and registration body of the appropriate province, has been submitted to it.¹⁴⁶

In the case of Cewana v Matiso t/a Matiso Bros and Others¹⁴⁷ it was contended that a board had issued permits without satisfying itself as to the roadworthiness of the vehicles to which the permits related and that the issuing was therefore ultra vires. The case was decided in terms of the provisions of the Motor Carrier Transportation Act which then applied in the Transkei. The relevant section, s9(7), said that a board or the Commission 'shall refuse to grant, renew, amend or transfer any motor carrier certificate or exemption...if it is not satisfied that the motor vehicle in respect of which the certificate or exemption is sought is roadworthy...'

Munnik CJ held that while the Act did not specify how the board was to satisfy itself of the roadworthiness of vehicles, it had adopted the method of requiring the production of certificates of fitness. (This method is now contained in s21(2)(b) of the Road Transportation Act). The learned Chief Justice concluded that the 'provisions of s9(7) are peremptory and therefore the Local Board, far from being entitled to issue the renewal, was in the circumstances bound to refuse it'.¹⁴⁸

A certificate of fitness must be lodged in respect of each vehicle for which a permit has been granted. If the original is not handed to the board or the Commission then a copy or photocopy, certified as a true copy by a Commissioner of Oaths may be handed in. Delivery must be made by hand or

registered mail and this requirement must be complied with not later than 60 days after the applicant has been informed of the grant.¹⁴⁹ The date of issue of the certificate may not be more than 180 days before the date on which the permit was granted.¹⁵⁰ The period within which the certificate of fitness may be lodged can be extended by the board or the Commission following a request by the applicant.¹⁵¹

(3) Information Which a Permit Must Contain

Any permit issued by a board or the Commission must contain certain information. This includes the name and address of the holder and, if the holder carries on any road transportation business, then his business address must be specified. If the holder has been granted a private permit the following must appear in addition to his name: the address at which the industry, trade or business, in respect of which the permit was granted, is carried on, or a description of the place or places where it is carried on.¹⁵² If the permit is granted for a fixed period, this period must be specified on the document when issued.¹⁵³ Information about the vehicle must be included. This includes the registration number, make, the year of manufacture, the type of and seating capacity of the vehicle or its carrying capacity.¹⁵⁴ If tariffs have been approved or laid down by the board or the Commission, the manner in which they are to be published or exhibited must be laid down.¹⁵⁵ In addition, the nature or class of road transportation which is authorized must be specified as well as the class or classes of persons which may be conveyed. If the permit contains authority to convey goods, then the class or classes of goods must be stated as

well as the class or classes of persons whose goods may be conveyed. These factors are determined by the board or the Commission in the exercise of the body's discretion when granting the permit. Similarly any permit must show the territorial area to which it applies either by specifying routes or areas. Restrictions and conditions in respect of these routes or areas must also appear.

(4) Conclusion

In conclusion it will be noted that when a board or the Commission decides on whether to grant, renew, amend or transfer a permit it has a wide discretion limited only by the factors the Act requires it to take into account and the principle of legality. When a permit is to be issued, certain jurisdictional facts must exist as a condition precedent for the issue of the permit. No discretion exists in this case. The board or the Commission must satisfy itself as to the existence of the facts in accordance with s21 and with the guidance of the regulations. On review a court must ensure that these statutory conditions, which limit the extent of the issuing body's powers, have been complied with. Non compliance will invalidate the purported exercise of power: to allow its decision to stand would be to allow it, by its own error, to give itself powers which were never conferred upon it.

FOOTNOTES_____

1. Herbst v Dittmar en 'n Ander 1970(1) SA 238(T); see too Ch 5 above at 105.
2. See Ch 5 above at 96.
3. Reg 3(1)(public permits); reg 7(1)(private permits); reg 9(1)(temporary permits).
4. S14(1)(a) read with reg 3(1A).
5. S14(1)(b).
6. S16(1)(public permits); s19(1)(private permits).

7. S16(2)(public permits); s19(2)(private permits).
8. S20.
9. S20(4).
10. Reg 18(1).
11. Reg 3(5)(public permits); reg 7(4)(private permits); reg 9(3)(temporary permits).
12. Reg 18(3)(a)(i).
13. Reg 18(3)(a)(ii).
14. Reg 18(3)(b)(i).
15. Reg 18(3)(b)(ii).
16. Reg 18(3)(b)(iii).
17. Reg 18(3)(b)(iv).
18. Reg 18(3)(b)(v).
19. A board or the Commission will have a discretion as to whether it will publish particulars in the following circumstances; when the application is for the renewal of a public permit (s14(1)(b)(i)); when the application is for the amendment of a permit as contemplated by s12A i.e. when tariffs are increased as a result of a rise in the cost of fuel (s14(1)(b)(ii)); when the application is for the amendment of a public permit authorizing the permanent replacement of a vehicle specified in the permit (s14(1)(b)(iii)).
20. S14(2).
21. Reg 4(1).
22. Reg 4(2).
23. Reg 4(3).
24. S14(2)(a).
25. S14(2)(b).
26. S14(2A).
27. S14(3).
28. S14(4)(a).
29. S14(4)(b).
30. S14(4).
31. s18(2).
32. Reg 8.
33. S20(3).
34. Baxter, 652.
35. See Herbst v Dittmar en 'n Ander 1970(1) SA 238(T).
36. S20(3).
37. It is acknowledged that other means exist by which the reasonableness or otherwise of facilities may be ascertained.
38. See for example Marinpine Transport (Pty) Ltd v Local Road Transportation Board, Pietermaritzburg and Others 1984(1) SA 230(N); South African Transport Services v Chairman, Port Elizabeth Local Road Transportation Board and Others 1984(1) SA 236 (SE).
39. Baxter, 251; see too Rauties Transport (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Johannesburg en n Ander 1983 (4) SA 146(W)
40. See H.R. Hahlo and E. Kahn, The South African Legal System and its Background, 191.
The expressio unius maxim represents an accepted technique of interpretation by implication, but it clearly does not apply if contrary indicia can be found in the instrument.
41. It should be noted that no duty exists to publish particulars concerning private permits; such a duty only has limited application in respect of public

- permits, although the board or the Commission has a discretion as to whether to publish or not in other situations. see 175 above.
42. See Marinpine Transport (Pty) Ltd v Local Road Transportation Board, Pietermaritzburg and Others 1984(1) SA 230(N); South African Transport Services v Chairman, Port Elizabeth Local Road Transportation Board and Others 1984(1) SA 236 (SE).
 43. Baxter, 250-1.
 44. 1981(4) SA 782(C); see too Fraser's (OVS) Bpk. v Voorsitter, Nasionale Vervoerkommissie en 'n Ander TPD 29 August 1984 (case 17853) unreported, Sonnex (Edms) Bpk v Voorsitter Nasionale Vervoerkommissie en 'n Ander SWA 6 September 1984(case 111/84) unreported.
 45. Supra.
 46. On s18(3) see below at 207.
 47. Polikor Investments supra, 787 H.
 48. At 789 B.
 49. At 789 C.
 50. Supra.
 51. Baxter, 650-8.
 52. Supra.
 53. Other relevant factors are any previous convictions of the applicant under the Act, any restrictions on the use of motor vehicles, imposed by law, in a relevant area or on a relevant route, any representations, the class (i.e. race) of the applicant and that of his potential customers or passengers, any recommendations made by a committee appointed under s2(h), any report or document drawn up as a result of an enquiry under s3(1)(g) or any other factors which are considered relevant by the Commission or board.
 54. 1980 (2) SA 472 (C).
 55. Roberts(1) supra 477H.
 56. Roberts(1) supra 480H.
 57. s14(3), s14(4).
 58. Polikor Investments supra 787H.
 59. Polikor Investments supra 789B.
 60. Baxter, 652.
 61. 1981 (4) SA 782 (C).
 62. S20(3).
 63. S15.
 64. S15(2)(b).
 65. S15(2)(a)(i).
 66. S15(2)(a)(iA).
 67. S15(2)(a)(ii).
 68. S15(2)(a)(iii).
 69. S15(2)(a)(iv).
 70. 1982 (4) SA 427 (A); For the position under the Motor Carrier Transportation Act see Johannesburg Local Road Board and Others v David Morton Transport (Pty) Ltd 1976 (1)SA 887 (A) 893 B-D.
 71. WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others TPD 22 May 1980 (case 2029/79) unreported.
 72. WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others 1982 (4) SA 427(A), 444 C-E.
 73. At 444F-445A.
 74. At 445-C.
 75. Herbst v Dittmar en 'n Ander 1970 (1) SA 238(T).

76. No 91 of 1980.
77. The section now reads: 'When an applicant applies for a public permit to undertake road transportation within an area or over a route or between two or more points already served by existing transportation facilities, the onus shall be upon the applicant of proving that-
- (i) such existing transportation facilities are not satisfactory and sufficient to meet the transportation requirements of the public in that area or along that route or between those points; and
 - (iA) he has the ability to provide in a manner satisfactory to the public the transportation for which the permit is sought; and
 - (ii) the tariff at which payment for such existing transportation facilities is to be made is unreasonable: Provided that railway tariffs shall, for the purposes of this section, be deemed to be reasonable; or
 - (iii) having regard to the circumstances, it will be expedient in the public interest to grant him the permit; or
 - (iv) he belongs to the same class as the majority of the persons to be served by the transportation service for which the permit is sought, and that it is in the interests of such persons desirable to grant him the permit.'
78. TPD 20 March 1985 (case 22195/83) unreported; the same interpretation was placed on the sub-section in Omega Freight Services (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en Andere 1984(3) SA 402(C), 405G-H.
79. 1985(3) SA 1030(D).
80. At 1031H.
81. At 1037 J-1038A.
82. 1982(4) SA 427A, 444F-H.
83. 1953(3) SA 482(C); the case involved an application for temporary permits, but under the old Act, no special provision was made for temporary permits. The board was required to deal with them as if they were public permits.
84. At 487C.
85. At 487E.
86. 1970(1) SA 238(T).
87. 1907 TS 427.
88. Herbst v Dittmar supra 244E.
89. Herbst v Dittmar supra 246 A-B.
90. See on similar issues Swift Transport Services (Pty) Ltd and Another v Road Service Board and Another 1956(2) SA 514(SR) 520; Clan Transport Co (Pty) Ltd v Road Services Board 1956(4) SA 26(SR) 32.
91. 1968(3) SA 243(E).
92. At 245F.
93. No 91 of 1980.
94. Supra.
95. Liesing's case supra 245G-H.
96. TPD 20 March 1985 (case 22195/83) unreported.
97. 1948 1 PH K 42 N.
98. Motor Carrier Transportation Act, s13(2)(d); Road Transportation Act, s15(1)(e).
99. Supra.
100. Asmal's Bus Service (Pty) Ltd and Others v Local Road

- Transportation Board and Others 1966(2) SA 456(N) 459 B.
101. 1966(2) SA 456(N).
 102. See too Eljomo Vervoer (Edms) Bpk v. Voorsitter, Nasionale Vervoerkommissie en Andere 1985(2) SA 199(T).
 103. S15(1)(i).
 104. S15(1)(k).
 105. S15(1)(l).
 106. Supra.
 107. At 461H.
 108. 1951(4) SA 440(A).
 109. At 447A-B.
 110. At 447E-G.
 111. At 449D-F.
 112. Supra.
 113. 1952(3) SA 726(N).
 114. At 404C-E.
 115. Supra.
 116. Dass' case, supra 408C-E.
 117. Supra.
 118. 1972(3) SA 726(A).
 119. At 737D-E.
 120. At 737H-738A.
 121. WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others 1982(4) SA 427(A) 444F.
 122. Chetty's case, supra 444H.
 123. Greyling and Erasmus supra 444H.
 124. This has no effect on the onus. In Sonnex (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en n Ander (SWA 6 September 1984 (case 111/84) unreported,) Strydom J dealt with this issue:
'Die verskille wat in die Wet bestaan tussen 'n publieke dan wel 'n privaat vervoerpermit wend Mnr. La Cock aan om, soos ek hom verstaan, aan te voer dat daar in die laasgenoemde geval 'n mindere bewyslas, in die sin van 'n ligter bewyslas, op 'n applikant rus as in eersgenoemde geval. By 'n nalees van die Wet is daar bepaald ander en meer vereistes wat gestel word in die geval van 'n aansoek om 'n publieke padvervoerpermit as wat die geval is by 'n aansoek om 'n privaat padvervoerpermit maar dat hierdie verskille die aard van die bewyslas, wat in die een of ander geval op 'n applikant sou rus, verander, blyk na my mening, by 'n nalees van die Wet, ongegrond te wees.'
 125. S18(3)(a).
 126. S18(3)(b).
 127. 1984(2) SA 826(W).
 - 127(a). 1985(2) SA 790(A).
 128. S18(4).
 129. S20(3).
 130. S20(1).
 131. S13(1).
 132. S18(1).
 133. S20(2).
 134. S13(1)(public permits); s18(1)(private permits); s20(2)(temporary permits).
 135. S13(2)(a).
 136. S13(2)(c).
 137. S13(2)(b).
 138. S13(2)(bB)(public permits); s18(5)(private permits).
 139. S13(2)(bD)(public permits); s18(6)(private permits).

140. S13(2)(bA).
141. S13(2)(bA) says that the board or Commission 'may refuse to consider...' s13(2)(bC) uses the same formulation. This contrasts with ss13(2)(bB) and (bD) which provide that the board or Commission 'shall not consider..
142. S13(2)(bC); see footnote 149 above.
143. Cooper and Bamford, 689. (It should be noted that the learned authors were discussing the provisions of the Motor Carrier Transportation Act); see too Reddy v African National Bus Transport Co (Pty) Ltd 1951(2) SA 518(N), 522(H); Bangtoo Brothers and Others v National Transport Commission and Others 1973(3) SA 275(N), 278H, 279A.
144. See Ch 5 above at 101.
145. S21(2)(a).
146. S21(2)(b).
147. 1980(3) SA 1068(Tk).
148. At 1073D.
149. Reg 5.
150. A certificate of fitness is valid for a period of 6 months but in the case of a school bus this period is extended to 12 months (See s79 of the Transvaal Road Traffic Ordinance No 21 of 1966). Furthermore a certificate of fitness must, in terms of s84(1), be carried in or on a public vehicle at all times while it is being operated on a public road. Failure to comply with the above provision constitutes an offence. (See s84(2)).
151. Reg 5.
152. S21(3)(a).
153. S21(3)(b).
154. S21(3)(d).
155. S21(3)(f).
156. S21(3)(c).
157. S21(3)(e); see Rauties Transport (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Johannesburg en 'n Ander 1983(4) SA 146(W), 157H-158.

CHAPTER 9

THE ALTERATION OF THE AUTHORITY GRANTED BY A PERMIT

INTRODUCTION

[I] THE WITHDRAWAL, SUSPENSION OR VARIATION OF PERMITS

[A] WITHDRAWAL, SUSPENSION OR VARIATION IN THE DISCRETION OF THE BOARD OR THE COMMISSION.

- (1) Grounds upon which the Discretion may be Exercised
- (2) Procedure
- (3) Appeals

[B] WITHDRAWAL OR AMENDMENT ON THE ESTABLISHMENT OF A RAILWAY SERVICE

- (1) Procedure
- (2) Compensation
- (3) The Determination of the Amount
- (4) The Appointment of a Committee

[C] WITHDRAWAL OR SUBSTITUTION AFTER AN ENQUIRY

- (1) Appointment of a Committee
- (2) Procedure
- (3) Compensation

[II] THE LAPSING OF PERMITS

[A] PRIVATE PERMITS

[B] PRIVATE AND PUBLIC PERMITS

[C] PUBLIC PERMITS

[D] CONSEQUENCES OF LAPSING

INTRODUCTION

The Act makes provision for the withdrawal, suspension or variation of public and private permits. The reason for the existence of powers to alter the authority originally contained in a permit is not hard to find: a permit is granted because there is, at the time, a perceived need for a road transportation service in an area. If circumstances change, the existing service may be rendered superfluous. The boards and the Commission are given the task of administering the transportation policy embodied in the Act. They are given some far reaching powers to fulfill that function. The power to withdraw, suspend or vary a permit is an instance in point.

The rights which a permit embodies may be lost in another way. Public and private permits may lapse in defined circumstances. In this case the authority contained in the permit ceases to be effective as a result of acts or omissions of the permit holder and not through the actions of a board or the Commission.

[I] THE WITHDRAWAL, SUSPENSION OR VARIATION OF PERMITS

The Act envisages the withdrawal, suspension or variation of permits in three situations: when such a course of action is deemed to be necessary by a competent board or the Commission,¹ when a railway service is established in an area² and after an enquiry instituted by the Minister.³ In all of the above instances procedural safeguards are prescribed and, in the case of the last two, provision is made for the payment of compensation to the holder of the permit which has been withdrawn or amended.

[A] WITHDRAWAL, SUSPENSION OR VARIATION IN THE DISCRETION OF THE BOARD OR THE COMMISSION

(1) Grounds upon which the Discretion may be Exercised

S25 grants a board or the Commission the power to withdraw, suspend or vary public and private permits in certain circumstances. For example, a permit may be withdrawn or suspended (for an appropriate period of time) if a holder, or a holder's employee, is convicted of an offence under the Act, under any law relating to motor vehicles or the regulation of traffic or contravenes a binding determination, agreement, award, licence or exemption dealing with remuneration for work or hours of work. The same consequences may befall a holder who has not faithfully carried out the conditions or requirements of the permit.

The section makes provision too for withdrawal or suspension if, in the tribunal's discretion, it believes that the circumstances under which the permit was originally granted have materially changed. In addition a permit may be cancelled, varied or amended in any way if a board or the Commission deems this step necessary in the interests of promoting the efficient use of fuel or for any other reason.

The interpretation of s25 was dealt with in the case of Rauties Transport (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Johannesburg en 'n Ander. The applicant had approached the court to have a decision of a board set aside. The board had purported to act in terms of s25 in order to amend permits held by the applicant because, it was alleged, their terms did not comply with s21(3)(e). While the board's decision was set aside on other grounds, Goldstone J

discussed those provisions of s25 which were argued before him. These included the interpretation of s25(1)(c).

S25(1)(c) empowered the board, of its own accord, to 'cancel or vary any condition or requirement of, or add any condition or requirement to, or define, redefine, curtail or otherwise amend, the authority contained in any public or private permit granted by it',¹⁰ if it deemed such action to be necessary in the interests of the promotion of economy in the use of petroleum fuel or for any other reason. It was argued by the applicant that in interpreting the phrase 'or for any other reason'¹¹ the eiusdem generis rule should apply. This argument was, correctly it is submitted, rejected by Goldstone J: for the rule to be of application the specific words of the enactment must form a genus¹² and no genus could be found in the specific wording of s25(1)(c).¹³ The learned Judge went on to hold that the section was intended merely to incorporate the saving of fuel as a consideration, and not to limit the power of the tribunal:¹⁴

'Na my mening is dit uiters onwaarskynlik dat die Wetgewer by wyse van die 1980 wysiging die magtiging van 'n, raad of die Kommissie nou wou beperk tot oorwegings betreffende die besparing van petroleumbrandstof. Inderdaad is dit wel meer waarskynlik dat die Wetgewer daardie oorweging wou invoeg as 'n bykomende oorweging.'

The court accordingly held that the phrase 'or for any other reason' meant 'enige rede wat deur die wet as geheel geoorloof word en behoorlik deur 'n raad of die Kommissie in oorweging geneem mag word'.¹⁵

S25(1)(c) was amended again by s13 of Act 8 of 1983. The effect of the amendment is to clarify the section in accordance with the interpretation given to it in the Rauties

Transport case. The section now says that a board or the Commission may exercise its powers under s25(1) 'if the commission or that board for any other reason (including the promotion of economy in the use of petroleum fuel), deems it necessary...'

(2) Procedure

The power granted under s25(1) is far reaching and may have disastrous consequences for an operator affected by action taken under the section. Therefore s25(2) lays down procedures to be followed by a board or the Commission before an exercise of power under s25(1) will be valid. The first requirement is that at least 21 days written notice must be given of the tribunal's intention to act, together with the reasons for the intended action. The notice and reasons must be given to the holder of the permit in question by registered or certified mail. Thus s25(2)(a) envisages the existence of jurisdictional facts as conditions precedent to any exercise of power under s25(1). S25(2)(b) incorporates the audi alteram partem rule into the procedure which must be followed. It allows the holder or his representative to appear before the board or the Commission, to adduce evidence and make representations in regard to the proposed action.

The purpose of the provision was explained by Goldstone J in the Rauties Transport case:

'Op dié manier mag die permithouer die optrede van die raad beïnvloed en hom vra om een of ander behoorlike besluit te neem. Na my mening is die aard van die prosedure dus nie sodanig dat die permithouer nie die raad mag nader om 'n behoorlike besluit te neem nie. Of die regshulp deur die permithouer gevra toegestaan behoort to word, hang af van die aard van die oorspronklike verrigtinge wat die raad uit eie beweging in aanvang laat neem het.'

It is submitted that, even if s25(2) did not exist, the rules of natural justice would nonetheless apply. While there is little clarity in our law as to when the audi alteram partem rule is relevant in borderline cases, this is clearly a situation where a duty to hear the other side exists. S25(2)(b) is a codification of the common law for the situation envisaged by s25(1).

The final procedural safeguard granted by s25(2) is peculiar to public permits for the conveyance of persons 'within or to or from the area of jurisdiction of a local authority'.¹⁹ It grants the local authority in question standing to submit representations to a board or the Commission in regard to the proposed action. These representations must be submitted not later than 21 days after a request to make them has been made by a board or the Commission. They must be in writing and be delivered either by hand or by registered mail.²⁰

It is trite law that a court has the power to set aside a decision which has been taken without regard to the provisions of s25(2).²¹ In the Rauties Transport case, however, it was argued that because the s25(2) procedures had not been followed, the court was precluded from making any order other than one remitting the matter to the board. The reason for this submission was that the court could only make an order which the board or the Commission could make. As the procedures had not been followed, no valid decision could be made by either of the latter bodies. Goldstone J held that the court, in review proceedings, has a discretion when it finds that a tribunal has acted improperly: it can either remit the matter or, in appropriate circumstances, make the decision itself.²² The learned judge accordingly held:²³

'Dit maak nie saak of die nietigheid daarvan die gevolg is van die gebrek aan voldoening aan die vereistes van art 25(2), of dat die Raad ultra vires opgetree het nie. Dit is verder van geen belang of hierdie Hof teen die verrigtinge of besluit van die Raad of die van die Kommissie optree nie. Die bevoegdheid en magte van die Hof sou presies dieselfde wees.'

(3) Appeals

S8 provides a right of appeal to interested parties against any act, direction or decision of a board. The case of Nasionale Vervoerkommissie van Suid Afrika v Salz Gossow Transport (Edms) Bpk ²⁴ dealt with whether a decision by a board to institute a s25 enquiry was subject to appeal to the Commission. The court (per Smuts AJA) held that the word 'decision' in s8(1) must be interpreted to refer to the merits of an application. Consequently decisions made in relation to procedural matters during the course of an application are not subject to appeal. Therefore a decision to hold a s25 enquiry is not a decision (or an act or direction) as intended by s8(1). The court's reasons appear ²⁵ from the following extract from Smuts AJA's judgment:

'Indien aan die woord "beslissing" waar dit in art 8 voorkom, die besonder wye betekenis geheg word wat appellant voorstaan, sal dit gevolge meebring wat nooit deur die Wetgewer bedoel kon gewees het nie. In die gewone loop van sake kan dit gebeur dat dit nodig sal wees vir 'n raad wat 'n aansoek aanhoor om 'n reeks beslissings te gee op uiteenlopende punte voordat daar uiteindelik by die beslissing van die aansoek, op die meriete daarvan, gekom word. Voorbeelde hiervan is beslissings in verband met aansoeke om uitstel en beslissings met betrekking tot die tersaaklikheid van getuienis (kyk art 9(1)(a). Indien elke sodanige beslissing onderhewig is aan appél kan dit 'n uitgerekte, tydverspillende, duur en frustrerende proses tot gevolg hê. Die spoedige beslegting van aansoeke ingevolge die Wet op Padvervoer van 1977 sal sekerlik nie bevorder word deur die vertolking voorgestel deur appellant nie. Vertraging sal eerder aan die order van die dag wees en dit moet noodwendig benadeling vir die partye en selfs die landseksonomie inhou, gesien die aard van die ondersoek waarop die Wet op Padvervoer betrekking het.'

[B] WITHDRAWAL OR AMENDMENT ON THE ESTABLISHMENT OF A RAILWAY SERVICE

(1) Procedure

If a railway service is established over a route or between points for which a public permit has been granted for the conveyance of persons, the Commission may withdraw the permit or amend it by curtailing the authority conferred by it. The Commission must act with the approval of the Minister, but it need not give prior notice of its intention. It must inform the holder in writing and the withdrawal or amendment may not take effect earlier than six months after the railway service commences operations. ²⁶ Once a permit has been withdrawn or amended in terms of this section no permit replacing, or substantially replacing, the one withdrawn or amended may be granted except if the Commission believes that such a grant will be in the public interest. ²⁷

(2) Compensation

Provision is made in the Act for compensation to be paid to the operator whose permit has been withdrawn or amended. When the holder is informed (by registered or certified post) of the Commission's action he must submit his claim for compensation, setting out how the amount claimed is arrived at. This must be substantiated by three separate sworn appraisements and be submitted to the Commission not later than 90 days after the Commission's decision becomes effective or within a further period allowed by the Commission. ²⁸ The compensation payable is for the loss suffered, or likely to be suffered, as a result of the withdrawal or amendment. ²⁹ Loss of possible profits in

respect of any period more than 12 months after the date of
the withdrawal or amendment of a permit is not payable.³⁰

(3) The Determination of the Amount

The amount of compensation to be paid shall be determined by
the Minister with the concurrence of the Minister of Finance.³¹
If the holder of a withdrawn or amended permit is not
prepared to accept the amount decided on by the Ministers,
the amount of compensation will be determined according to
the provisions of the Arbitration Act,³² by an arbitrator or
arbitrators appointed in the manner prescribed by regulation.³³
In terms of the regulations compensation must be determined
by two arbitrators. The Director General : Transport may
nominate one while the party to be compensated may nominate
the other.

If the latter either fails to appoint an arbitrator or does
not inform the Director General of his choice within 14 days
of being called upon to nominate a person, he (the Director
General)³⁴ may nominate the second arbitrator. S26(7)
provides for interest to be paid on the amount of
compensation which has been decided on. The rate of
interest, payable from the date upon which the permit was
withdrawn or amended, will be that applicable to loans in
terms of s26(1) of the Exchequer and Audit Act.³⁵

(4) The Appointment of a Committee

The Minister has power to appoint a committee before a
railway service is established, but after it has been
approved.³⁶ This committee has been granted certain powers
and has a number of duties imposed on it: it may negotiate
with a holder in an attempt to find alternative routes for

him; it may make recommendations to the Commission or a competent board which the affected holder may lodge;³⁸ it may negotiate with the holder and any interested party in an attempt to change from road to rail transportation as easily and cheaply as possible;³⁹ and it may meet at any place it deems most suitable, and inspect 'any place, route or area whose inspection it deems necessary'.⁴⁰

The committee may consult with a holder whose permit will be affected and any other interested party, as well as exercise any of its powers or functions irrespective of whether a notice has been sent to the holder in terms of s26(2). The committee is composed of three members, coming from the Department of Transport, the Treasury and SATS.⁴¹ In addition the Minister may, in his discretion, appoint an advisory member. This member shall be a person whom the Minister considers to have an interest in the matter dealt with and may only attend meetings on the written request of the chairman.⁴²

Members hold office at the Minister's pleasure, but a member shall vacate his office if he ceases to work for the Government Department concerned or SATS, or he resigns or is relieved of his office by the Minister.⁴³ There are two grounds on which the Minister may dismiss a member: first, if the Minister believes that the member has been guilty of improper conduct or has regularly neglected his duties, and secondly, if he believes that the member is incapable of the efficient discharge of his duties.⁴⁴ It should be noted that the above provisions apply to full members and advisory members.⁴⁶

[C] WITHDRAWAL OR SUBSTITUTION OF A PERMIT AFTER AN ENQUIRY

(1) Appointment of a Committee

When the Minister has reason to believe that improvements in transportation facilities may be brought about, or for any other reason believes it to be in the public interest to withdraw a public permit completely, or to replace it with one issued to a person other than the holder, he may cause a public enquiry to be instituted. This enquiry is conducted by the Commission or by a member of the Commission.

(2) Procedure

Certain procedures must be adhered to by the members conducting the enquiry. The first is that notice must be given and all interested parties must be allowed to attend and be heard. The notice must specify the venue of the enquiry, the time and date of the commencement of the enquiry, and if it is instituted by a member of the Commission, that member's full names. The notice must appear in one issue of the Government Gazette and at least one issue of an Afrikaans newspaper and one issue of an English newspaper which circulate in the province concerned. Prior to an amendment, copies of the notice had to be sent by registered mail to every interested party. During the enquiry s15(1) must be taken into account.

Once the commissioner or commissioners have conducted the enquiry a report must be submitted to the Minister. After considering this document and any recommendations, the Minister may direct that the permit in question be withdrawn completely or that it be withdrawn and, in its place, another permit or other permits be issued to persons other than the

original holder.

(3) Compensation

The Minister may not exercise his power to withdraw a permit unless the person or persons who are to undertake transportation in lieu of the original holder have given an undertaking to pay compensation to the latter.⁵⁴ This sum is to cover the likely loss suffered by the original holder as a result of the withdrawal of the permit⁵⁵ and in the absence of agreement between the parties, it will be determined by arbitration in accordance with the provisions of the Arbitration Act⁵⁶ and the Transport Regulations.⁵⁷ Note that, as in the case of compensation granted under s26, the affected permit holder may not claim for loss of possible profits in respect of any period later than 12 months after⁵⁸ the date of withdrawal of the permit.

[II] THE LAPSING OF PERMITS

The circumstances in which permits may be withdrawn, suspended or varied has been discussed above. In each case the alteration of authority is brought about by the exercise of power vested in an authorized body. While acts or omissions of the permit holder may bring about the conditions necessary for the exercise of power, that is not always the case. In each instance a discretion exists as to whether or not the authority contained in a permit should be withdrawn, suspended or varied. The lapsing of permits may be distinguished from the situations discussed above. Permits lapse by operation of law (brought about by circumstances within the control of the permit holder) and not by way of an exercise of power by an official or body. A permit may lapse

in a number of ways which will be dealt with below.

[A] PRIVATE PERMITS

S29(2) deals specifically with the lapsing of private permits. This type of permit may cease to have effect if the holder does not carry on the industry, trade or business for which the permit was granted at the place or places specified.⁵⁹ Alternatively, if two or more places are specified and the holder's operations cease at any of these places his permits will lapse in relation to those places.⁶⁰ In other words the permit would lapse partially, remaining in force in relation to those places from which the industry, trade or business is carried on.

[B] PRIVATE AND PUBLIC PERMITS

Public and private permits will lapse if the transportation for which they were issued does not commence on a date specified by the board or the Commission. This date must be specified in a written notice sent to the holder by registered or certified post. The permit lapses on the date set out in the notice unless that board or the Commission has, in writing, declared itself satisfied that the holder has commenced the road transportation in question.⁶¹

[C] PUBLIC PERMITS

A public permit will lapse if a person or company acquires a controlling interest in the permit holder's business or company without the prior approval of a board or the Commission. The permit will lapse on the date on which the controlling interest is acquired.⁶² An application for approval must be made on the prescribed form.⁶³ In considering such an application the following factors must be

taken into account: whether a monopolistic situation which is not expedient in the public interest is likely to be created;⁶⁴ other permits held by the applicant;⁶⁵ the applicant's interest in other transportation undertakings;⁶⁶ the applicant's interest in other companies, partnerships, industries, trades or businesses;⁶⁷ the provisions of s15(1);⁶⁸ and any other factors which may affect the desirability of the grant of the application.⁶⁹

A 'controlling interest' is defined in terms of the Companies Act.⁷⁰ S1 of the Act says that a controlling company is one which directly or indirectly is able to control another company. The term includes a company which: (1) holds more than 50 percent of the equity share capital of another company; (2) can exercise more than half of the voting rights in respect of the shares of that other company; and (3) is entitled to, or has the power to, determine the majority of the directors of the other company. This includes the power, without the consent or concurrence of any other person, to appoint or remove all or the majority of the directors, and the power to prevent appointments as directors. If a person's appointment as director follows necessarily from his appointment as a director of the first named company (ie the controlling company) it shall be deemed to be a power exercised by the controlling company. So, if a company holds an interest in any other company and by virtue of this interest, is able to exert control as contemplated by the Companies Act, approval for the acquisition of that interest is a condition of the continued validity of any permits held by the company so controlled. A similar interest held by a natural person in a company has the same

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effect.

Beuthin says that the factors mentioned in the Companies Act are merely examples of control. The term 'controlling interest' can consequently have a wider meaning. The essence of control is to be found in the de facto, and not the de jure position. Thus the test for a controlling interest is a ⁷² factual one and not a legal one:

'De facto control can exist despite the absence of any legal control. Shareholders are notoriously apathetic, and if the membership of a company is large and dispersed widely, even a small proportion of the total shares is capable of vesting actual control in the holders, and if the holders constitute the management, they will have the additional advantage of being able to control the proxy-voting machinery. It will be realized, however, that control may exist even when the controlling company does not hold any shares at all, as would be the case, for example, if control were conferred by way of debentures or by way of management control.'

[D] CONSEQUENCES OF LAPSING

If a permit lapses, the holder is under an obligation to return the permit and the distinguishing mark to the board or the Commission within seven days of the lapsing. Delivery ⁷³ must be made by registered or certified mail. Failure to comply with the above requirement constitutes an offence and ⁷⁴ a fine of not more than 50 rand may be imposed on conviction.

FOOTNOTES

1. S25(1).
2. S26(1).
3. S28(1).
4. S25(1)(a)(i).
5. S25(1)(a)(ii).
6. S25(1)(b).
7. S25(1)(c); for an outline of s25 see Nasionale_Vervoer-kommissie_van_Suid_Afrika v Salz_Gossov_Transport_(Edms) Bpk 1983 (4) SA 344 (A), 359 B - D.
8. 1983 (4) SA 146(W).
9. See Ch 8 above.

10. S25(1)(c) has, since the decision in the Rauties Transport case supra been amended by s13 of the Road Transportation Amendment Act 8 of 1983. The effect of the amendment is discussed below.
11. The board, when it wished to act in terms of s25(1)(c), was clearly not seeking to amend the permits in question in the interests of the promotion of the economical use of petroleum fuel. It was acting for another reason viz to make the permits comply with the provisions of s21(3)(e).
12. Steyn , 30; H R Hahlo, and E Kahn The South African Legal System and it's Background, 189.
13. Rauties Transport supra 160A.
14. At 160 C - D.
15. At 160 F.
16. Supra.
17. S25(2)(a).
18. 1983 (4) SA 146(W), 159 A-B.
19. S25(2)(c).
20. Reg 4(4).
21. Supra.
22. See Ch 13 below at 353.
23. Rauties Transport supra 162 A; Goldstone J, at 162 H, found it unnecessary to decide whether to exercise the discretion or not in the circumstances of the case.
24. 1983 (4) SA 344 (A).
25. At 356 G - 357A.
26. S26(1).
27. S26(3).
28. S26(3).
29. S26(4).
30. S26(5).
31. S26(5).
32. No 42 of 1965.
33. S26(6).
34. Reg 20.
35. No 66 of 1975.
36. S2(h) read with s27.
37. Reg 22(a).
38. Reg 22(b).
39. Reg 22(c).
40. Reg 22(d).
41. Reg 21(2).
42. Reg 21(3).
43. Reg 21(4).
44. Reg 21(6)(b).
45. Reg 21(5).
46. Reg 21(4).
47. S28(1).
48. S28(2).
49. Reg 19(1).
50. Reg 19(2).
51. Reg 2, published in Government Gazette No 6941 of 11 April, 1980, Government Notice R772, deleted Reg 19(3).
52. S28(3).
53. S28(4).
54. S28(5).
55. S28(5).
56. No 41 of 1965.
57. Reg 20.
58. S28(6).

59. S29(2)(a).
60. S29(2)(b).
61. S29(1).
62. S29(3)(a).
63. Reg 6.
64. S29(3)(c)(i).
65. S29(3)(c)(ii).
66. S29(3)(c)(iii).
67. S29(3)(c)(iv).
68. S29(3)(c)(v).
69. S29(3)(c)(vi).
70. No 61 of 1973.
71. S29(3)(e).
72. R C Beuthin Basic Company Law, 152.
73. S29(3)(b).
74. S29(3)(d).

CHAPTER 10

CONDITIONS ATTACHED TO PERMITS AND THEIR VALIDITY

INTRODUCTION

[I] THE DISTINCTION BETWEEN GRANTING AN APPLICATION IN PART AND GRANTING IT SUBJECT TO CONDITIONS

[II] THE VALIDITY OF CONDITIONS

[A] THE ULTRA VIRES DOCTRINE

[B] THE GROUNDS FOR ATTACKING THE VALIDITY OF CONDITIONS

[III] THE GROUNDS DISCUSSED

[A] EXCEEDING OR IGNORING THE PROVISIONS OF THE ACT

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(5) **The Suggested Test to be Applied to Determine the Reasonableness of Conditions**

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INTRODUCTION

A board or the Commission is empowered to grant an application for a permit 'in full or in part subject to such conditions or requirements as it may deem necessary'.¹ The reason for the existence of this power is to be found in the duty of boards and the Commission to co-ordinate transportation services in an area. It may defeat the purpose of the Act if it was not possible to prescribe how the authority which has been granted may be used. By granting a permit subject to conditions it is possible for a board or the Commission to direct a service to routes on which it is most necessary.² The alternative would be to either grant or refuse an application, but such an approach contains problems: it is too rigid and therefore is not suitable to the implementation of transportation policy.

The case of Flying Lotus (Pty) Ltd v Chairman, National Transport Commission and Another³ provides an example of the use of conditions. The applicant had applied for a permit authorizing it to convey passengers over a route which, it was claimed, consisted of both private and public roads. The board had granted the application but the second respondent appealed to the Commission. The appeal was upheld because, it held, the board had no jurisdiction to grant permits for conveyance on roads which were not public roads.⁴

In review proceedings Didcott J pointed out that while conveyance of persons or goods on a private road is not covered by the Act, in that it does not fall within the definition of 'road transportation', it may still be relevant to a board when considering an application for a permit over

a 'mixed route'. It has a bearing, for instance, on how a bus will get from place to place, whether it will ever get there, the feasibility of the route as well as time factors, distances, tariffs and time-tables. The learned judge went on to hold that, in addition, the board or the Commission could impose conditions in relation to the roads which were not 'public'. In other words, because part of a route does not fall within the definition of a public road, this does not mean that the board or the Commission cannot control the operations of a transport service on those parts. This power, he said, stemmed from the broad authority conferred by s13(1)(c). In deciding that the Commission had misdirected itself, Didcott J held:

'The effect, if the blue stretches were not really public roads, was neither to vitiate the application nor to deprive the Board of jurisdiction over it. The Board had the power to grant it, either in full or in part. Section 13(1) has seen to that. Having satisfied itself of the application's merits, it could therefore have ordered a permit to be issued which, since one was required for the brown stretches alone, was confined to these. It could at the same time have added the condition that the blue stretches were to complete the route.'

[I] THE DISTINCTION BETWEEN GRANTING AN APPLICATION IN PART AND GRANTING IT SUBJECT TO CONDITIONS

While it has been noted that a board or the Commission has the power to grant an application either in part or subject to conditions, it must be emphasized that these two functions can be conceptually separated.

The difference between the two powers was dealt with in the case of Pietermaritzburg City Council v Local Road Transportation Board, Pietermaritzburg. Henochsburg J, in drawing the distinction held:

'a grant subject to conditions is not necessarily a grant in part. In order that there should be a grant in part of an application there must be a grant of portion only of what was applied for, something less than that for which appellant asks, it cannot be something more. There can be no grant in part if the whole is not notionally capable of division... A grant subject to a condition on the other hand, implies that the whole of what is sought is granted, but some condition is superimposed which effects the exercise of that whole by the grantee. The whole is nevertheless granted, whereas a grant in part implies that part only is granted.'

Burne AJ, in a concurring judgment, said that the distinction between the two concepts is of great importance and, where language is used which may cloud the nature of the power exercised, the court is entitled to go behind the words used and examine the intention of the board or the Commission.

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The learned acting judge described the situation thus:

'For instance if an application were made for a licence to sell commodities, A, B and C, the tribunal seized of the matter, might say that it granted the licence only in respect of commodities A and B. That would, I think, be a correct way of saying that it granted the application in part. But the same tribunal, although intending exactly the same thing may, as a result of looseness of phraseology, express itself by saying that it granted the application subject to the condition that the applicant did not sell commodity C. That would I apprehend, be an incorrect way of saying what it really meant.'

The importance of the distinction lies, it is submitted, in the court's powers to interfere with the particular exercise of power by a board or the Commission. Its power to invalidate conditions may be wider for two reasons: first, they are 'drafted onto' permits and so may require interpretation in a different sense to the provisions of the permit itself: the standard provisions of a permit are prescribed by the Act, whereas the provisions of conditions are individualized additions to the primary authority;

secondly, the grant of an application or its refusal may be invalidated on well recognized, mainly procedural, grounds,¹⁰ but in the case of conditions their effects may be justiciable. In short, a court may be more willing to interfere because conditions (being analogous to legislation) may more readily be seen to operate harshly.

[III] THE VALIDITY OF CONDITIONS

[A] THE ULTRA VIRES DOCTRINE

The ultra vires doctrine has been described as the 'central principle of Administrative Law'.¹¹ Wade, in explaining the doctrine and its relationship to Acts of Parliament says:¹²

'It is presumed that Parliament did not intend to authorize abuses, and that certain safeguards against abuse must be implied in the Act. These are matters of general principle, embodied in the rules of law which govern the interpretation of statutes. Parliament is not expected to incorporate them expressly in every Act that it passed. They may be taken for granted as part of the implied conditions to which every Act is subject and which the courts extract by reading between the lines, or (it may be truer to say) insert by writing between the lines. These implied conditions are taken to be part and parcel of the Act, just as much as express conditions. Any violation of them, therefore, renders the offending act ultra vires.'

Rose Innes says that the doctrine is simply based on the axiom that a body which owes its existence to a statute can perform no valid act unless authorized to do so by the instrument which created it.¹³

[B] THE GROUNDS FOR ATTACKING THE VALIDITY OF CONDITIONS

The grounds for attacking the validity of conditions are, to a large extent, the same as those available when attacking the validity of any exercise of administrative power.¹⁴ In this chapter those grounds which lend themselves to, but are not necessarily peculiar to, challenges to the validity of conditions will be examined. The grounds which have been isolated for discussion here are: first, exceeding or ignoring the provisions of the Act in the broad sense (i.e. where the purported exercise of power results in a lack of co-incidence between the condition and the enabling Act); secondly, the vagueness or uncertainty of the terms of the condition and; thirdly, the unreasonableness of the condition.

[III] THE GROUNDS DISCUSSED

[A] EXCEEDING OR IGNORING THE PROVISIONS OF THE ACT

(1) General

It is trite law that an administrative body, when exercising powers, must do so within the four corners of its source of power. At the same time it should be remembered that not every power which may be exercised lawfully needs to be specifically spelt out in the parent Act. A body would be acting *intra vires* if it exercised powers which were incidental to those which the statute mentioned expressly i.e. the legislature must have intended the body in question to possess those powers, but found it unnecessary to detail them in the statute. The court, in construing the extent of an administrative body's power, will read between the lines of the statute or, as Wade has said (perhaps more correctly)

write between the lines.

If the body goes beyond these limits it will have acted ultra vires, and the purported exercise of power will be a nullity. Thus, if a board purported to impose conditions relating to the sex of passengers to be conveyed by a permit holder, or the number of times he could refuel his vehicle per week, it is clear that the conditions would have no force: in both instances there is no co-incidence between the content of the conditions and the terms of the enabling statute. In other words, the invalidity of the conditions would stem from the fact that their substance infringes or bears no relation to the parent Act.

(2) **Specific Examples**

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In R v Ramatlo the validity of a condition limiting the number of passengers which a taxi-operator could convey was attacked. The basis of the attack was that the regulation under which the condition was made was ultra vires: the Act authorized the issuing of exemptions for the conveyance of not more than eight people (including the driver) in a vehicle designed or intended to carry that number.

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S19(1)(c) of the Motor Carrier Transportation Act empowered the Commission to make regulations (with the approval of the Governor-General) prescribing conditions and requirements which could be imposed on a certificate of exemption. Reg 11(5)(a) was made in terms of this power and read as follows:

'The Board or a local board may impose in connection with, or include, in, any exemption issued by it any or all of the following conditions or requirements: (9) prohibiting the holder or his servant from conveying more than a specified number of passengers... at one and the same time.'

Acting in terms of this regulation, a board had limited the appellant's authority to the conveyance of not more than five passengers. The prosecution arose after he had been stopped with eight passengers in his taxi.

It was argued that while reg 11(5)(a) fell within the language of s19(1)(c), it was nevertheless ultra vires because it went beyond the scope and purpose of the Act.

This argument was dismissed by Murray J in the court

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a quo:

'It seems to me that when the Board or a local board is in terms given the discretion by sec 9(2)(g) to grant exemption for the conveyance of not more than a specified number of passengers, and allowed to attach conditions prescribed by regulation approved of by the Governor-General, it is a fair and reasonable interpretation that their discretion covers the right to fix, at a figure less than eight (including driver) the maximum number of passengers who may be conveyed.'

On appeal, Schreiner JA held too that the regulation (and the condition framed under it) was valid. The learned judge of appeal held that the board's competence to fix the number of passengers was not inconsistent with the primary and secondary objects of the Act because overloading a vehicle could be regarded as a form of unfair competition as it reduces the cost of conveyance. Furthermore the safety of passengers is a consideration which is not foreign to the scheme of the legislation and so a board may consider this aspect in setting conditions.

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In R v Zondi and Another it was argued that a condition was ultra vires because its terms did not correlate with the terms of the regulation under which it was framed. The condition sought to prohibit the picking up of passengers in

certain circumstances whereas the regulation provided for the formulation of conditions prohibiting the holder from seeking to pick up passengers. The court (per Milne AJP) held that the condition was intra vires. The essence of the court's decision appears from the following dictum:

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'Further, I am not at all certain that a power to prohibit the seeking to pick up passengers does not necessarily include the power to prohibit the actual picking up. Where the law enacts a prohibition against attempting to do a thing it is difficult to imagine that it contemplates, at the same time, that it will be lawful to do that very thing. This is not a case of giving meaning to ambiguous words. The grammatical and ordinary meaning of the words "seek to pick up" is plain but it seems to me that the scope and intention of a power to prohibit a holder seeking to pick up other passengers, in specified circumstances, contemplates the making of a prohibition against the actual picking up of such passengers.'

The race of a passenger was the issue in the case of S v Engeldoe's Taxi Service (Pty) Ltd and Another.
22 The permit in question authorized (by means of a condition) the 'conveyance of not more than four non-white passengers'. It further provided that the provisions of the permit did not relieve the holder from complying with the provisions of any other law relating to motor vehicles. The appellant had conveyed a white person and had been convicted in terms of s9(1) of the Motor Carrier Transportation Act. It was argued, inter alia, on appeal that the condition was repugnant to s22 of the Taxi Regulations of the Cape Town Municipality framed under two provincial ordinances.
23 S22 imposed a duty on taxi drivers to accept all fares if seating was available in the car or if the taxi was not engaged.
24 Wessls JA rejected this contention. He held that the proviso to the condition did not relate to s22 of the Taxi Regulations but was intended to impose on permit holders a

duty to obtain any other licences or permits which may have been necessary in terms of any other law relating to motor vehicles. The learned judge of appeal concluded:

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'I might add that the holder of a certificate would no doubt also be bound by any other provisions of a law relating to motor vehicles which are not inconsistent with a condition which a board is required to and does incorporate in a certificate issued by it.'

[B] VAGUENESS OR UNCERTAINTY

(1) General

Glanville Williams, writing on the interpretation of statutes, says that 'the words we use though they have a central core of meaning that is relatively fixed, are of doubtful application to a considerable number of marginal cases'. While statutes must be given effect to by the courts despite vagueness or uncertainty this is not the case when subordinate legislation suffers from the same defect. A by-law may be invalidated because its terms are vague or it is uncertain in its operation or application:

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'That is not, however, to say that the court will think up fanciful arguments, for if a bye-law is capable of reasonable interpretation within the terms of the enabling statute, the court will be prepared to give it that interpretation.'

While the chief application of the rule against vagueness is in cases involving subordinate or administrative legislation, it applies equally to judicial, quasi-judicial or purely administrative acts. No distinction can be drawn on this basis; one test is used irrespective of the form which the instrument under scrutiny takes. Vagueness or uncertainty (whether seen as a separate ground of review or part of the rule against unreasonableness) allows considerable scope

for judicial activism or restraint as a result of the fact that language is an imperfect medium of communication, being inherently ambiguous.

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(2) The Basis of the Rule Against Vagueness

The rationale of the rule that administrative action which is uncertain or vague is ultra vires derives from a presumption that Parliament, when it delegates powers, intends them to be used in such a way that those subject to the enactment in question know how to comply.

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This point was made forcefully by Lord Goddard CJ in Brierley v Phillips:

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'It is surely desirable that orders creating criminal offences should be stated in language which the persons who may commit the offence... can understand... I am certainly not prepared... to find persons guilty of criminal offences when the orders which they are charged with violating are couched in language which is open to all sorts of meanings and causes all sorts of difficulties, so that the persons to whom they apply cannot know whether they are acting legally or not, unless possibly they get counsel's opinion, or at any rate a solicitor's advice.'

(3) The Test

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In R v Jopp and Another Broome J set out the test for vagueness in the following terms:

'But these principles have no application where the only claim is that the bye-law or regulation is void for uncertainty. In that case the Court must first construe the bye-law or regulation, applying the usual canons of construction with no bias towards "benevolence". Having ascertained the meaning, the court must then ask itself whether the bye-law or regulation, so construed, indicates with reasonable certainty to those who are bound by it the act which is enjoined or prohibited. If it does, it is good; if it does not, it is bad; that is the end of the matter.'

The test which is applied is that of the reasonable man with average intelligence. If this hypothetical figure would, in

the court's opinion, know what it is that he is to do, or to
refrain from doing, the act is valid. ³⁵ Absolute clarity is
not essential. All that is required is a hard core of
certainty which is sufficient to justify enforcement.

Thus in a case in which the appellants had, in terms of the
Internal Security Act, ³⁶ been restricted from attending social
gatherings and gatherings at which social intercourse also
took place, *Didcott and Shearer JJ*, in deciding on the
validity of the instrument held: ³⁷

'Had the notice simply prohibited the appellants from
attending what in common parlance were social
gatherings, the banning orders would have contained a
hard core of certainty, sufficient for present
purposes.'

Taitz has suggested a contrary approach to testing for
vagueness. He submits that the courts construe the
instrument in question benevolently. ³⁸ With respect, it must
be pointed out that the benevolent interpretation doctrine
does not apply to the test for vagueness. ³⁹ The learned
writer uses *Kruse v Johnson* ⁴⁰ to establish this proposition,
but that case dealt with the unreasonableness, and not the
vagueness, of a bye-law. ⁴¹ Broome JP, in *Jopp's case*, took
pains to distinguish the two enquiries. He said that when
testing subordinate legislation for vagueness 'the court must
first construe the bye-law or regulation applying the usual
canons of construction with no bias towards "benevolence".' ⁴²

(4) Specific Examples

(a) Conditions Relating to Race

In *S v Salama Taxis (Pty) Ltd and Others*, ⁴³ it was argued
that a condition limiting a taxi company to the conveyance of

'non-Whites' only, was ultra vires because of vagueness. S7 of the Motor Carrier Transportation Act required a board to specify the class or classes to be conveyed under the authority of a permit issued by it. It was argued that, if the term 'non-white' connoted a race group, the various groups included under that head should have been specified. In other words, counsel's contention was that the term 'non-white' was too vague to allow the condition in which it appeared to be valid. Corbett J, in upholding the validity of the condition, held that the terms 'White' and 'non-White' as well as 'European' and 'non-European' had well known and well accepted meanings in South Africa, not only in statutes⁴⁴ but also in common parlance: in other words the term 'non-White' had a hard core of certainty. Although problems may arise 'in determining the classification of persons who belong to the periphery of each of these classes'⁴⁵ the existence of such borderline cases did not justify the⁴⁶ invalidation of the condition as a whole:

'The fact that in a relatively small number of individual cases the persons obliged to obey the terms of the Act, read together with the certificate, would have difficulty in deciding whether a passenger is a non-White or a White, does not, in my opinion, render the condition as a whole void on the ground of vagueness.'

(b) Conditions Relating to the Number of Passengers

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In S v Aziz and Another a condition purporting to limit the number of passengers to be conveyed by a taxi was held to be void for uncertainty. The condition limited the driver to conveying not more than six passengers on trips within a 30 mile radius of the Kranskop Post Office or on 'casual trips' from within this area to any place outside the 30 mile radius

and vice versa. A proviso then limited the permit to the conveyance of four passengers (including the driver) per trip between Kranskop and Stanger and Kranskop and Durban.⁴⁸ This proviso, it was argued, was ultra vires for want of certainty.

Fannin J pointed out a number of problems which the proviso raised without the possibility of clear answer. For instance the learned judge could not say with any certainty what the meaning of the phrase 'trip between' meant. If the taxi went from Kranskop to Durban and then returned via Stanger had it made a trip between Kranskop and Durban or three separate trips from Kranskop to Durban, Durban to Stanger and Stanger to Kranskop? For the purposes of the condition, did one consider a trip as a trip by the vehicle and driver or a trip by the passengers? If the former was the case, one trip had been made and only three passengers would have been permitted. If the latter interpretation applied, clearly several trips could have been made and the legality of each passenger's conveyance would have had to be tested against the proviso. The learned judge pointed out further that insurmountable problems arise when the terms of the proviso are mixed with the terms of the condition. In other words the position of the taxi owner and driver is uncertain when some passengers are travelling from Kranskop to Durban, for instance, while others are travelling from the former point to a point before Durban, or from a point after Kranskop to Durban. In holding that the condition was ultra vires⁴⁹ Fannin J held:

'In order to ascertain whether he may do any of these things, he must refer to the proviso to the condition in his certificate, and he is entitled to find a reasonably precise answer to his question. It seems to me that he will not find such an answer there and counsel who appeared for the State found himself unable to suggest to us in argument what the answers are. Thus the proviso fails to measure up to the standards laid down in the cases referred to above and must therefore be held to be void for vagueness, and the convictions and sentence cannot be allowed to stand.'

(c) Conditions Relating to Competition

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The appeal in R v Mahabeer succeeded in part because the first condition imposed by the board was held to be void for vagueness. This condition prohibited the holder from 'competing unfairly' with existing railway services. In Ex Parte Naidoo the court came to a similar decision when dealing with a condition which was worded identically, save that the word 'unfairly' had not been included. Carlisle J found that the insertion of the word tended to increase rather than diminish the state of uncertainty. In both cases the prohibition was such that the holder of the permit, or his servant, could not be expected to know what they may or may not do.

(d) Conditions Relating to the Route

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The condition held to be *intra vires* in Zondi's case was invalidated in the case of S v Maharaj and Another. The attack on the validity of the condition in the latter case was based on a different ground. In Zondi's case it was unsuccessfully argued that there was a lack of co-incidence between the condition and the enabling regulation. In Maharaj's case the condition was challenged successfully on the ground of vagueness. Harcourt J held that the words 'the same journey' were sufficiently clear to be capable of application. The learned judge experienced difficulties with

the term 'or for the return journey or any portion thereof'. He pointed out that an exact retracing of an outward journey or a substantial retracing of that journey would obviously not run the risk of falling foul of the condition, but when the taxi driver does not retrace his original route exactly, uncertainty begins to creep in. In this regard a variety of meanings can be attributed to the word 'return'. If, for instance, a taxi driver was chartered for four successive trips with terminal points in the directions of the cardinal points of the compass, he would not travel on the same roads from dropping his first fare at the northern point to dropping his second at the western point and so on. Could any of those trips be said to be a return journey? If so, which one is that return journey? Is the last leg of the journey (i.e. back to the starting point) the return journey of the first trip or the last one? Does an outward journey start at the driver's home where he garages his taxi or at the taxi stand? After each fare must he return to one of these places? If he gets a fare by way of a radio or telephone where does the receipt of the fare take place? The conclusion that the learned judge arrived at after posing the above questions was:

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'From this welter of uncertainty, anomaly and apparent plurality of possible meanings there emerges only one certainty and that is that the condition - so far as it relates to the "return journey" or any part thereof - is lacking in certainty to such an extent that it should be regarded as void or ultra vires for vagueness in terms of Jopp's case, supra and the many subsequent cases in which that case has been followed and applied. The same reasoning applies to the corresponding portion of the regulation.'

[C] UNREASONABLENESS

(1) General

It is not surprising that what Wiechers calls the rule against unreasonableness is uncertain in its application. 58
This uncertainty goes to whether unreasonableness per se is a ground for review and, if so, what test applies for determining whether an exercise of power (or its consequence) 59
is unreasonable. In the words of Baxter:

'Some Judges of Appeal have gone to extraordinary lengths to emphasize that unreasonableness (and then only "gross" or even "strikingly gross" unreasonableness) can at most serve only to indicate that "another", recognized ground for review might be present.'

The issue is further complicated by the fact that a long line of cases in England and South Africa have, following the test laid down in Kruse v Johnson, 60 held that certain exercises of power (ostensibly of a legislative nature) can be invalidated for unreasonableness. It is submitted that unreasonableness per se is a ground for review, whether the act sought to be invalidated be administrative or 61
legislative.

(2) The Basis of the Rule Against Unreasonableness

Despite the fact that statutes often confer a discretion to take certain action (or make rules) without expressly limiting the power, it is trite that in public law there is no such thing as an unfettered discretion, 62 but only wide and narrow discretions. Certain prerequisites, one of which is reasonableness, are implied in the terms of Acts which confer a discretion. 63 This standard of conduct applies even when a discretion is conferred by highly subjective language

as happened in the case of Roberts v Hopwood. Borough Councils were empowered to pay employees such wages as they saw fit. The court (per Lord Wrenbury) held that councils could not pay in excess of what was reasonable:

'A person on whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so - he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably.'

A slightly different formulation is to be found in the case of Kruse v Johnson which involved the reasonableness of a bye-law. Lord Russell CJ held that if a legislative act was found to be unreasonable (in the special sense in which the word was used in that case) 'the court might well say "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires".' So, just as the common law presumes that when powers are delegated by Parliament it is intended that the resultant enactments are clear, it also presumes that they will be reasonable.

(3) The Test

In Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd, Stratford JA held that unreasonableness per se was insufficient to set aside the Minister's act. He set the test for unreasonableness as follows:

'...emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is "inexplicable except on the assumption of mala fides or ulterior motive"... or that it amounts to proof that the person on whom the discretion is conferred has not applied his mind to the matter...'

This test has, until relatively recently, been unchallenged.⁷⁰
Indeed the courts have, if anything, tightened the test.

The case of Theron v Ring van Wellington van die N G Sending-
kerk in Suid Afrika⁷¹ has, however, provided an alternative

test without expressly overruling the Union Steel
formulation.⁷² Jansen JA, in the Theron case, accepted that
unreasonableness is a ground for review for two reasons:
first, from the presumption that Parliament did not intend
delegated powers to be used unreasonably it could be assumed
that the courts could set such actions aside and, secondly,
the learned judge of appeal held that there was authority for
the proposition that the courts could set aside decisions
which could not reasonably be arrived at on the available
evidence.⁷³

He limited this approach (the 'uitgebreide
formele maatstaf') to 'purely judicial decisions', because
such decisions are most familiar to courts.

The test for unreasonableness in Kruse v Johnson⁷⁴ looks to
the application of the enactments in question:

'If, for instance, they were found to be partial and
unequal in their operation as between different classes;
if they were manifestly unjust; if they disclosed bad
faith; if they involved such oppressive or gratuitous
interference with the rights of those subject to them as
could find no justification in the minds of reasonable
men, the Court might well say, "Parliament never intended
to give authority to make such rules; they are
unreasonable and ultra vires".'

It has been argued that there is no real difference between
the Union Steel test and the Kruse formula except in
terminology.⁷⁵ This view is not, it is submitted, vindicated
by the cases: in Sinovich v Hercules Municipal Council,⁷⁶
for instance, the majority, applying the Union Steel test,
arrived at a different result to Schreiner JA, the only

dissentient, who applied the Kruse test. A second approach is that the Union Steel test applies to all administrative acts, the Theron formula applies to purely judicial decisions, and the Kruse test applies to subordinate legislation. While the cases, (with exceptions) tend to support this view, there are problems involved: first, it requires a prior classification of the function in question with all the dangers inherent in such a process;⁷⁷ secondly, it is difficult (if not impossible) to classify accurately and with the desired result, especially in borderline cases.⁷⁸

A third theory suggests that the test to be applied depends on the judge's conception of the justiciability of the issue:⁷⁹ judges are able (and willing) to decide on the reasonableness of the decision-making process (the 'dialectical reasonableness' of the act) because one is dealing with factors common to all decision-making and 'judges know as much as administrators how decisions should be reached'.⁸⁰ The Union Steel test would be applied in such a case. The issue would involve a high degree of public policy and so the court, on review, would be limited to its powers, falling outside the 'reasonableness constituency' for the purpose of looking at the outcome of the decision or its effects. In situations where the decision does not involve a high degree of discretion the court may go further in exercising its review powers. Jansen JA called such a decision a 'purely judicial decision' in Theron's case.⁸¹ Here the judge will form part of the 'reasonableness constituency' in respect of the 'substantive reasonableness' of the decision. In other words the weight to be attached to

evidence is justiciable in such a case and the 'extended formal test' may apply. In short, the public policy content in a 'purely judicial decision' is low and therefore the judge will see himself as competent to review the crux of the decision. Finally, some decisions are so patently unreasonable in their effect that, it being possible to recognize unreasonableness easier than reasonableness, the court will regard the application of the administrative action as being justiciable. When the court is of the opinion that it can form part of the 'unreasonableness constituency' it will apply the Kruse formula. (i.e. the substantive unreasonableness of the action will be justiciable, but subject to limitations such as the political accountability of the decision-maker, its position in the political hierarchy, the prominence of public policy and the exactness of the enabling provision.)⁸²

The applicability of the appropriate tests will be considered in the final section of this chapter.

(4) Specific Examples

⁸³
The case of R v Mahabeer dealt with the validity of a number of regulations, but the approach adopted in that case is of importance for present purposes. The purpose of the regulations was to prescribe the power of a board in imposing conditions. The validity of the regulations alone was attacked, but if it had been successful, the conditions framed thereunder would have fallen too.

While it emerges from the judgment that there were insufficient facts to justify the invalidation of the regulations, it is clear that Carlisle J did not approach the

matter from the basis of the Kruse test. Instead the learned judge adopted the formulation which was applied by the majority in Sinovich v Hercules Municipal Council,⁸⁴ which⁸⁵ emerges clearly from the dictum quoted below:

'The powers granted to the Board are extremely wide. If they are to be attacked as unreasonable the appellant must put before the Court some evidence to show that when the Board promulgated the Regulations it did not genuinely exercise its discretion or that it acted mala fide or for some ulterior motive.'

⁸⁶
The majority in Sinovich's case drew a distinction between general and specific powers conferred on the empowered body. If the powers are specific the court will only interfere on the basis of the Union Steel test.

It is submitted that Carlisle J's approach in Mahabeer's⁸⁷ case is incorrect. Not only was it an erroneous⁸⁸ application of Sinovich's case but the correctness of that decision is open to doubt: subordinate legislation, having a life of its own, operates over time and has the potential to effect a great number of persons so it is important that its validity is tested in terms of the reasonableness of its application. The Kruse formula allows for this, while the Union Steel formula does not.

In Ismail v Local Road Transportation Board, Pietermaritzburg⁸⁹ and Northern Districts and Another the reasonableness of conditions was argued on the basis of the Union Steel⁹⁰ formula. No mention was made of Kruse v Johnson and Caney AJP decided it on the narrower test enunciated in the former⁹¹ case. In Ex Parte Naidoo the applicant sought a declaratory order on the validity of conditions imposed on him as the owner of a taxi. He attacked them on the basis of

their vagueness and their unreasonableness. With regard to the latter issue the court found itself unable to reach a decision because, apart from making the submission in his affidavit, the applicant placed no material facts before the court. Selke J indicated that the wider test for unreasonableness was the one which applied to the case. He held that the failure to provide the court with these facts was central to enabling the court to 'decide upon the reasonableness or otherwise of the conditions, in so far as a decision of that question may depend upon the practical application of these conditions or requirements to circumstances affecting specially the applicant or his type of business'.⁹² (emphasis added.)

(5) **The Suggested Test to be Applied to Determine the Reasonableness of Conditions**

It is apparent from the cases cited above that confusion exists as to which test applies. In addressing this problem it is assumed that there is indeed a difference between the tests which have been postulated. The problem will be approached from two perspectives which, it is submitted, will achieve the same result, namely that the Kruse formula should be used to test the reasonableness of conditions.

(a) **The Bye-Law Analogy**

If a strict classification is made the imposition of a condition will most probably be regarded as an administrative act and not a legislative act.⁹³ Prima facie therefore the narrower Union Steel formula will apply when a condition is tested for reasonableness. At the same time it will be noted that a condition has legislative characteristics in that it operates over time and impinges on a holder's rights by

curtailing the manner in which he operates. The effect of the condition is thus more important than the motivation or reasons for its imposition, especially because of the criminal consequences of contravening the provisions of a condition.

The English courts have adopted a functional approach to classifying in order to avoid strict conceptualism. In Fawcett Properties Ltd v Buckingham County Council, a case involving planning conditions, Lord Denning examined the reasonableness issue as follows:

'...or yet again, to borrow the words of Lord McNaghten and Lord Wrenbury in this House, a public authority which is entrusted with a discretion must act reasonably...; and I take it that if the authority acts reasonably the result will be reasonable. Out of these various shades of meaning I am not sure that the last is not the best: for it puts planning conditions on much the same footing as bye-laws made by a local authority, to which they are so closely akin. Indeed I see no difference in principle between them. As with bye-laws so with planning conditions. The court can declare them void for unreasonableness but they must remember that they are made by a public representative body in the public interest.'

So too in Mixnam's Properties Ltd v Chertsey Urban District Council the reasonableness of conditions attached to a site licence for a caravan site was approached on the basis of the conditions being analagous to bye-laws. Lord Diplock reasoned as follows:

'Failure to comply with a condition attached to a site licence is a criminal offence. The power to impose conditions is thus, in effect, a power to make subordinate legislation analogous to a power to make bye-laws... The validity of such conditions is thus to be tested by the same principle as the validity of bye-laws.'

It is submitted that conditions attached to road transportation permits are so similar in effect to those dealt with in the Mixnam's Properties case⁹⁹ that the bye-law analogy could be applied to justify the use of the Kruse¹⁰⁰ formula.

(b) The Justiciability Theory

The justiciability theory is predicated on the court's institutional competence to interfere with administrative action.¹⁰¹ It is clear that the decision to impose conditions is not a 'purely judicial' one. Therefore no question of the justiciability of the 'substantive reasonableness' of the decision can arise: the fact that the decision-making process is policy-loaded will preclude the court from deciding on, for example, what weight to be attached to the various considerations. While it is conceded that the 'dialectical reasonableness' of the decision-making process will certainly be justiciable, the fact that conditions have certain ascertainable effects (in which the underlying policy is largely irrelevant) will ensure that the court will fit into the 'unreasonableness constituency'. In short, because the 'substantive unreasonableness' of the decision to impose conditions can be judged by its application in a relatively policy free environment, it is submitted that the Kruse formula is particularly appropriate when the reasonableness of conditions is in issue.

FOOTNOTES

1. Ss13(1)(c), 18(1)(c), 20(2)(c).
2. The reasons for doing so may include the avoidance of congestion in urban areas, the co-ordination of a number of services or to effect compliance with municipal requirements. Obviously the power to impose conditions extends to factors other than routes e.g. the goods which a vehicle may carry or the number of passengers which a vehicle may convey simultaneously. As Schreiner JA pointed out in R v Ramalho 1955(2) SA 331(A), 336E-H, 337B, the Act is not only concerned with the control aspect of regulation: safety also plays a role in the scheme of the Act.
3. 1982(4) SA 253(D).
4. See the definition of road transportation in s1(1); see Ch 14 at 370.
5. At 255 C-256 B.
6. At 256 G.
7. 1960 (1) SA 254 (N).
8. At 258 A-C.
9. At 260 E-F.
10. See Ch 13 below.
11. Wade, 38; the ultra vires doctrine was evolved in England to control the excesses of legal authority by companies and other statutory bodies. Gradually its scope was extended to cover acts of the State and its servants; see Sinovich v Hercules Municipal Council 1946 AD 783, 787-793; see too Evans, 94-6; 1 LAWSA, para 79.
12. Wade, 38.
13. Rose Innes, 89-90.
14. See Ch 13 below.
15. Wade, 38.
16. 1955(1) SA 14(T); 1955 (2) SA 331 (A).
17. Motor Carrier Transportation Act, s9(2)(g).
18. 1955(1) SA 14(T), 16 G-H.
19. 1955(2) SA 331(A), 336 E-G.
20. 1960(2) SA 239(N).
21. At 242F - 243A.
22. 1966(1) SA 329(A). The main issue concerned the vagueness of the terms 'White' and 'non-White' and the court approved the decision in S v Salama Taxis (Pty) Ltd and Another 1964(1) SA 371(C) which is discussed below.
23. Ords. 19 of 1951(C) and 15 of 1938(C).
24. Contrast the case of R v Kisten and Others 1959(1) SA 105(N) in which it was unsuccessfully argued that the bye-law imposing the duty on taxi drivers was not 'a law' for the purposes of the Act and alternatively that it was ultra vires because it did not discriminate. The Act was amended to prevent the situation which arose in Kisten's case. In this regard, see Ch 3 above at 63 where the Motor Carrier Amendment Act 42 of 1959 is discussed.
25. At 342 F.
26. Glanville Williams 'Language and the Law-II' (1945) 61 LQR 179, 191.
27. Garner, 83-4.
28. Ismail v Local Road Transportation Board, Pietermaritzburg and Northern Districts and Another

- 1967 (4) SA 659 (N).
29. The form that the instrument takes may have a bearing on the justiciability of the subject matter. Taitz ('Vagueness and Uncertainty in Subordinate Legislation as a Ground of Invalidity' (1979) 42 THRHR 412) has classified the least justiciable matters as exceptions.
 30. See Baxter, 529 (footnote 269).
 31. Baxter, 531-2; The judgments in the Natal Provincial Division and the Appellate Division in S v Meer and Another 1981(1) SA 739(N); 1981(4) SA 604(A), provide a ready example.
 32. R v Shapiro and Another 1935 NPD 155, 159.
 33. [1974] 1 KB 541, 543.
 34. 1949(4) SA 11(N), 13-14; for a general discussion on uncertainty as a ground for invalidity see S v Meer and Another 1981(1) SA 739(N), 740 F-748G.
 35. 1 LAWSA, para 81.
 36. No 44 of 1950; now no 74 of 1982.
 37. S v Meer and Another 1981(1) SA 739(N), 734 F-G; see too Steyn , 231.
 38. 'Vagueness and Uncertainty in Subordinate Legislation as a Ground of Invalidity' (1979) 42 THRHR 412, 418.
 39. Baxter 529; the learned author also submits that the so-called benevolent interpretation doctrine is not a legal rule but an expression of judicial restraint when, for instance, the court is dealing with a bye-law (or other instrument) promulgated by an elected, and hence politically accountable, body. (at 493) (Also see the severe criticism of the doctrine by Matthews J in Kruse v Johnson [1898] 2 QBD 91, 111).
 40. [1898] 2 QBD 91.
 41. 1949(4) SA 11(N).
 42. At 13-14; for a general discussion of benevolent interpretation see Nolte 'The Benevolent Interpretation of Local Laws' (1959) 76 SALJ 39.
 43. 1964 (1) SA 371(C).
 44. At 374 A-B; see too Moller v Keimoes School Committee and Others 1911 AD 635.
 45. S v Salama Taxis supra 374F.
 46. At 375D; see too S v Engeldoe's Taxi Service (Pty) Ltd, and Another 1966(1) SA 329(A) in which the court dealt at length with the meanings of the terms and held that they were sufficiently clear for application.
 47. 1964(4) SA 83(N).
 48. The relevant condition read as follows: 'This certificate authorizes the conveyance of not more than 6 (six) non-White passengers and their personal effects and any food or drink intended for their own consumption - (a) on trips within a radius of 30 (thirty) miles from Kranskop Post Office and (b) on casual trips from within the area described at (a) to any point beyond that area or from any point beyond that area to any point within that area; in accordance with the conditions and requirements set out herein and in the annexure hereto, provided further that not more than 4 (four) passengers, including the driver, be conveyed per trip between (a) Kranskop and Stanger and (b) Kranskop and Durban.' (quoted at 83G-H)
 49. At 84H - 85A; see too Ismail v Local Road Transportation Board, Pietermaritzburg and Northern Districts and Another 1967(4) SA 659(N).

50. 1950(2) SA 744(N).
51. The condition in question read: 'The holder of the exemption or his servant shall not compete unfairly with existing rail services or services in respect of which motor carrier certificates or exemptions have been issued.' (quoted at 745)
52. 1943 NPD 269.
53. 1960(2) SA 239(N).
54. 1962(3) SA 190(N). The relevant condition read: 'The holder of this motor carrier certificate or his servant shall not, after having obtained a fare or after having been chartered for a journey, seek to obtain or pick up other passengers for the same journey or any portion thereof, or for the return journey or any portion thereof.' (quoted at 191 C)
55. Supra.
56. Supra.
57. Maharaj's case supra 196 F-G; for a case where a condition dealing with the route contained sufficient clarity see S v Goss 1974(1) SA 380(N), 381 E-G.
58. 1 LAWSA, para 84.
59. Baxter, 478.
60. [1898] 2 QBD 91: see further C Plasket and P Firman 'Subordinate legislation and unreasonableness: the application of Kruse v Johnson ([1898] 2 QBD 91) by the South African courts' (1984) 47 THRHR 416.
61. See Ch 13 below at 342.
62. Wade, 355.
63. Baxter, 497.
64. [1925] AC 578.
65. At 613.
66. [1898] 2 QBD 91.
67. At 99.
68. 1928 AD 220.
69. At 236-7.
70. See for examples National Transport Commission v Chetty's Motor Transport (Pty) Ltd 1972(3) SA 726 (A) where Holmes JA held that the Commission's decision would be set aside for unreasonableness if it was 'grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind as aforesaid - a formidable onus' (at 735 G) and Johannesburg Local Road Transportation Board v David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A); see too the criticisms of the standard by Henning J in Bangtoo Brothers v National Transport Commission 1973(4) SA 667(N), 683 H and by Miller J in Chetty's Motor Transport (Pty) Ltd v National Transport Commission 1972(1) SA 156(N), 159 D.
71. 1976(2) SA 1 (A).
72. Supra.
73. At 15F - 21C.
74. [1898] 2 QBD 91, 99.
75. Rose Innes, 221.
76. 1946 AD 783.
77. See the warning sounded by Schreiner JA in Pretoria North Town Council v A 1 Electric Ice Cream Factory (Pty) Ltd 1953(3) SA 1 (A), 11 as to the dangers of elevating a convenient classification into a source of legal rules.

78. When attempts to classify are made the distinction drawn between 'administrative acts' and 'legislative acts' is made on the assumption that the former is 'specific' while the latter is 'general'. (Evans, 71); Griffith and Street point to the futility of the classification process: 'These words, although they have some extreme and easily recognizable forms, do not help to solve the doubtful cases. The matter is finally one for arbitrary decision. There is no answer, save one that is arbitrary to the old and comparable riddle: "How many sheep make a flock"'.
(Principles of Administrative Law 5 ed, 48); see too Glanville Williams Salmond on Jurisprudence 11 ed, 39.
79. Baxter, 490.
80. Baxter, 489.
81. 1976 (2) SA 1 (A), 20 A-F.
82. Baxter, 496.
83. 1950 (2) SA 744(N).
84. 1946 AD 783.
85. Mahabeer's case supra 747.
86. Supra.
87. Supra.
88. Supra. Sinovich's case drew a distinction between general and specific powers conferred on the body entrusted with the making of bye-laws. If the powers are specific, the court will only interfere in cases where powers should have been exercised but were not, where bad faith is established or where an ulterior motive is present. In Mahabeer's case supra the power in question was a general power and so the narrower test in Sinovich was not appropriate.
89. 1967(4) SA 659(N).
90. [1898] 2 QBD 91.
91. 1943 NPD 269.
92. Ex Parte Naidoo supra 273. The crux of the Kruse formula is that the validity of an exercise of power is judged by its effect i.e. in terms of its application; see C Plasket and P Firman 'Subordinate legislation and unreasonableness: the application of Kruse v Johnson ([1898] 2 QBD 91) by the South African courts' (1984) 47 THRHR 416. 423-4 and the cases cited therein.
93. See Ismail v Local Road Transportation Board Pietermaritzburg and Northern Districts and Another 1967(4) SA 659(N), 667 G-H where Caney AJP classified as follows: 'The principles by which to determine whether subordinate legislation is void for vagueness are well established and I shall presently refer to them, but before doing so I observe that it appears to me that the first respondent, in imposing conditions in connection with or to be included in a transportation certificate, does not legislate: its product in this relation is made for the individual certificate holder and, though binding upon him and available as a basis upon which he may be prosecuted if he contravenes its terms, is not law for the general public or any section of the public. Its act is an executive act under powers conferred by legislation and subordinate legislation, namely the statute and the regulations made under the statute.'

94. See Blackpool Corporation v Locker [1948] 1 KB 349, 368 where Scott LJ dealt with the nature of circulars containing powers to requisition. On a conceptual approach the circulars were clearly executive directions: 'As the Ministers' Powers Committee itself pointed out, it is the substance and not the form, or the name that matters. In the delegated legislation, law making is the essential feature, and law-making (except in the case of mere codification) means altering the existing law - whether written or unwritten - and, therefore, means interfering with existing rights vested in persons affected.'
95. [1961] AC 636
96. At 679.
97. [1964] 1 QB 214.
98. At 235; see too Chertsey Urban District Council v Mixnam's Properties Ltd [1964] 2 All E R 627 (HL) where the same approach was followed.
99. Supra.
100. The bye-law analogy is not unknown in South Africa. See for instance S v Meer and Another 1981 (1) SA 739(N), 742 C where Didcott and Shearer JJ were dealing with the nature of a 'banning order' issued in terms of the Internal Security Act 44 of 1950: 'These (the orders) are aimed in each instance at a single individual, rather than the public at large or any section of it. It may perhaps follow that they do not amount to subordinate legislation, in the strict sense at any rate, but are better described as administrative decrees. For present purposes, however, the difference seems unimportant... To treat the banning orders as subordinate legislation is therefore convenient even if technically that is not quite how they should be graded.' It should however be noted that Rumpff CJ did not expressly classify the 'banning order' on appeal, but treated its issue as an administrative act. (S v Meer and Another 1981(4) SA 604 (A), 614 D-E).
101. Baxter, 482-507.

PART FOUR

PROCEDURE AND CORRECTIVE MACHINERY

CHAPTER 11

PROCEDURE

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[III] SOME OBSERVATIONS ON PROCEDURE AND THE AUDI ALTERAM PARTEM RULE

- [A] THE FLEXIBILITY OF THE AUDI ALTERAM PARTEM RULE
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INTRODUCTION

s9 of the Road Transportation Act deals with the procedure that boards and the Commission must use in dealing with matters. It is thus a section of general application. Three other sections dealing with procedure will be discussed in this chapter. They describe the procedure to be followed in specified situations: s25 empowers a board or the Commission to withdraw, suspend or vary permits, s26 allows for the withdrawal or amendment of permits on the establishment of a railway service and s28 deals with the withdrawal or substitution of permits after an enquiry.

Prior to dealing with the rules contained in ss9, 25, 26 and 28 it is necessary to discuss decision-making and procedure in general terms. As the procedure which a statute prescribes has an effect on the common law, the rules of natural justice and related issues will be dealt with where appropriate.

{1] THE PLACE OF PROCEDURE IN DECISION MAKING

[A] DECISION-MAKING AND PROCEDURE

It is perhaps trite to say that the decision-making process is a complex one because, except in cases where a decision is reached mechanically, the decision-maker is always working under conditions of uncertainty involving 'complex and often ambiguous environments'.¹ In order to reach an 'acceptable'² decision, the decision-maker is required to weigh up alternative courses of action and consequences and to evaluate these consequences. Whether these choices are unlimited (as adherents to the unbounded rationality school argue) or narrowed, out of necessity (as Braybrooke

and Lindblom submit), the person or body entrusted with making the decision is faced with a task of unenviable complexity.³ To this must be added the difficulty of assessing the result:⁴

'Correctness, good/bad and efficient/inefficient are all concepts which can only be established by appealing to value judgements. Thus value judgments will, in addition to evaluating the ends/goals of the decision process, also evaluate the means through which the attainment of these ends are effected.'

These problems are exacerbated yet further by the fact that the validity of administrative decisions can be attacked on a number of grounds, one of which is relevancy. Thus if the court holds that a relevant consideration was not taken into account or that an irrelevant consideration tainted the decision it will be struck down. Craig, while stressing that relevancy, if properly used, is an appropriate control mechanism,⁵ points out:

'The unspoken premise behind this ground of attack is somewhat dubious. It presumes a decision taken with all relevant information at hand, which is then carefully weighed and a conclusion reached. Yet one thing upon which the literature upon decision-making, at least in its descriptive aspect, appears to be clear is that this premise does not represent actual practice.'

The role of procedure should be seen against the background of decision-making as outlined above. It is important in enabling a decision-maker to reach an acceptable decision by setting out rules to follow and thus narrowing the issues that have to be weighed up.⁶ Ideally it should also be designed to place those issues (or sufficient of them to provide the basis for a satisfactory decision) before the deciding person or body. Seen in this light, procedure is

not designed or intended to ensure a correct result.⁷

It has widely been assumed that, for reasons of information gathering and fairness, the adversary system is best suited to the resolution of disputes before administrative bodies.⁸ Craig challenges a blanket assumption that this system is best suited to the needs of all tribunals.⁹ He argues that it is premised on the equality of the parties (apart from intellect and experience). This, he says, is not necessarily the position in public law disputes.¹⁰ Secondly, while the adversary system may be appropriate in private law matters, involving for example two parties contesting a piece of land or the spoils from a contract, wider issues are at stake in public law disputes:¹¹

'There may be a wider public interest involved, over and beyond that of the particular parties before the tribunal, and whereas much private law litigation is retrospective in the sense of concerning a completed set of past events, public law will often be concerned with the future, with the modification of the public body's conduct, and with a series of events which will continue to have ramifications outside of the present dispute.'

He suggests therefore that a more 'active' role should be played by the deciding body, but at the same time, that the area of involvement be carefully assessed so as to avoid 'accusatory inquisition.'¹²

[B] THE IMPORTANCE OF PROCEDURE

The importance of fair procedure in the administrative sphere cannot be over emphasized. The courts have developed rules enabling them to control the means by which a decision of a tribunal or official is reached. The most widely used device, where it has not been excluded, is the principle of

natural justice which is based on the premise that a fair procedure (one which is impartial and affords parties a hearing) is not only desirable to ensure just results but is a sign of good administration.¹³ These considerations have been used to justify the insistence of the courts that procedures similar to their own can be forced on administrative bodies.¹⁴ To illustrate the important role played by procedure,¹⁵ Wade says:

'Procedure is not a matter of secondary importance. As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable. The legislation which controls the use of land, for example, contains a large element of expropriation without compensation, which is for the most part accepted without public complaint. But if there is the least suggestion that a planning appeal has been handled unfairly, public complaint is loud and widespread.'

It is often argued that the value of prescribing procedures is to ensure fair results, or at least, a high possibility of fair results. For instance, the underlying rationale of the audi alteram partem rule is, in part, to ensure that a power is exercised correctly because it is exercised after certain facts have been found to exist.¹⁶ At the same time it must be conceded that unjust laws may be administered with due regard to procedures and bad decisions may be reached despite meticulous care in observing procedures.¹⁷ The latter instance does not create an insurmountable problem because such a decision may be attacked on substantive issues. The usual grounds for reviewing administrative action will be available.¹⁸ If the decision is attacked simply because it is alleged to be wrong, the court will not interfere. It is not entitled or qualified to deal with the merits and so substitute its decision for that of the body entrusted by

statute with exercising the discretion.

[C] WHAT IS MEANT BY THE WORD 'FAIR'?

It is often glibly said that decisions of courts and tribunals should be fair, and that the reason for the imposition of procedures or procedural safe-guards is to ensure fair results. One must therefore enquire into what exactly is meant by the word 'fair'. This enquiry is complicated by the fact that fairness is a contested concept. In other words, one person's notion of fairness may differ substantially from another person's notion of the same concept, while both agree that procedures should be fair. X may feel, for example, that fairness is enshrined in equality, while Y may think that anything is fair if the parties consented thereto. A related justification for observing procedures is that certain objectives, deemed to be desirable, will be achieved by so doing. These objectives include accuracy of decision-making, objectivity and efficiency. Baxter says:

'Underlying these assumptions are value judgments that those objectives are desirable - one could imagine an administrative state where the sole objective was efficiency in administration, in which case accuracy may take only second place and objectivity none at all. So even the purely utilitarian approach to procedural standards is based upon moral notions of fairness'.

If it were possible to measure the correctness of a decision against an objective yardstick the need for procedural observance would fall away. Where subjective standards regarding the merits of a decision have to be weighed up procedure plays a valuable role. Three categories of procedural justice may be distinguished:

'Perfect procedural justice may be devised where

(a) there is an independent criterion for measuring the correctness of the result, and (b) it is possible to devise a procedure that will ensure the desired outcome. As Rawls says, 'perfect procedural justice is rare, if not impossible, in cases of much practical interest.'

Imperfect procedural justice is exemplified by trials. The procedure is framed to ascertain the facts, but 'it seems impossible to design the legal rules so that they always lead to the correct result.'

Pure procedural justice, on the other hand, 'obtains when there is no independent criterion for the right result; instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed'

Because procedures in administrative decision-making, exemplified by the principles of natural justice, will inevitably fall into the category of imperfect procedural justice or that of pure procedural justice, the justification exists for judicial interference when those principles are not complied with.

[III] THE PROCEDURE LAID DOWN IN THE ROAD TRANSPORTATION ACT

[IA] SECTION 9 - GENERAL PRECEDURE

(1) The Provisions of the Section

The procedure laid down in s9 of the Act is general because it prescribes the way in which a board or the Commission must deal with any matter before it. It is, however, subject to the provisions of ss25(2)(b) and 28.

In terms of s9, a board or the Commission may, in its descretion, allow any person who is affected by, or interested in, the matter before it to give evidence or make oral representations, to call witnesses and lead evidence and to question any person who has testified as a witness.

These rights may be exercised by the affected or interested

party personally or by his duly authorized legal
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representation.

The remainder of s9(1) gives a board or the Commission powers to enable it to gather sufficient information on which to base a decision. S9(1)(b) grants the power to subpoena any person to appear before a board or the Commission to give evidence or to produce any book, plan or other document or article in his possession or under his control.

This power must be exercised by written notice and served in
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the manner prescribed by regulation. S9(1)(c) contains almost identical provisions but it applies to persons who are present at the place where the hearing is taking place. The formalities of reg 11 are not required in such a case. Furthermore, a board or the Commission may question any
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person appearing before it as a witness and refuse to hear
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any person who refuses to be sworn or affirmed.

(2) The Discretion Exercised by a Board or the Commission S9 is of relevance, not only to applications for permits but also to all of the other functions entrusted to boards and
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the Commission. Seen in this light, the discretion contained in s9 is merely an acknowledgment of the variable
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content of the audi alteram partem rule. When a board or the Commission is hearing an application for a permit, the decision to refuse to allow an interested party a full hearing would most certainly be fatal. On the other hand, if the decision in Roberts v Chairman, Local Road
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Transportation Board and Others(2) is to be seen as correct, the refusal to hear a party when the Commission acts in terms of s7(2) is not contrary to the principles of natural

justice.

Thus, while the discretion must be exercised properly, a failure to allow a party a hearing will not, on its own, invalidate the final decision. To exercise the discretion in the proper way, a board or the Commission must consider the matter, apply its mind to the issue, act in good faith, for a proper purpose and without an ulterior motive. If the tribunal has exercised its discretion in accordance with the above principles of legality, the further question of the applicability of natural justice can be tackled. This amounts to asking whether the correct procedure was adopted in the circumstances. Whether natural justice applies will depend, inter alia on '...die omstandighede van die saak, die aard van die ondersoek, die reëls waarvolgens die regsinstansie handel, die onderwerp waarmee gehandel word, ens...'³¹

[B] SECTION 25 - THE WITHDRAWAL, SUSPENSION OR VARIATION OF PERMITS

(1) The Provisions of the Section

The procedures laid down in s9 are made subject to the special procedures of s25(2).³² S25(1) empowers a competent board or the Commission to withdraw or suspend public or private permits or to cancel, vary or amend any conditions or requirements.³³ Before exercising any power under this section the following procedures must be observed: the board or the Commission must give the permit holder in question at least 21 days written notice of its intention, along with reasons for its proposed action. This notice must be tendered by registered or certified post;³⁴ the permit holder must be allowed, either personally or through a legal

representative, to appear before the board or the Commission to adduce evidence and submit representations; and the appropriate local authorities must be allowed to make representations if the permit which may be withdrawn, suspended or varied is a public permit authorizing the daily conveyance of persons.³⁶ The representations must be delivered to the board or the Commission not later than 21 days after being requested and must be in writing.³⁷ Delivery must be made either by hand or by registered post.

(2) The Giving of Notice as a Jurisdictional Fact

Rose Innes defines a jurisdictional fact as '...a fact the existence of which the legislature contemplates as a prerequisite to the exercise of a statutory power'.³⁸ Non compliance, by a tribunal, with a jurisdictional fact will render any purported exercise of power ultra vires,³⁹ unless the statutory provision is merely directory.⁴⁰ While the answer to whether the terms of a statute are mandatory or directory depend to a large extent on the context and wording of the enactment in question, Evans makes the following⁴¹ observation:

'Some classes of procedural requirements are so important that they will nearly always be held to be mandatory. For example, an administrative authority which fails to comply with a statutory duty to give prior notice or hold a hearing or make due enquiry or consider objections in the course of exercising discretionary powers affecting individual rights will seldom find the courts casting an indulgent eye upon its omissions.'

The giving of notice and reasons to a permit holder, in terms of s25(2)(a), are jurisdictional facts which must exist prior to the exercise of any powers, in terms of s25, by a board or the Commission. It is submitted that a decision taken

without compliance with the subsection will be invalid.

The onus of proving the existence of a jurisdictional fact is on the person or tribunal vested with power. It is not cast on the applicant to prove its non-existence.⁴³

(3) The Giving of Notice as a Requirement of Natural Justice

It is submitted that had s25(2)(a) not been enacted, the giving of notice would still be necessary.⁴⁴ The common law principle audi alteram partem would apply because the act in question is quasi-judicial in nature or, alternatively,⁴⁵ fairness would demand that natural justice be applied. The content of the right to a hearing is variable, so those elements which the courts regard as particularly appropriate to the situation would have to be complied with. It is difficult to envisage a fair exercise of power, in the set of circumstances contemplated by s25, in which notice has not been given: the right to a hearing would be rendered worthless if no time was allowed to a permit holder in which he could prepare his representations and evidence.

[C] SECTION 26 - THE ESTABLISHMENT OF A RAILWAY SERVICE

S26 provides that on the establishment of a railway service the Commission, acting with the approval of the Minister, may withdraw or amend any permit which formerly authorized the conveyance of persons who would be served by the railway service. In such a situation the permit holder is presented with a fait accompli because no prior notice need be given.⁴⁶ Notice must, however, be sent to the permit holder (by certified or registered post) requiring him to submit a claim for compensation. The claim must be submitted within 90 days of the withdrawal or amendment becoming effective⁴⁷

or such longer period as the Commission may allow. The amount of compensation is determined by the Ministers of Transport Affairs and Finance but provision is made for arbitration if the permit holder is not prepared to accept the amount decided on by the Ministers.

[D] SECTION 28 - PUBLIC ENQUIRIES

(1) The Provisions of the Section

S28 makes provision for a public enquiry with a view to withdrawing or substituting existing permits. S28(1) reads as follows:

'Whenever the Minister has reason to believe that, in order to bring about improvements in transportation facilities within any area or over any route, or for any other reason, it may be expedient in the public interest that any public permit be withdrawn or that any such permit be withdrawn and in lieu thereof one or more such permits be issued to a person other than the holder of such permit, the Minister may cause a public inquiry in regard to the position to be instituted by the commission or by a member of the commission.'

The following procedures must be followed when a s28 enquiry is instituted: notice must be given to all interested parties who must also be afforded an opportunity to attend and be heard at the enquiry. Reg 19 stipulates how notice is to be given and the facts which must be made public. These consist of the venue of the enquiry, the time and date of its commencement and, if the enquiry was instituted by a member of the Commission, that member's full names. Notice must be published in one issue of the Government Gazette and in at least one issue of an English and an Afrikaans newspaper circulating in the province in which the road transportation is undertaken; in conducting the enquiry the Commission or member thereof must take into account the provisions of

s15(1), which sets out the matters which have to be considered when an application for a public permit is dealt with.⁵³ When the enquiry has been completed the Minister is empowered to make the final decision. He may, subject to⁵⁴ undertakings of compensation, direct that the permit be withdrawn, or that it be withdrawn and one or more permits be issued to a person or persons other than the original permit holder. In reaching his decision the Minister is required to consider the report made by the Commission and any⁵⁵ recommendations. The amount of compensation payable should be determined by the parties, but in the absence of agreement it will be determined by an arbitrator in accordance with the⁵⁶ Arbitration Act.

(2) Natural Justice and the Commission's Report

S28(2) codifies three aspects of the audi alteram partem rule, namely, the rights to notice, to a hearing and to an opportunity to attend the enquiry. Whether these rights may be supplemented by the common law is a vexed question which has received much attention by the courts in South Africa and in England. The decisions, unfortunately, have shown a great deal of diversity. At the heart of the controversy is the fact that the body which hears the matter does not decide on it. The exercise of that power is left to the Minister whose decision is made on the basis of the Commission's report.

The argument in favour of a restrictive approach to the problem is based on a classification of the function in question. The body entrusted with hearing the matter is not entrusted with deciding, and so cannot affect the rights of interested parties. Consequently it does not exercise a

quasi-judicial function in the normal sense and so only those aspects of natural justice which are enshrined in the statute need be applied. The case of Cassem en 'n Ander v Oos⁵⁷ Kaapse Komitee van die Groepsgebiedraad en Andere provides a clear example of this approach. In terms of the Group Areas Act⁵⁸ a Group Areas Board was entrusted with the task of investigating and reporting on whether areas should be proclaimed as Group Areas. The report was made to the Minister and effect was given to findings by way of proclamations made by the Governor-General acting on the advice of the Minister. The appellants wished inter alia to be allowed to give oral evidence before the Board and to cross examine other witnesses. In dismissing the appeal, Steyn CJ held that the appellants were only entitled to make use of those procedures which the Act laid down. He held that the rules of natural justice, apart from the statute,⁵⁹ did not apply:

'Voordat die funksie van n statutêr gemagtigde uit die aard daarvan as kwasi-geregtelik in bedoelde sin beskou kan word, moet, afgesien van ander moontlike vereistes, in n geval soos die huidige, eers blyk dat die uitoefening daarvan die regte van n persoon sal tref.'

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Rose Innes says that Cassem's case went against the weight of previous authority and that the courts generally treated the proceedings of fact-finding and advisory bodies as quasi-⁶¹judicial. Notwithstanding the above, it is submitted that the decision can be criticized on a number of grounds: first, to assert that the enquiry will have no effect on the rights of interested parties overlooks the fact that a decision which will affect rights will be made. In other words, the enquiry should not be seen in isolation;

secondly, by short-circuiting natural justice the type of situation is created which the concept seeks to avoid. The decision-maker is allowed to make a decision without all of the relevant facts at his disposal, but, because he took no part in the enquiry, that decision, if made honestly in the broad sense, will be immune from attack; thirdly the formalistic approach manifested in Cassem's case elevates 'a convenient classification into a source of legal rules' at the expense, it is submitted, of equity and efficiency; fourthly, the correctness of the decision must be questioned against the general policy of South African law. The law, in many other areas, experiences no problems in looking at the substance and not the form. Indeed this is seen as a healthy characteristic. Thus a disguised sale will be exposed as a loan in appropriate cases; an agreement which the parties call a lease in which the dominant right is the *ius abutendi* will be held not to be a lease, despite the form of the agreement; and an agreement which is framed as a partnership to avoid a minimum wage provision will have the trappings of partnership stripped away and be categorized as a contract of employment.

It is submitted that the way out of the conceptual trap created by the classification of functions is the adoption of the approach favoured by the English courts. Recognizing the variable content of natural justice, the English courts have applied the fairness doctrine, which does not depend on the type of function in question. Far from tipping the scale too much in favour of the individual, the application of natural justice in this way has allowed judges sufficient latitude to decide the extent to which the concept applies in situations

of an extremely varied nature. This determination will
depend upon a number of factors which Craig outlines:⁶⁸

'the proximity between the initial investigation and the final decision; the construction of the statute; the importance of the subject matter for the individual; and the need for administrative efficiency.'

(3) The Minister's Decision

The Minister is given the power to make the decision as to whether the permit which was the subject of the enquiry should be withdrawn completely or withdrawn and replaced by another permit or other permits.⁶⁹ Prior to making his decision he is required to consider the report made by the Commission and, where applicable, any recommendations.

Two initial points must be made about the decision-making process before a fuller discussion of the Minister's decision is embarked on: first, a Minister, as a member of the executive should have a policy in respect of the affairs which form part of his portfolio;⁷⁰ secondly, the Minister of Transport Affairs acts as the 'co-ordinating factor' between SATS and the Commission, both of which fall within his department.⁷¹ Bearing the above two factors in mind the problem of departmental bias will be canvassed as will the process of the Minister's decision-making.

It will be remembered that in terms of s28(1) the Minister has power to initiate the enquiry. The permitted reasons for doing so are widely stated in the Act:

'Whenever the Minister has reason to believe that, in order to bring about improvements in transportation facilities...or for any other reason, it may be expedient in the public interest that any public permit be withdrawn... the Minister may cause a public enquiry in regard to the position to be instituted...'

It can generally be assumed that the Minister's decision to hold an enquiry is based on a policy which he holds (and is entitled to hold). As the ultimate decision-maker, that policy will come into his considerations. Wade points out that 'ministerial or departmental policy cannot be regarded as disqualifying bias' and that attempts to have decisions set aside on this basis have 'uniformly failed'.⁷² The same author says elsewhere:⁷³

'The minister's policy, however loudly he proclaims it, will not vitiate it by itself. For, of course, the minister is required by Parliament to have a policy and it is absurd to suppose that Parliament puts duties upon him with the intention that he shall lay his policy aside while he performs them'.

⁷⁴
The case of Franklin v Minister of Town and Country Planning is perhaps an extreme case of ministerial bias. In terms of the New Towns Act 1946, the Minister of Town and Country Planning had decided that Stevenage was to be a new town. Prior to this (and prior to a public enquiry) the Minister had made a speech at Stevenage at which he was jeered and heckled. Despite this he stated his policy and also said: 'It is no good your jeering: it is going to be done'. The objectors, after the final decision was made, attacked its validity on the basis of the Minister's stated bias. The House of Lords, in upholding his decision held that the law did not, in the circumstances, require impartial consideration on the part of the Minister. Wade favours the approach taken by the Court of Appeal in the same case. This

court held that the law required impartial consideration and that the Minister had dealt with the matter impartially, despite his outburst at the public meeting. 75

If the Minister's decision cannot be impugned on the basis of ministerial bias, are there any other available grounds? The answer to this question is in the affirmative, although it must be conceded that these grounds are limited. Wade illustrates this point in distinguishing between procedural regularity leading to the decision and the decision itself: 76

'If the minister has come safely through the prescribed course, and provided (it must be added) that he acts in good faith, he is then at liberty to decide as he likes free of all legal trammels. If he secretly decides by tossing a penny, or by drawing lots, there is no process by which the substance of his decision can be attacked - though if he discloses that he has so decided, this might be accepted as evidence that he had not considered the obligation.'

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The decision in CREEDNZ v Governor-General is perhaps wider in its terms. The court held that the proper enquiry into the validity of the Minister's decision is whether, when he considered the report and made his decision, he genuinely addressed himself to the question with an open mind.

[IIII] SOME OBSERVATIONS ON PROCEDURE AND THE AUDI ALTERAM PARTEM RULE

[A] THE FLEXIBILITY OF THE AUDI ALTERAM PARTEM RULE

The principles of natural justice are flexible and can be applied in varying degrees: 78

'The audi alteram partem rule does not postulate rigid norms of invariable content and accordingly, its ambit must vary with the context in which it is invoked'

Craig says that, while the court takes a number of factors

into account when applying natural justice, it is often influenced by a utilitarian concept of fairness. This will not usually be expressed. The result is therefore a balance of three factors:

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'the individual interest at issue; the benefits to be derived from added procedural safeguards; and the cost to the administration, both direct and indirect, of complying with those procedural requirements.'

The advantage of flexibility cannot be overemphasized: it enables courts to apply those principles most suited to a particular situation. In the words of Baker AJ:

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'Dit is, algemeen gesproke, stellig reg om to sê dat die vereistes van natuurlike geregtigheid van die omstandighede van die saak, die aard van die ondersoek, die reëls waarvolgens die regsinstansie handel, die onderwerp waarmee behandel word ens ahang...'

The trend to apply natural justice in an all or nothing manner has been severely criticized. Such an approach is not only inappropriate, but also a dangerous deviation from the common law safeguards inherent in the concept. Thus, while the 'procedural' sections of the Road Transportation Act codify some aspects of the audi alteram partem rule, those provisions are not necessarily the beginning and the end of the matter. The court may, in appropriate circumstances, bolster the omissions of the statute with the principles of the common law.

[B] THE CONTENT OF THE AUDI ALTERAM PARTEM RULE

The exact content of the audi alteram partem rule is difficult to define. The main reason for this state of uncertainty is the flexibility of the concept and its

variable content, dependent on the facts of each case. Corder, in looking for the essentials of natural justice, suggests that any attempt to codify the audi alteram partem principle should contain the following as minimum⁸³ requirements:

- '1. Timeous notice of intended administrative action which may affect a particular individual's rights, including notice of the time and place of a hearing and the nature of the prejudicial allegations against that individual.
2. An oral hearing, at which the individual be given an opportunity to produce rebutting evidence, and to be assisted by legal counsel, if he so desires.
3. The giving of reasons for a decision, which reasons will be made available only to the parties concerned.'

At the same time, it should be noted that in certain circumstances the above requirements would be inadequate to ensure fairness in the administrative process. In these situations additional safeguards would be necessary, whether they are prescribed by the relevant statute or not. When applying natural justice a court should always bear two conflicting interests in mind: the need for fairness and just results on the one hand and considerations of administrative expediency on the other. An over strict application of the rule by the courts would result in the administrative process grinding to a standstill. Three⁸⁴ guidelines have been suggested in Durayappah v Fernando to assist judges in deciding whether the rule is appropriate or not.⁸⁵ These guidelines are:

'...first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice: secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene; thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other.'

It must be added that despite the undoubted convenience of an all embracing formula, the application of which determines the admissibility or otherwise of the rule, the inherent flexibility of natural justice which is, after all, its principle characteristic, defies attempts to formalize it to any extent. Wade succinctly makes this point as follows:

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'On the other hand, it must be emphasized that 'it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject matter.' The application of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject matter of the case.'

FOOTNOTES

1. P M Jackson The Political Economy of Bureaucracy, 88.
2. The word 'acceptable' has been used in an effort to use a more neutral term than 'good' or 'correct.'
3. See Craig, 231-3, for an outline of decision-making theories; see too Jackson, op cit, 86-119.
4. Jackson op cit 119 (footnote 3).
5. Craig, 234.
6. Wade, 413.
7. Wade, at 414, dealing with rules of procedure says: 'Provided that the courts do not let them run riot, and keep them in touch with the standards which good administration demands in any case, they should be regarded as a protection not only to citizens but also to officials. A decision which is made without bias, and with proper consideration of the views of those affected by it, will not only be more acceptable: it will also be of better quality. Justice and efficiency go hand in hand, so long at least as the law does not impose excessive refinements'.
8. See for example Wade, 803.
9. Craig, 613; for a discussion of the inquisitorial nature of the procedure under the Road Transportation Act see Ratner and Collett Agencies (Pty) Ltd v Chairman.

National Transport Commission and Others TPD 20 March 1985 (case 22195/83) unreported.

10. Ibid.
11. Craig, 164.
12. Ibid.
13. Wade, 442.
14. Craig, at 262-3, says that this is debatable: 'The reasons for the development of a legal doctrine are often mixed. The emergence of natural justice was partly influenced by the court's desire to assert the supremacy of the common law over statute, not in Coke's sense of declaring the latter to be void, but by imposing certain procedural constraints on its operation. While a desire to impose uniform adjudicatory procedure may also have formed part of this rationale for the application of natural justice, the major reason for the development of the doctrine was the protection of property rights or interests akin thereto.'
15. Wade, 413.
16. L G Baxter 'Fairness and Natural Justice in English and South African Law' (1979) 96 SALJ 607, 629-630.
17. Wade, 413: the learned author says: 'A judge in the United States Supreme Court has said: 'Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied'. He went on to say that it might be preferable to live under Russian law applied by common-law procedures than under the common-law enforced by Russian procedures.'
18. See Ch 13 below.
19. See Ch 13 below at 326.
20. Baxter op cit 633.
21. Baxter op cit 634-5.
22. Baxter op cit 630.
23. S9(1).
24. S9(1)(a).
25. See reg 11 which says: 'Any notice given in terms of section 9 (1)(b) of the Act shall be in the form prescribed in Schedule 1, and an inspector shall personally hand such notice to the person to whom it applies, and such inspector shall thereupon report to the Commission or board, as the case may be.'
26. S9(1)(d).
27. S9(1)(e).
28. See Ch 5, above, on the functions of boards and the Commission.
29. On the variable content of the rule see Wade, 472; Craig, 265; Evans 195; C P Seepersad, 'Fairness and Audi Alteram Partem' 1975 P.L. 242, 244. Rose Innes, unlike the above mentioned writers, does not regard the fluidity of natural justice as being an integral part of the concept: 'The 'variable content' of the rules of natural justice seems to be no more than a somewhat misleading description of a characteristic of nearly all rules of law: that they have qualifications, exceptions and differing modes of application according to the varying circumstances of fact'. (at 147).
30. 1980(2) SA 480(C).
31. Bell v Van Rensburg 1971(3) SA 693(C), 707A; see too Craig, 265.

32. S9(1).
33. See Ch 9 above at 222.
34. S25(2)(a).
35. S25(2)(b).
36. S25(2)(c).
37. Reg 4(4).
38. Rose Innes, 100; Garner, 147.
39. See S_A Defence and Aid Fund and Another v Minister of Justice 1967 (1) SA 31(C), 34-35; United Democratic Front (Western Cape Region) v Theron NO 1984 (1) SA 315(C).
40. Rose Innes, 100.
41. Evans, 144.
42. For an analagous case see Roberts v Chairman Local Road Transportation Board and Another (1) 1980 (2) SA 472(C).
43. Rose Innes 100; United Democratic Front (Western Cape) v Theron NO supra 326 D-F.
44. On the supplementing of statutory procedures by the 'justice of the common law' see Wade, at 475, who observes: 'No statutory procedure is likely to cover every possibility of unfairness.'
45. On the fairness doctrine see Ch 5 above at 127.
46. S26(1).
47. S26(2).
48. S26(5).
49. S26(6).
50. S28(2).
51. Reg 19(1).
52. Reg 19(2).
53. See Ch 8 above at 195.
54. S28(5).
55. S28(4).
56. No 42 of 1965.
57. 1959(3) SA 651(A).
58. No 41 of 1950.
59. At 660 C-D.
60. Supra.
61. Rose Innes, 155.
62. Supra.
63. Pretoria North Town Council v A I Electric Ice Cream Factory (Pty) Ltd 1953(3) SA 1(A), 11.
64. Lawson and Kirk v S_A Discount and Acceptance Corporation 1938 CPD 273. For a general discussion on disguised transactions see A J Kerr, The Principles of the Law of Contract (3 ed.), 132-4.
65. Uitenhage Divisional Council v Port Elizabeth Municipality 1944 EDL 1; A J Kerr, The Law of Lease (2 ed.) 1-2.
66. Venter v Livni 1950(1) SA 524(T); G Wille and P Millin Mercantile Law of South Africa (17 ed.), 414. It should be noted that the above three instances are merely examples of a wider principle viz that the courts can look behind the form which the parties give their agreement.
67. Craig, 285-6.
68. Craig, 286.
69. S28(4).
70. Wade, 437.
71. Verburgh, 33.
72. Wade, 435-6.
73. H W R Wade, 'Quasi Judicial and its Background' (1949)

- 10 CLJ 216, 236.
74. [1948] AC 87.
75. Wade, 437.
76. H W R Wade, 'Quasi Judicial and its Background' (1949) 10 CLJ 216, 236.
77. 1981 1 NZLR 173. (Quoted from Wade, at 437, who says that the reasoning in the case is far superior to that in Franklin's case supra).
78. CP Seepersad 'Fairness and Audi Alteram Partem' 1975 PL 242, 244; see too footnote 29 above.
79. Craig. 265.
80. Bell v Van Rensburg 1971 (3) SA 693 (C), 707 A.
81. See for example E. Cameron 'Etiquette, Morality and Law; The Strange Case of an Unmerited Rebuff for Natural Justice' (1980) 97 SALJ 189, 193-4.
82. Wade, 475.
83. H Corder 'The Content of the Audi Alteram Partem Rule in South African Administrative Law' (1980) 43 THRHR 156, 177.
84. [1967] 2 AC 337.
85. At .
86. Wade, 472.

CHAPTER 12

APPEALS

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INTRODUCTION

Appeal must be distinguished from review. The former is always the creature of statute¹ while the basis of the latter is the common law: the court, on review is simply acting in accordance with its inherent powers and 'performing its ordinary functions in order to uphold the rule of law'.² A further distinction is that appeals deal with the merits of a decision, whereas reviews are concerned with the legality of a decision.³ The importance of this distinction is outlined by Baxter:⁴

'The primary function of the courts is to apply the law in the resolution of disputes. This provides the justification for their inherent review jurisdiction...but it also limits this jurisdiction to matters involving the legality of administrative action. Without statutory authority, the court may not venture to question the merits or wisdom of any administrative decision that may be in dispute. If the court were to do this, it would be usurping the authority that has been entrusted to the administrative body by the empowering legislation. More than this, the court would be moving beyond its special area of expertise.'

[I] THE NATURE AND FUNCTION OF APPEAL

[A] WHY ARE APPEALS NECESSARY?

The first, and perhaps, most obvious reason for the creation of appeal mechanisms is to correct bad or wrong decisions. Humans, being fallible, make mistakes which may be corrected if the matter is decided again. The existence of an appeal procedure should not be seen solely as a safeguard against dishonesty or bad faith: review procedures are designed to cure such abuses of power. Instead it should be seen as a means of curing bona fide errors made by adjudicators of first instance. It is thus an invaluable safeguard for, in

the words of Baxter:

'It provides an aggrieved individual with the assurance that the decision will be reconsidered by a second decision-maker. The appellate body is able to exercise a calmer, more objective and reflective judgement. Detached from the "dust of the arena", as it were, and the immediacy of the initial decision, the second decision-maker is in a better position to discern a faulty reasoning process and, in particular, to evaluate facts.'

In addition, it is an unfortunate fact that not all adjudicators, despite the best selection methods, will provide a suitable standard of decision-making. The hardships that can be caused by the poor quality of adjudication may be overcome on appeal.

[B] THE TYPES OF APPEALS

The types of appeals may be examined from two perspectives: in terms of hierarchy and in terms of appellate powers. It should be remembered in what follows that, because appeals are creatures of statute, they are created on an ad hoc basis by individual statutes: the types of appeals need not necessarily conform to any particular general principle.

(1) Hierarchy

In the judicial system the hierarchy of appeals is stable and relatively simple: a litigant has an automatic right to appeal from the decision of a magistrate to the Supreme Court. Leave to appeal is required to appeal from a decision of any division of the Supreme Court to either a full bench of that division or the Appellate Division.⁶

It is unusual for an appeal to be granted from a decision of an administrative tribunal to a court: courts as a rule, do not possess the institutional competence to decide on the

merits of often highly complex policy issues but other members of the administration would be better suited to do so:⁸

'Since the executive branch of government exists in order to administer, it seems appropriate that the wisdom of its actions should be left in its hands. But neither departmental supervision nor procedural safeguards are sufficient to guarantee that administrative discretion will be exercised wisely. Hence provision is often made for an administrative appeal against particular administrative decisions.'

The hierarchical structure of appellate jurisdiction⁹ varies from statute to statute. Baxter points out that the relative importance given to the protection of individual rights on the one hand and the application of public policy on the other will be the major factor in determining the type of body to which an appeal should lie:¹⁰

'Seldom is the choice between legal rights and public policy clearcut. In many cases both require adequate protection. Various blends may be employed in order to achieve the most appropriate balance of representation, skill, accountability and independence in the appellate body to match the subject matter of the appeal.'

Hence an appeal may lie to a minister (usually from a power exercised by an official in his department), from a member of a department to a superior (such as a director general), from a local tribunal to a supervisory agency which operates on a national level, from a tribunal of first instance to a body representative of various interest groups, from boards to specially created appellate bodies (such as the Publications Appeal Board) or to special courts staffed by people with the necessary expertise.¹¹

(2) Powers

Despite the ad hoc nature of the creation of appellate jurisdiction, appeals can be classified according to how narrow or wide the powers of the appellate body are. In the case of Tikly and Others v Johannes NO and Others,¹² Trollip J isolated three distinct types of appeal on this basis:

- '(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information.
- (ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given and in which the only determination is whether that decision was right or wrong.
- (iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not but whether the arbiters had exercised their powers honestly and properly.'

The sense in which the word is used in each case must be determined from its statutory context.¹³

[C] APPEALS AGAINST DISCRETIONARY DECISIONS

An appeal from an administrative body to a court, when the former is required to exercise a discretion, may be inappropriate. The court is not necessarily familiar with the policy which underpins the administrative body's functions. In instances where such an appeal is created it may perhaps be most suitable to grant the narrowest appellate jurisdiction i.e. what Trollip J described as a 'review'.

The more policy loaded the decision of the tribunal of first instance, the more appropriate will it be to grant appellate powers to an administrative body: in such cases less objection can be raised against granting a wider appeal. In an appeal in the widest sense, the appellate body will have

original jurisdiction of its own. In other words, it will
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have:

'...the power and duty to hear the administrative proceedings afresh and to hear new evidence if need be, and to substitute its opinion, discretion and decision for that of the inferior administrative tribunal. It exercises the same powers on the appeal as the inferior authority had in the first instance.'

Finally it must be stressed that the above comments are qualified by the fact that the type of appeal created will depend on the terms of the parent legislation. It may also be dependent on the procedural machinery contained in the Act
15
and the facilities available to the appellate body.

[III] THE APPEAL MECHANISM OF THE ROAD TRANSPORTATION ACT

[A] THE PROVISIONS OF SECTION 8

(1) Who May Note an Appeal

S8(1) of the Act provides for an appeal to the Commission against any act, direction or decision of a board, unless the context of a particular section of the statute provides otherwise. A person may appeal if: (a) he has applied to a board for the grant, renewal, amendment or transfer of any permit; (b) if he is the holder of a permit; or (c) if, in accordance with the regulations, he submitted representations to a board 'objecting to or supporting any application published under section 14(1) or any application for the grant, renewal or amendment of a private permit'. Such a person must, in addition, be affected by the act, direction
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or decision of the board.

S8(1) as outlined above was introduced by amending
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legislation in 1980. Before the amendment it provided a
wider right to appeal. It read:

'Save as otherwise provided in this Act, any person affected by any act, direction or decision of a board may, in the manner prescribed by regulation, within 21 days after the said act was performed or the said direction or decision was given by the board concerned, appeal against such act, direction or decision to the commission.'

Prior to the amendment therefore, an affected person could await a decision of a board before becoming involved in the issue. That is no longer possible. If the person is not the applicant or a permit holder, involvement (through the submission of representations at the very least) is a
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condition for standing on appeal.

(2) How is an Appeal Noted?

The appeal must be noted within 21 days of the act of the board being performed or the direction or decision being given. Furthermore it must conform with the requirements
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prescribed by regulation. These requirements are contained in reg 10(1) and comprise of the following: (a) a clear, full description of the act, direction or decision which forms the basis of the appeal; (b) the name of the board whose act, direction or decision is sought to be challenged and the date on which it was performed or made; and (c) the grounds of appeal, which must be clearly set out. Reg 10(1)(d) required elaboration of the grounds to be relied upon but it
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has been held to be ultra vires because of its vagueness.

Reg 10(1)(e) says that the notice of appeal must be in writing and copies of the document must be lodged by hand or by registered mail with the Commission in quindecuplicate and

with the board concerned in duplicate. It must, in terms of reg 10(1)(f) be accompanied by a fee of R100 as prescribed by reg 18(4).

(3) The Powers of the Commission

The Commission is empowered to receive and consider any appeal which has been lodged. In reaching its decision it may, in its discretion, adopt one of the following courses:

(a) it may reject the appeal and thus confirm the original act, direction or decision; (b) it may uphold the appeal and set aside the act, direction or decision; (c) it may uphold the appeal partially and vary the act, direction or decision of the tribunal of first instance.

In the event of the Commission following the second course of action (i.e. setting aside the board's act, direction or decision), it has two choices open to it: it may either substitute its own act, direction or decision, provided that the resultant exercise of power could have been performed by the board, or it may remit the matter to the board for fresh consideration. S8(4) provides that when the Commission either substitutes an act, direction or decision for that of a board, or upholds an appeal partially, thus varying the act, direction or decision, the resultant act, direction or decision is deemed to be that of the board of first instance.

The Commission has powers to request the board whose act, direction or decision has been appealed against to forward to it all documents relating to the appeal as well as the written reasons for its act, direction or decision. This the board must do within 21 days of the request, but the Commission may extend this period at the request of

the board concerned.

A duty is imposed on the Commission to take cognisance of all information contained in the documents of both the appellant and the board. This duty relates to the handling of an appeal in terms of s8(2) of the Act and s9 which prescribes the procedure to be followed. In addition the Commission may, at its discretion, inspect any place or object relating to the appeal and direct the board to collect information on any matter arising from the appeal and to submit, or to specify, the reasons for its decision in greater detail. The Commission must inform the appellant and any other party who is, in its opinion, affected by the appeal of the decision reached. This must be done in writing.

(4) The Powers of the Chairman

The chairman of the Commission, or any member who has been nominated by the chairman, has a number of wide powers conferred by s8(3). The first relates to the condonation of the late filing of a notice of appeal. The chairman or his nominee has a discretion as to the granting or refusing of such an application, provided that the late appeal is lodged within 42 days of the act, direction or decision appealed against, and it conforms to the requirements set out in the regulations. Secondly, he may grant or refuse an application to suspend the operation of an act, direction or decision of a board which has been appealed against. If he grants such an application, but a permit has already been issued in terms of the act, direction or decision under challenge, the Commission or a competent board may demand of

the holder that it be lodged with either body. The holder
must lodge it either by hand or by registered mail. ³⁶

Thirdly, the chairman has power to set aside an act,
direction or decision of a board which has been appealed
against and remit it to the board for fresh consideration. ³⁷

It is submitted that this power should only be exercised in
exceptional circumstances, e.g. when the original act,
direction or decision is so blatantly wrong that there is no
reasonable chance of the appeal being rejected. Thus, if on
the documents before the chairman it is clear that the board
acted beyond its powers or reached its conclusion contrary to
the overwhelming weight of the evidence or misdirected itself
in some other way, the power conferred by s8(3)(c) may be
invoked. In the above instances no duty rests on the
empowered person to give notice or to hear any interested
party. ³⁸

[B] AN ANALYSIS OF SECTION 8

(1) The Type of Appeal

S8(2), which grants appellate jurisdiction to the Commission,
has been interpreted in a number of cases. In

Golden Arrow Bus Services v Central Road Transportation

³⁹

Board and Others, for instance, it was argued that because a
board had a discretion to grant an application, the appeal to
the Central Board (the present Commission) was intended to be
limited. The appellate powers of this body only went to
ascertaining whether the board had exercised its discretion
properly and had taken into consideration those matters which
the Act required it to consider. *Centlivres JA* rejected this
argument: ⁴⁰

'One can hardly imagine clearer language to indicate that the Legislature intended that an appeal to the Central Board should be an appeal in the fullest sense of the word.'

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In Cape Carriers Ltd v SAR and H and Another, Beyers J dealt with the powers of the Commission. He stressed that it was an administrative body and not a court of law. In addition it has appellate jurisdiction and original jurisdiction to grant or refuse applications. An appeal to the Commission is not, however, an appeal in the sense in which that term is used in a court of law because there is not, as a matter of course, a record of evidence from the board. He

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concluded:

'In my view, if a matter comes before the Central Board on appeal it becomes the duty of that Board to consider it in all its aspects and to arrive at a fair and honest decision thereon. While the Central Board will obviously attach importance to the Local Board's reasons, the proceedings before the Central Board are more in the nature of an original hearing of the application than of an appeal stricto sensu.'

Holmes JA examined the powers and duties of the Commission in its appellate capacity in Johannesburg Local Road

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Transportation Board and Others v David Morton Transport (Pty) Ltd. He made five points in this regard:

- '(a) The Commission does not sit as a court;
- (b) It is not bound by rules of judicial procedure;
(It is a body of laymen (from a lawyer's point of view), appointed for their expertise in their particular field;
- (d) It is not obliged to hear oral evidence. It is not required to keep a record of the proceedings or to give reasons for its decision;
- (e) It can reach its decision in its own way, so long as it honestly applies its mind to the issue, and observes the statutory behests and the tenets of natural justice.'

The same learned judge of appeal had dealt with this issue in National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd. He pointed out, inter alia, that on appeal the issue is not whether the Commission concludes that the board was wrong, because the Commission comes to its own decision. At most the decision and reasons of the board will be factors which the Commission will bear in mind. He described the Commission's position in the regulatory structure by saying that the legislature had 'appointed it as the final arbiter in its special field and right or wrong, for better or worse, reasonable or unreasonable, its decision stands'.

If it is accepted that the type of appeal is determined by the wording of the legislation which creates the appeal and the procedural machinery available to the appellate tribunal, the Commission has appellate powers of the widest kind. From the discussion of the cases it is apparent that the legislature has granted it complete powers to rehear matters and to reach its own decision. Further indicia of its wide powers are its competence to consider oral evidence, require the production of 'any book, plan, or other document or article,' compel witnesses, inspect places or objects and require reasons from the board of first instance as well as additional information and more detailed reasons. In short therefore:

'The NTC has the fullest powers and facilities to redetermine the decisions of local boards, or even to take the original decision itself. It therefore has power to review and set aside or correct illegalities perpetrated by local boards, except where such illegalities prevent the NTC itself from applying the relevant legislation.'

(2) Late Appeals

It has been noted that an appeal must be lodged within 21 days of the making or giving of the act, direction or decision under challenge. In addition, the chairman of the Commission or his nominee may condone the late filing of notice to appeal. This discretionary power may only be used for a further 21 days after the original period has expired. Thereafter no possibility of an appeal exists. Essentially similar provisions were dealt with in the case of Pillay v Central Road Transportation Board and Others.⁵⁵ Pillay applied to have a decision of the Central Board set aside, in which it had upheld certain appeals. In terms of reg 12 framed under the Motor Carrier Transportation Act, an appeal was required to be noted within 14 days of the decision of a local board. Appeals were noted 17 days and 25 days after the original decision and there had been no condonation of the late appeals. Selke J, in granting the application, held that the language of the regulations in question was peremptory and so a failure to comply with the time period set down was, in the absence of condonation, fatal to the validity of the appeals. The result of this failure on the part of the Central Board was to rob it of its appellate jurisdiction.⁵⁶

(3) Notice to Objectors

S8 and reg 10 are silent on the need to inform affected persons of an appeal against an act, direction or decision of a board. This problem was dealt with by Hathorn JP in Durban Corporation v Rugnath and Central Road Transportation Board.⁵⁷ In holding that notice must be given to interested parties the learned Judge President pointed to the usual

practice of the Central Board which was to give notice. The
ratio of the court was stated in the following terms: ⁵⁸

'I do not think that the silence of the regulations on this subject can properly be construed as a provision that notice need not be given, but, if I am wrong about that, then clearly, in so far as the regulations have the effect of depriving an interested party of his right to be heard on appeal, the regulations are ultra vires because the power to regulate procedure cannot possibly include the power to deprive an interested party of his right to be heard on appeal. This right is fundamental. The principle is audi alteram partem.'

(4) The Suspension of the Act, Direction or Decision
Pending and Appeal

In terms of s8(3)(b), the chairman of the Commission or his nominee may grant or refuse an application to suspend the operation of an act, direction or decision of a board pending an appeal. The empowered official may exercise his discretion 'without giving prior notice to or hearing any interested party'.

The rationale for s8(3)(b) was dealt with by Broome J in Marinpine Transport (Pty) Ltd v Local Road Transportation Board, Pietermaritzburg and Others: ⁵⁹

'Disputes over transportation certificates are seldom any different from any other form of dispute ventilated in court and it is a time-honoured principle that, in the absence of extraordinary circumstances, the court, as the chairman did here, will always maintain the status quo until the last word has been spoken by the final court of appeal.'

In Leburu en Andere v Voorsitter, Nasionale Vervoer-
kommissie, en Andere ⁶⁰ on the other hand, Grosskopf J took a wider, and it is submitted, a more correct view of s8(3)(b). He held that the maintenance of the status quo was not all-

important, but merely a factor to be taken into account by the empowered official. That person is required to decide whether the status quo should be returned to or not:

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'Die gevolgtrekking waartoe ek dus kom, is dat die blote aantekening van appél teen 'n handeling, opdrag of beslissing van 'n plaaslike padvervoerraad nie meebring dat daardie handeling, opdrag of beslissing, of die werking daarvan, outomaties opgeskort word nie. Die Wetgewer het egter ingevolge art 8(3)(b) aan die eerste respondent die bevoegdheid verleen om na goeë dunnke 'n aansoek om opskorting toe te staan of te weier.'

Prior to the promulgation of amending legislation the section was silent as to whether the audi alteram partem rule applied to s8(3) decision-making. In addition, the Transvaal and Eastern Cape Provincial Divisions had arrived at conflicting decisions regarding the right to a hearing. In Anderson

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Transport (Pty) Ltd v Chairman, National Transport Commission
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and Others, however, Berman AJ held that the position after

the amendment was clear and that prior to the change was academic:

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'It seems to me to be abundantly clear from the incorporation, by amendment, into s8(3) of the Act of the words "...and without...hearing any interested party," that it was open to first or second respondent to decline to hear applicant if it desired to make representations or submissions in opposing third respondent's application for suspension of applicant's permits, however cogent, weighty or unanswerable they might appear to applicant to be.'

It is clear from the above that the discretion exercised by the empowered official is a very wide one indeed. Two questions arise: 'how is the discretion to be exercised?' and 'is it reviewable?' The answer to the first question must, it is submitted, depend on the facts of each case. In simple matters the maintenance of the status quo may be

sensible, necessary or convenient. So in Anderson Transport
(Pty) Ltd v Chairman, National Transport Commission⁶⁵

and Others, Berman AJ appeared to have regarded the exercise of the discretion with favour where the official, without concerning himself with the merits or the grounds of the pending appeal, suspended permits on the basis that they authorized a new service and so 'the status quo ought to be maintained pending the outcome of the appeal'.⁶⁶ In

South African Transport Services v Chairman, Port Elizabeth
Local Road Transportation Board, and Others,⁶⁷ the second

respondent had used temporary permits for a considerable period but had applied successfully to the board for public permits. The grant was suspended in terms of s8(3)(b), and Jennett AJ held that this allowed for the continued granting of temporary permits. In both of these examples the restoration of the status quo did not appear to prejudice any of the parties and so the 'time honoured principle' spoken of by Broome J in the Marinpine case⁶⁸ could be given high

priority. Where a party may suffer prejudice the decision will not be as easy to make because that prejudice and the need to maintain the status quo may conflict. In such cases a dictum of Jansen J in Sing and Co (Pty) Ltd v Pietermaritzburg Local Road Transportation Board⁶⁹

and Another provides, it is submitted, a useful approach in terms of which the empowered official can exercise his⁷⁰ discretion:

'The very urgency excludes a full investigation into the facts and the law, and it allows only of a superficial approach which might lead to a view which, upon full investigation, might well appear to be erroneous. It seems to me that if the court does err it should rather err in the direction of preventing irreparable harm from happening.'

The learned judge, it must be conceded, was dealing with the policy which the court should adopt when asked to grant an interim interdict, but many of the same considerations apply when an official is asked to suspend an act, direction or decision of a board: little time may be available for independent research, difficult inferences and questions of law relating to the merits may be involved and the urgency of the matter may exclude a full investigation.

In conclusion, it is submitted that an exercise of power in terms of s8(3)(b) is subject to review. The full range of grounds will be available with the exception of a failure to observe the audi alteram partem rule, which has been expressly excluded. Practical problems brought about by the wide discretion, the closed decision-making process and the interlocutory nature of the decision will no doubt affect the justiciability of the issue and render proof of the irregularity more difficult.

(5) Which Acts, Directions or Decisions are Subject to Appeal?

S8 provides an appeal against any act, direction or decision of a board. While the section does not prima facie limit the type of act, direction or decision which is subject to appeal, the court found, in Nasionale Vervoerkommissie van Suid Afrika v Salz Gossow Transport (Edms) Bpk. that there are indeed limitations to the applicability of s8.

The facts of the case were briefly as follows: Wesbank Transport had applied to a board for the transfer of five public permits belonging to one Theron. At the hearing the respondent asked the board to institute an enquiry in terms

of s25 into Theron's use of the permits in order to have them withdrawn, suspended or varied. The board decided to institute the enquiry and for that reason postponed Wesbank's application. The latter appealed successfully against these decisions and the respondent took the matter on review. The court a quo set aside the Commission's decision because, it held, no appealable decision had been taken and the Commission was therefore not competent to consider the

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matter. On appeal, the case turned on the interpretation of the word 'decision' in s8.

In holding that a wider meaning for the word could not have been intended, Smuts AJA found that a great number of decisions may be taken by a board before a final decision on the merits.⁷³ If all of the preliminary decisions were subject to appeal, the object of the Act (to provide quick resolution of disputes) would be frustrated and would result in 'n uitgerekte, tydverspillende, duur en frustrerende proses.'⁷⁴ Delays would be common place and would cause prejudice not only to the parties but also to the economy.⁷⁵ The learned acting judge of appeal therefore concluded:

'Waar die een vertolking dan die gevaar van moontlike verydeling van die Wetgewer se bedoeling inhou en die ander vertolking gevolg daaraan sal gee, moet laasgenoemde vertolking voorkeur geniet ... Dit sal dan in heirdie geval beteken dat die woord "beslissing" vertolk moet word om betrekking te he op die meriete van die aansoek en nie op beslissings wat in die loop van so 'n aansoek gegee word met betrekking tot prosssessuele aangeleenthede nie.'

Similar meanings were given to the words 'act' and 'direction'. Neither of the decisions taken by the board was therefore subject to appeal and the appeal was dismissed.

[C] EXHAUSTION OF REMEDIES AND THE GIVING OF REASONS

(1) May a Party Approach the Court Before Appealing?

(a) Doctrine

Wade contends that there is no rule that administrative remedies must be exhausted before a court will review a tribunal's decision. He says:

'One aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There is therefore no need first to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter; and so even may be an appeal to a court of law.'

Baxter argues that, while the right to approach the court on review only after internal remedies have been exhausted is not absolute or automatic, the relief may be refused if the governing legislation requires the exhaustion of remedies. Relief will, on the other hand, be granted if domestic remedies cannot redress the wrong or where the alleged unlawfulness undermines those remedies.

In principle therefore, internal remedies will not have been exhausted if an administrative appeal is wide enough to cover reviewable irregularities or to cure defects at the a quo stage. It would appear on this basis that the duty to exhaust internal remedies would prima facie apply in road transportation cases because the Commission is empowered to correct proceedings of a board which are ultra vires and to decide on jurisdictional matters. Furthermore, as a complete rehearing is allowed, even defects in natural justice at the first stage can be cured on appeal:

'In the case of the former, (a complete hearing de novo) it is possible for the appellate tribunal, by observing the precepts of natural justice, to gather completely fresh evidence in a fair manner and to weigh it objectively and impartially. To this extent the injustice of the first hearing can be remedied.'

The above should not be seen as a dogmatic statement because the circumstances of each case will determine whether the applicant should have exhausted internal remedies. The nature of the appeal and the wide powers of the Commission would appear to militate in favour of exhaustion prior to approaching the court.

(b) Road Transportation Cases

In Main Line Transport v Durban Local Road Transportation Board,
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it was argued by the respondent that the applicant was not entitled to the relief sought because it had not exhausted its internal remedies by making use of an appeal.

Henochsberg J held that the applicant could approach the court at any time unless the jurisdiction of the court was expressly or impliedly ousted by the statute conferring the

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right of appeal or other remedy. After a thorough examination of the case law, the learned judge concluded as

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follows:

'Now it seems to me that it is not clear that the terms of the Motor Carrier Transportation Act, 1930 are such as necessarily imply that an aggrieved party cannot approach a court of law on the ground of irregularity or illegality. There is no express ouster of the court's jurisdiction and there is always a strong presumption against a statute being construed so as to oust the jurisdiction of the court completely. The remedy of applying to court for redress where a person's fundamental rights have been disregarded has long been in existence and the mere creation of a statutory right of review and appeal cannot in my view be regarded as an indication on the part of

the Legislature to take away that remedy and as entirely ousting the jurisdiction of the court in such cases.'

The learned judge appeared to disregard the failure to exhaust remedies for two reasons: first, if the board was to continue with the hearing (having adjourned the matter) without correction, its decision would have been void because it had failed to comply with the proper procedure.⁸⁴ This would, it is assumed, rob the applicant of a fair and proper hearing and appeal; secondly, the consent of the board, evidenced by its decision to adjourn, was given to the applicant so that it could approach the court. In this regard Henochsburg J held that the board could not 'depart from this attitude and claim by its counsel that the proceedings are premature and that applicant must first exhaust its remedy of appealing to the Commission'.⁸⁵

In Pietermaritzburg City Council v Local Road Transportation Board,⁸⁶ Fannin J granted the relief sought by the applicant despite the fact that it had not taken the board's decision on appeal. His reason for not requiring internal remedies to be exhausted was that, while the Commission could grant temporary permits to the applicant pending the outcome of an appeal, it could not do so if the board's proceedings were taken on review.⁸⁷ If the board's decision was set aside, there may be no appeal, but in the meantime, the applicant would suffer irreparable harm. If the court refused interim relief, the applicant would have a choice of:

'...closing down its service pending the outcome of the review, or putting into effect a decision which it contends was not properly made, or as an alternative to both of these courses, of abandoning the review proceedings and confining itself to its statutory remedies. That would be

tantamount to refusing to the applicant the right which it had chosen to exercise.' (88)

Miller J decided the issue on different grounds in Durban City Council and Another v Local Road Transportation Board⁸⁹ and Another. He held that the Act's appeal mechanism does not necessarily oust the court's jurisdiction and, even though the appeal is a complete hearing de novo, the Commission has a discretion as to whether more evidence should be adduced or to decide the matter on the documents before it. This discretion militated against a rigid application of the principle that internal remedies should be exhausted prior to approaching the court.⁹⁰ On appeal⁹¹ Holmes JA approved of the approach adopted by the court a quo, holding that the court's jurisdiction was not ousted by necessary implication in regard to 'matters such as an illegality or a material irregularity committed by the local board, which fall outside⁹² the purview of the application of the Act,' especially where the illegality or irregularity complained of may render the effectiveness of the statutory remedy problematic.

The most recent case on point is Rauties Transport (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Johannesburg en 'n Ander⁹³ in which Goldstone J held that the noting of an appeal does not preclude a party from approaching the court for the same relief. In following the Appellate Division decision in⁹⁴ the Durban City Council case, the learned judge concluded that in the case before him internal remedies did not have to⁹⁵ be exhausted:

'Kortom is die bewering namens die applikant, en is dit betoog van sy advokate, dat die Raad en die Kommissie, onder andere, mala fide, in fraudem legis en minagtend teenoor hierdie Hof opgetree het. In hierdie omstandighede is dit klaarblyklik

wenslik en gepas vir hierdie Hof om die
verrigtinge aan to hoor.'

(c) Conclusion

From a perusal of the case law it is evident that the court's power to intervene prior to the outcome of an appeal has not been ousted. Despite the fact that the Commission has wide appellate powers, the courts have adopted a flexible approach which appears to favour the maintenance of jurisdiction. Perhaps the principle that a party is entitled to a proper two-tiered hearing plays an important part in this regard. The following emerges as the court's basis for interference or non interference: (i) if illegality or irregularity of a material nature is alleged, the court will usually assume jurisdiction; (ii) the circumstances of each case are important, so if the matter is urgent and/or the applicant may suffer irreparable harm the court will review the decision, but if these factors are not present it may hold that the proceedings are premature; (iii) it may not interfere in matters incidental to the general application of the Act which can be cured on appeal.

(2) The Giving of Reasons

(a) The Importance of Reasons

The importance of reasoned decision-making has been emphasized by many commentators. For instance, Wade says 'reasoned decisions are not only vital for the purpose of showing the citizen that he is receiving justice: they are also a valuable discipline for the tribunal itself'.⁹⁶

Baxter highlights four advantages of creating a general statutory duty to give reasons: the duty would ensure that decisions are rationalized: the giving of reasons is fair

and engenders public confidence because the individual is informed as to how the decision was made: rational criticism, especially to form the basis of an appeal or review, can only be made if reasons are furnished: and an educative function will be served by the giving of reasons because unsuccessful applicants will be able to ascertain what is expected of them in the future. While Craig too argues that the furnishing of reasons is important he points out that there is opposition to the extension of the duty:

'There is no doubt that the idea would be opposed upon grounds of time and cost to the administration. There is no doubt that both time and expense would be incurred. How much is more difficult to evaluate. Whether the expense is worthwhile would depend upon a value judgment in which the other side of the equation is the greater accountability thereby engendered. Another fear might be that the courts would become too involved in subsequent challenges based upon the information thereby provided.'

(b) Is There a Duty to Give Reasons?

In South Africa there is no common law duty imposed on decision-makers to give reasons and the courts have been reluctant to impose such a duty. Where a duty exists, it is the creature of statute.

A limited duty to give reasons exists in the Road Transportation Act: a board must submit reasons to the Commission when an appeal is noted against its act, direction or decision. No similar duty is imposed on the Commission, although a failure to give reasons has been criticized by the courts. In W.C. Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others, for instance, Kotze JA held:

'It has repeatedly been held that a body like the

Commission is not obliged to give reasons for its decision. But that does not mean that it should not furnish reasons for its decision.'

An interesting point to note is that the Commission is under a statutory obligation to give reasons when it deals with air service licence applications in terms of the Air Services Act,¹⁰⁴ but not when dealing with road transportation appeals.¹⁰⁵ When reasons are given in the latter instance they are 'often prefaced by a warning that they are given as a matter of grace and not duty'.¹⁰⁶

(c) The Result of a Failure to Give Reasons

Baxter says that 'the good administrator will give reasons even if there is no duty upon him to do so'.¹⁰⁷ In certain circumstances, however, a failure to give reasons, where no duty exists, may lead to an inference being drawn adverse to the decision-maker. The extent to which such an inference will be drawn 'depends to some extent on the relative activism or restraint of the court concerned',¹⁰⁸ but obviously no inference can be drawn in cases where the failure is reasonable. It is submitted that the South African courts, in road transportation matters, have moved away from a relatively restrained approach to one whereby an adverse inference will more readily be drawn. This shift is highlighted by two important Appellate Division cases which will be discussed below.

In National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd,¹⁰⁹ the Commission refused to give reasons (as it was entitled to do) despite request. Instead the chairman, by way of affidavit blandly asserted that the Commission had sufficient facts at its disposal,

had fully canvassed the merits, had given them full consideration and had applied the relevant provisions of the Act.¹¹⁰ Holmes JA held that an election to remain silent on the part of the Commission did not give rise to a presumption of unlawfulness. Only if direct prima facie testimony of unlawfulness was placed before the court would the Commission's refusal be of relevance: in such a situation an adverse inference would be drawn but 'if the evidence is circumstantial, a failure to give reasons does not necessarily strengthen it'.¹¹¹ The learned judge of appeal continued:¹¹²

'In other words, it is not enough for an applicant to aver vitiating conduct by the Commission: he must demonstrate it, prima facie, before he can draw supporting inferences from the absence of reasons by the Commission...the refusal to give reasons is an important element to be taken into account only where there is evidence aliunde of bad faith.'

This approach has been criticised. Baxter, for instance, argues that where no explanation for the failure is given and no rebutting evidence is offered, an inference of unlawfulness should be drawn: the individual is left to flounder 'in the dark' in attempting to establish a case, while the tribunal which, after all, must act in the public interest,¹¹³ is able to achieve immunity by its secrecy.

A shift in emphasis was evidenced by the decision of W C Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others¹¹⁴ in which an adverse inference was drawn from the Commission's refusal to give reasons.¹¹⁵ Kotze JA in giving the judgment of the court held:

'Where, as here, the only evidence presented is

impressive and acceptable, remains unchallenged in cross-examination and uncontradicted by other evidence, then the failure to give reasons does tend to support an inference that the evidence was ignored.'

The more activist approach has been followed in other road transportation cases: in Salz Gossow Transport (Edms) Bpk v Nasionale Vervoerkommissie van Suid Afrika en Andere,¹¹⁶ for instance, Bethune J held that, in the absence of reasons, it was difficult for the court to arrive at any other conclusion but that the Commission had misdirected itself as to the law ('mistaking van die reg begaan') or had acted in an arbitrary manner.¹¹⁷ In Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and Others,¹¹⁸ Broome J came very close to imposing a duty to give reasons (on a board):¹¹⁹

'I have, on the one hand, what appears to be a strong case and I have nothing at all to weigh against that. Now I do not consider that the first respondent was entitled simply to remain silent if in fact there were valid reasons for the refusal. An appeal having been lodged to the NTC, reasons have to be furnished, and the failure to furnish reasons at this stage must affect the court's view on the issue of whether or not a prima facie case has been made out.'

FOOTNOTES

1. Wade, 34; Baxter, 255.
2. Wade, 35; see too Rose Innes, 7, 13; Johannesburg Consolidated Investments Co Ltd, 1903 TS 111, 115.
3. Wade, 34-5; Rose Innes, 14.
4. Baxter, 305.
5. Baxter, 255.
6. See generally J. Herbstein and L. van Winsen The Civil Practice of the Superior Courts of South Africa (3 ed), 661-708.
7. For an example of such an instance see s15 of the Local Authorities Rating Ordinance 20 of 1933 (T) which grants an appeal against a valuation of property by a local authority to a Magistrate's Court.
8. Baxter, 255; for judicial acknowledgement of this see Airoadexpress (Pty) Ltd v Chairman Local Road Transportation Board Durban and Others 1984 (3) SA 65 (N), 73D -74A.
9. Baxter, 263.
10. Baxter, 264.
11. Baxter, 264-7.
12. 1963 (2) SA 588 (T), 590G-591A.
13. At 591B; see too De Le Rouviere v SA Medical and Dental Council 1977 (1) SA 85 (N), 90B-H.
14. Rose Innes, 38.
15. Baxter, 255-6, 261-3.
16. S8(1)(c).
17. Road Transportation Amendment Act 91 of 1980.
18. See Chairman National Transport Commission and Others v L C De Lange Transport (Pty) Ltd 1983 (4) SA 678 (E), 682H.
19. S8(1).
20. See Suid Afrikaanse Vervoerdienste v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander 1985 (3) SA 519 (NC); Tidewater Transport Group (Edms) Bpk v Nasionale Vervoerkommissie en 'n Ander 1985 (3) SA 422 (T).
21. S8(2). This duty is made subject to s8(3), which grants the chairman or his nominee certain special powers. They are discussed below. For statistical information on the number of appeals heard by the Commission and the results thereof for 1981/82 and 1982/83 see the Report of the Department of Transport and the National Transport Commission for the period 1 April 1982 to 31 March 1983, RP 73/1983, 96.
22. S8(2)(a).
23. S8(2)(b).
24. S8(2)(c).
25. S8(2)(b)(i).
26. S8(2)(b)(ii).
27. In terms of s8(2)(b)(i).
28. In terms of s8(2)(c).
29. Reg10(2).
30. Reg10(4).
31. Reg10(4)(a).
32. Reg10(4)(b).
33. Reg19(5).
34. S8(3)(a).
35. S8(3)(b).
36. Reg10(3).

37. S8(3)(c).
38. See Anderson Transport (Pty) Ltd v Chairman, National Transport Commission and Others 1985(2) SA 95(C), which is discussed below at 307.
39. 1948(3) SA 918(A).
40. At 924; see too Tayob v Ermelo Local Road Transportation Board 1951 (4) SA 440 (A), 448F.
41. 1958 (3) SA 482 (C).
42. At 486F: but see reg10(2) which places a duty on a board to submit to the Commission 'copies of all documents relating to the appeal, and the written reasons for its act, direction or decision appealed against'.
43. At 486E.
44. 1976 (1) SA 887 (A), 894H-895A.
45. 1972 (3) SA 726 (A), 735H-736G.
46. At 735D-E; see too the decision of the court a quo (Chetty's Motor Transport (Pty) Ltd v National Transport Commission and Another 1972 (1) SA 156 (N)) in which Miller J, at 161A, held that the Commission was not entitled to entirely disregard the board's decision: 'That the Local Board came to a decision is as much a fact as any other fact that might be established by evidence and despite the wide powers given to the Commission on appeal, it could not omit the Local Board's conclusions and reasoning from the totality of the information before it'.
47. At 735E.
48. S9(1)(a).
49. S9(1)(b).
50. S9(1)(c).
51. Reg 10(4)(a).
52. Reg 10(2).
53. Reg 10(4)(b).
54. Baxter, 263; it is interesting to note that when the Page Commission dealt with the appeal mechanism of the Act it expressed itself in favour of a narrower appeal. It suggested that the appellate powers of the Commission should be similar to the appellate powers of a court and that the former should only upset a board's decision 'where that decision is manifestly wrong'. (Paras 269 and 270.) The reasoning is not entirely convincing: it loses sight of the purpose of an administrative appeal and the Commission's function as an expert body and a national policy formulator.
55. S8(3)(a).
56. 1947 (2) SA 166 (N).
57. 1940 NPD 551.
58. At 553.
59. 1984 (1) SA 230 (N), 232C; see too South African Transport Services v Chairman Port Elizabeth Local Road Transportation Board and Others 1984 (1) SA 236 (SE), 241E-F and Stellar Transport Hire (Pty) Ltd v Chairman National Transport Commission and Others (EPD 14 September 1982 (case 2066/82) unreported) in which Solomon J held: 'the suspension of the applicant's permit is an administrative act to restore the status quo pending the Commission's decision on appeal. In this respect it places the parties in the same position as those in a case where the judgment of a court is the subject of an appeal'.
60. 1983 (4) SA 89 (T).
61. At 95H-96A.
62. Leburu's case supra held that the audi alteram partem rule

applied while the Stellar Transport case supra held that it did not.

63. 1985 (2) SA 95 (C).
64. At 101D-E.
65. Supra.
66. At 99C.
67. 1984 (1) SA 236 (SE).
68. 1984 (1) SA 230 (N).
69. 1959 (3) SA 822 (N).
70. At 824D-E.
71. 1983 (4) SA 344 (A).
72. See Salz Gossow Transport (Edms) Bpk v Nasionale Vervoerkommissie van Suid Afrika en Andere 1982(1) SA 651 (SWA)
73. The Appellate Division decision supra at 356G-H.
74. At 356H.
75. At 357B-C.
76. Wade, 593.
77. Baxter, 720-1; see too Rose Innes, 76-88.
78. Rauties Transport (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad Johannesburg en 'n Ander 1983 (4) SA 146 (W).
79. Chairman National Transport Commission and Others v L C De Lange Transport (Pty) Ltd 1983(4) SA 146(W).
80. Baxter, 590 a problem with this approach was outlined by Megarry J in Leary v National Union of Vehicle Builders [1971] Ch 34, 49: 'If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?'
81. 1958(1) SA 65(N).
82. At 70 A-B.
83. At 73G-74A.
84. At 74A-C.
85. At 74F.
86. 1959(2) SA 758(N).
87. At 772A.
88. At 773B.
89. 1964(3) SA 244(N).
90. At 251H-252A.
91. Local Road Transportation Board and Another v Durban City Council and Another 1965(1) SA 586 (A).
92. At 594B.
93. 1983(4) SA 146(W).
94. Supra.
95. At 157G.
96. Wade, 812.
97. Baxter, 228; Craig 234.
98. Craig, 234; for the objections which are raised to the imposition of a duty to give reasons see Baxter at 230. Also see Baxter, 232(footnote 278) for an interesting American instance pointing to the conclusion that the giving of reasons should not, for example, require an increase in the staff of administrative bodies.
99. Baxter, 741. The learned author says: 'In South Africa it seems that the courts simply do not regard themselves as competent to read such a duty into an empowering statute'.
100. Reg 10(2).
101. W C Greyling and Erasmus (PTY) Ltd v Johannesburg Local Road Transportation Board and Others 1982(4) SA 427(A), 448C. It is interesting to note that the Marais

Commission at para 769 recommended that 'provision be made in Act 39 of 1930 to require the National Transport Commission to furnish any person affected by its decision on an appeal under section 6(2) of that Act with the reasons for its decision, under payment by such person to the Secretary for Transport of an appropriate prescribed fee'.

102. Supra.
103. At 448C.
104. No.51 of 1949, s3(3).
105. Baxter, 227.
106. Baxter, 227.
107. Baxter, 746.
108. Baxter, 747.
109. 1972(3) SA 726 (A).
110. At 732F.
111. At 736A-B.
112. At 736D-E.
113. Baxter, 748.
114. 1982 (4) SA 427 (A).
115. At 448D.
116. 1982 (1) SA 651 (SWA).
117. At 657H.
118. 1984 (3) SA 65 (N).
119. At 74A-B.

CHAPTER 13

REVIEW

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[I] REVIEW IN GENERAL

[A] THE PURPOSE OF REVIEW

The purpose of review was set out clearly by Bristowe J in ¹
African Realty Trust Ltd v Johannesburg Municipality

'If a public body or an individual exceeds its powers the court will exercise a restraining influence; and if, while ostensibly confining itself within the scope of its powers, it nevertheless acts mala fide or dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an unreasonableness so gross as to be inexplicable, except on the assumption of mala fides or ulterior motive, then again the court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body or person who has decided it, then the court has no functions whatever. It has no more power than a private individual would have to interfere with the decision merely because it is not one at which it would have arrived.'

The judgment of Innes CJ in Johannesburg Consolidated Invest-
ment Co Ltd v Johannesburg Town Council ² was to similar effect.

The learned Chief Justice said that where a public body disregards provisions of a statute which impose duties on it, is guilty of gross irregularity or clear illegality the court may review and set aside its decision. Thus the purpose of review is to ensure that the principle of legality, which derives from an adherence to the rule of law, ³
is observed.

[B] THE SOURCE OF THE COURT'S POWER TO REVIEW

Review is a remedy which derives from the common law. ⁴ In the words of Wade, it is simply a matter of the court 'performing its ordinary functions in order to uphold the ⁵
rule of law'. ⁶ The same author says elsewhere:

'Every act of governmental power i.e. every act which affects the legal rights, duties or liberties

of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can then safely disregard.'

The existence of this power has been recognized and stated by s19(1) of the Supreme Court Act⁷ which says that the Supreme Court has jurisdiction to hear all causes arising within its area of jurisdiction. The power to review the acts or decisions of tribunals exists apart from any review or appeal mechanism created by statute. It is only excluded if a statute so enacts either expressly or by necessary⁸ implication. A presumption applies against construing a⁹ statute in such a way as to oust the courts jurisdiction. Rose Innes makes the point that no special statutory provisions or rules of court govern the review of administra-¹⁰ tive tribunals. The rules which apply are those derived from¹¹ the common law and developed by the courts.

[C] REVIEW AND APPEAL COMPARED

The terms 'review' and 'appeal' have been used interchange-¹² ably by our courts in a number of cases and in many statutes. This careless use of language led Lansdown J, in Crossley v Durban Town Council and Another,¹³ to say:

'In 1897 and for many years onwards, certainly up to 1909 there was much confusion in Natal legal and forensic practice between review and appeal, the terms often being used indiscriminately.'

The first difference between review and appeal to warrant¹⁴ mention is that the former derives from the common law while appeals are created by statute. This proposition is subject, of course, to the existence of special statutory reviews,¹⁵ such as that found in s20(1)(a) of the Liquor Act.

Secondly, the purpose of the two remedies is different. Review proceedings are designed to rectify illegalities and to ensure a fair hearing.¹⁶ Thus the emphasis is placed on controlling procedural irregularities. Rose Innes says in this regard:¹⁷

'The result of the trial or proceeding - the decision, judgment or order made - whether correct or wrong, is not the concern of the reviewing court.'

Wade, dealing with the same point says that while, on appeal, the question is whether the prior decision is right or wrong, on review the issue is whether the decision was lawful or unlawful.¹⁸

Thirdly, a court of appeal has, generally speaking, jurisdiction to examine the merits, while on review the court must stop short of this.¹⁹ In the latter case it will examine procedural, jurisdictional and evidential issues. The fact that none of the recognized grounds for review go directly to the substantive issues of the decision was succinctly stated by De Beer J in R v Hlatswayo:²⁰

'In reviews the Court will not, as a rule question the decision of the magistrate on the facts - nor will it give the same weight to technicalities. The Court is in fact concerned only with the question whether the proceedings appear to be in accordance with justice.'

Appeal and review may overlap in one particular sense: where illegality is averred and provision is made for an appeal, a court of appeal may adjudicate on the issue. It is not essential for an aggrieved party to bring review proceedings. If no appeal lies, then obviously, the aggrieved party will only have the remedy or review available.²¹

An integral part of exercising appellate power is that the higher body substitutes its decision for that of the inferior body.²² When the court reviews the decision of an inferior court or tribunal the principle is different. In that case, as a general rule, the court will remit the matter, if a decision is found wanting, to the original arbiter for fresh consideration.²³ The reasons for this rule were outlined by Van Blerk JA in Krog v Dranklisensieraad vir Gebied 42²⁴ in the following terms:

'Maar dit gaan hier om 'n geval waar die wetgewer die ondersoek aan 'n raad toevertrou het, en nie aan 'n geregshof nie, gevolglik kan die Hof nie, selfs by nietigverklaring van die verrigtinge, administratiewe funksies vir homself aanmatig deur sy diskresie te substitueer vir dié toevertrou aan 'n raad nie.'

There are instances where a court may intervene by refusing to remit the matter and by substituting its decision for that of the tribunal or official whose decision it has reviewed.²⁵

[D] THE TYPES OF REVIEW

Innes CJ, in Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council,²⁶ identified three distinct and separate meanings for the word review. These are: (1) the process by which the proceedings of inferior courts are brought before the Supreme Court in order to cure grave irregularities or illegalities. The grounds upon which such proceedings may be based are limited by statute. The application is by summons; (2) the review of actions by public bodies or officials where important provisions of a statute have not been complied with or gross irregularity or clear illegality is alleged. The court will exercise this type of review despite the absence of a statutory power

allowing it to examine the act in question. In comparing
this common law review to the first type, Innes CJ said: ²⁷

'The body whose proceedings are reviewed is not a judicial one; the application is by way of motion, and not by way of summons; and the grounds upon which a review may be claimed are somewhat wider than those which alone would justify a review of judicial proceedings.';

(3) the third type of review identified by Innes CJ is a special statutory review. This type, he said, is wider than the other two and can be likened to a hearing de novo. In this sense it overlaps with an appeal.

The type of review available to an aggrieved party who wishes to challenge an act, decision or direction of either a board or the Commission is the second type mentioned by Innes CJ. No statutory provisions exist which create review machinery and clearly the processes created by the Road Transportation Act are administrative in nature.

[II] THE GROUNDS OF REVIEW AND SPECIFIC EXAMPLES OF THE EXERCISE OF THE COURTS' POWER TO REVIEW

[A] GENERAL

A problem associated with any writing on review is that the cases do not fall easily into clearly defined categories: the grounds on which the courts will interfere with an administrative decision have been developed in an ad hoc manner. For this reason, and because of the use of widely varying terminology, a great degree of overlapping is found in the cases: a failure on the part of a tribunal to apply its mind may also be seen in terms of the application of a fixed policy; the failure to take into account a relevant

consideration may be evidence of an ulterior motive; the cumulative effect of a number of misdirections and abuses of power may be expressed in unreasonableness terminology. The discussion below will seek to isolate and illustrate the grounds on which the courts will set aside decisions of a board or the Commission. For this purpose, a loose distinction has been made between discretionary acts and non-discretionary acts.

[B] THE REVIEW OF DISCRETIONARY ACTS

(1) Failure to apply natural justice

The procedures prescribed by the Act and the common law require decision-makers, as a general rule, to apply the principles of natural justice. There are exceptions to this statement which have been dealt with elsewhere.²⁸

(a) Nemo Judex in Sua Causa

The common law requires that any person engaged in decision-making of the type undertaken by boards and the Commission should be impartial. This aspect of natural justice has been dealt with²⁹ but it should be noted that both the Road Transportation Act³⁰ and the Transport (Co-ordination) Act³¹ prescribe classes of persons who are not eligible for appointment. Only two of these categories have a bearing on natural justice,³² but both Acts further provide that the mere fact that a disqualified person takes part in a decision is insufficient to invalidate that decision.³³ It has been argued that these statutory validity clauses do not, per se, exclude natural justice.³⁴ Consequently the partiality (or in some cases, the apprehended partiality) of a decision-maker³⁵ will render the decision in question a nullity.

(b) Audi Alteram Partem

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With limited exceptions, any person who has standing has a right to a full and proper hearing in proceedings before a board or the Commission. This proposition was clearly enunciated by Henochsberg J in Main Line Transport v Durban Local Road Transportation Board:

37

'As I appreciate the legal position it is that a statutory body or tribunal such as the local board must in its proceedings apply the principles of natural justice; that is to say, in particular it must inter alia comply with its own rules or constitution and the principles involved in the maxim audi alteram partem.'

A failure to comply with natural justice will be a reviewable irregularity and will result in the setting aside of the decision under review.

38

The procedures laid down by the Act are explicit. Therefore cases of gross denials of natural justice are rare. Cases like Du Toit en 'n Ander v Plaaslike Padvervoerraad,

39

Windhoek are exceptional: the applicants had approached the board for the grant of permits to authorize the conveyance of rubber. Five of the sixteen vehicles for which applications were made were authorized to carry meat and game carcasses from various points in Namibia to places within South Africa, excluding Bophuthatswana. The applicants were informed that the applications had been granted in part. When the permits were issued they authorized conveyance to the South African border with Namibia. The same amendment was made to a permit which had been lost, when the applicants asked the board for a replacement. Bethune J set aside the amendments made by the board because the audi alteram partem rule had not been applied: the amendments did not stem from

an application brought before the board, at no stage were the applicants informed of the board's proposed action and they were not given an opportunity to make any representations with regard thereto.

Boards (and the Commission) are expected to be familiar with available transportation facilities and transportational needs. Knowledge of this kind is essential because without it, 'they would not be able adequately to perform their duties'.⁴⁰ This raises the issue of whether a board or the Commission must disclose information which is within its knowledge when this is relevant to an application before it. In Asmal's Bus Service (Pty) Ltd and Others v Local Road Transportation Board and Others,⁴¹ Miller J held that private information given to the board by a Bantu Affairs Commissioner on which the board had based its decision should have been disclosed to the applicants, unless those 'facts or considerations were discarded by the Board and in fact did not influence or sway its decision'.⁴² Similarly (although obiter) in Road Services Board and Another v John Bishop (Africa) Ltd,⁴³ Tredgold CJ said that before acting on information, the applicant should be informed of it and be given a chance to deal with it:⁴⁴

'But this does not mean that it must disclose every jot and tittle of such information or the sources from which it is obtained. For example, a Board, such as this, may have in its possession information relevant to an application, that has been obtained in proceedings before it from other and rival applicants. It need not ignore such information, nor need it give to the applicant details of his rivals businesses, which might be of value to him as a trade competitor. It would be sufficient were he told the general effect of such information.'

In Clairwood Motor Transport Co Ltd v Pillai and Others,

Kennedy J held that information which is prejudicial to a party, 'the non-disclosure of which may result in a failure of justice'⁴⁶ had to be disclosed. The court decided that where the board (and subsequently, the Commission) had, after hearing argument, held an inspection in loco no infringement of natural justice had occurred.

(2) Failure to Exercise a Discretion

When an administrative body has been vested with discretionary powers it must exercise them when called upon to do so by a person who is entitled to a decision.⁴⁷ The body may fail to exercise a discretion by simply refusing to make a decision (however that refusal may be couched), by applying a rigid policy and thus not deciding properly (i.e. on the individual merits of each case) or in some other way by not applying its mind.⁴⁸ A failure to exercise a discretion properly is often linked to an error of law made by the tribunal on a preliminary point (e.g. as to the standing of a party or the powers of the tribunal itself), an error in assessing factual matters (the weight to be attached to particular factors which must be taken into account) or even errors occasioned by a failure to apply the principles of natural justice.

(a) Avoiding a Decision

While the case of Vokwana v National Transport Commission

and Others⁴⁹ does not deal with road transportation, it provides a clear example of an administrative body refusing to make a decision. The applicant wished to start an air service in the Transkei. He therefore applied, in terms of the Air Services Act⁵⁰ to the Commission for a licence to do

so. He completed sufficient of the application form as was required for publication in the Government Gazette but intended leading oral evidence at the hearing to establish the further information which was needed to put the matter properly before the Commission. The legal representative of the third respondent raised a point in limine: the application was materially defective because it did not contain all the information required in terms of the Act. The Commission found that the application was indeed defective and refused to hear the matter.

On review, Davies AJ held that only those details which were required for publication in the Government Gazette had to be included in an application. For the rest, the Commission had a discretion as to whether to allow omissions in the form to be cured at the hearing by memorandum or oral evidence.⁵¹ The Commission had not exercised this discretion because it was unaware that it had a discretion. Consequently its failure⁵² constituted an irregularity which was justiciable on review.

The case of Flying Lotus (Pty) Ltd v Chairman, National Transport Commission, and Another⁵³ provides a further example of the avoidance of a decision. The applicant had been granted a permit by a board. The second respondent, an objector, appealed to the Commission which upheld the appeal. The reason for doing so was that the route, according to the Commission, covered both private and public roads and this deprived it of jurisdiction. In setting aside the decision Didcott J held that the disputed roads were public roads and so the Commission should have heard the matter fully and given a decision. The learned judge held further that even if some of the roads were private roads, this fact would not

prevent the Commission from granting the permit.

(b) Fixed Policies

Regulatory agencies and other administrative bodies are expected to have policies: part of the justification for their existence is the familiarity of their members with policy. These policies are intended to play a part in the decision-making process, but as Baxter says:

'Where discretionary powers are exercised, the courts will insist that discretion is in fact exercised and they will not accept that it has been if the decision has really been dictated by an informal rule, policy, standard or precedent which has become inflexible.'

The same learned author submits that policies, standards or precedents may be applied if discretion is not totally excluded, if they are compatible with the enabling legislation and if the person affected is informed of them before a decision is reached.

Perhaps the most notable road transportation case involving the application of a rigid policy is Tayob v Ermelo Local Road Transportation Board, in which an Indian taxi-driver was refused a 'first-class' permit (for the conveyance of whites) solely on the basis of his race. The board had refused his application for various other reasons, but before the Commission, the appeal was dismissed because it had adopted a policy: 'Europeans' should convey persons of that race group while 'non-Europeans' should convey only 'non-Europeans'. Although Centlivres CJ phrased his decision in terms of unreasonableness, he dealt briefly with the Commission's policy: he held that there was no statutory foundation for the policy and therefore no basis for the

decision. It had, in short, failed to exercise the discretion which the legislature had vested in it.

Similar issues were involved in Pietermaritzburg City Council
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v Local Road Transportation Board. The board had resolved to implement a policy of segregation in passenger conveyance. It advised the applicant of this and when the applicant wished to renew its permits for its passenger service the board asked it to specify which vehicles would be used for the conveyance of particular race groups. It thereafter resolved to grant the applications subject to a condition: separate vehicles were to be used for the conveyance of members of each race. The applicant applied to the court for a rule nisi interdicting the respondent from requiring compliance with its decision pending an application to have the decision set aside. In confirming the rule Fannin J
⁵⁹
held:

'...the applicant has made a prima facie case for the proposition that the policy has been rigidly and inflexibly applied, without a proper consideration of the question as to whether the circumstances justify its application, and whether it should be applied forthwith.'

While most will agree that like cases should be treated in the same way, a deciding body may not use a 'rule of thumb'. This would mean that individual consideration is not given to
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each case, and a proper decision on the merits, reached. In other words where a 'rule of thumb' is used, the deciding body has not exercised its discretion and its decision can be
⁶¹
set aside.

The case of National Transport Commission v Airoadexpress
⁶²
(Pty) Ltd provides an illustration. In deciding on the

carrying capacity of vehicles for the purpose of the now defunct s1(2)(1) permit, the Commission had applied a rule that if the gross vehicle mass of a vehicle was in excess of 4 000 kilograms it would not grant a permit: it said that, in its experience, vehicles of that mass or more had a carrying capacity in excess of 1 000 kilograms.⁶³ James JP remitted the matter to the Commission for fresh consideration because it did not decide the carrying capacity of vehicles in a proper way. The same mistake was made (after the repeal of s1(2)(1)) in the unreported decision of Ratner and Collett Agencies (Pty) Ltd v Chairman, National Transport Commission and Others.⁶⁴ The Commission had imposed a condition when granting an application for permits to authorize an express freight service. The condition was to the effect that the gross vehicle masses of the vans used could not exceed 2 500 kilograms. Le Roux J held:

'There is no evidence of an acceptable nature that I could find either before the Board or before the Commission that justifies the bald statement by the chairman of the first respondent that a standard 1 ton truck does not weigh more than 2 500 kilograms.'

(c) Irregularities Distorting the Decision

An irregularity (which may or may not be justiciable on review) can lead to a decision being made in which the deciding body did not apply its mind properly. A failure of natural justice, an error of law or a misdirection in assessing evidence can cause a distortion in the exercise of the discretion.

So, in Asmal's Bus Service (Pty) Ltd and Others v Local Road Transportation Board and Others⁶⁵ a failure on the part of

the board to apply natural justice had resulted in an arbitrary and capricious decision in which it had not applied its mind.⁶⁶ The misdirection of the board in Fraser's (OVS) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander⁶⁷ was an error of law which resulted in the first respondent's discretion being exercised incorrectly: in refusing an application for a private permit it had erroneously interpreted s18 of the Act to give itself power to take into account the second respondent's service and it held that it was bound to protect it from competition because '[dit het] vir baie jare reeds 'n diens in Namakwaland lewer wat in 'n groot mate onekonomies is'.⁶⁸

(3) Abuse of Discretion

The term 'abuse of discretion' is used here to describe the improper use of discretion, the use of discretion for an ulterior motive and the dishonest exercise of power, all of which are grounds for setting aside decisions.

The power to refuse an application in part was used for an improper purpose in Ratner and Collett Agencies (Pty) Ltd v Chairman, National Transport Commission and Others:⁶⁹

application had been made unsuccessfully to a board for permits for six vehicles and six trailers, each having a carrying capacity of 1 000 kilograms. The Commission, on appeal, granted the applications in respect of the vans but refused authorization for the trailers. The chairman, in giving his reasons for the refusal, said that it was very difficult to see whether a trailer had been overloaded whereas it was easier to recognize an overloaded truck. The Commission had therefore, in effect, decided to remove the temptation of overloading the trailers by not granting

permits for them. Le Roux J held:

'The anticipation of and attempt to guard against a possible contravention of the prohibition against the carrying of a load of more than a thousand kilograms appears to me to be improper and unwarranted.'

It amounted to using powers which were to be exercised for particular purposes (in broad terms, in the public interest) to prematurely anticipate criminal action on the part of the applicants. Furthermore, no reasons existed for the belief that the trailers would be overloaded.

The case of Rauties Transport (Edms) Bpk v Voorsitter,
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Plaaslike Padvervoerraad, Johannesburg, en 'n Ander

provides an example of bad faith on the part of the decision-maker. The board and the Commission had acted in collusion in trying to prevent the applicant from obtaining judicial redress. Goldstone J, in affirming that the decision was invalid stressed 'dat die redes vir hierdie nietigheid die mala fide oogmerk van die Raad en die departementele amptenare
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insluit'.

(4) Irrelevant Considerations and Failures to take Relevant Considerations into Account

Relevancy is an important judicial tool which is used to control discretion. A decision will be set aside if irrelevant considerations motivated it or if relevant con-
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siderations were not taken into account. To some extent
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relevancy overlaps with purpose as a control mechanism.

What factors, however, are relevant and what factors are irrelevant? The essential problem in answering this question is that, as Craig points out, the considerations deemed to be

relevant are not self-defining. He says:

'...the term relevancy is often used to denote not the types of interests which the decision-maker exercising discretion must take into account, but rather the purposes which he is entitled to pursue. A consideration is deemed to be irrelevant because its content is based upon a purpose which the courts believe the legislation does not authorize.'

The courts are guided in assessing relevance by the fairly full list of factors contained in s15(1) which applies only to public permits. That the list is not closed is made clear by s15(1)(m) which empowers the deciding body to take into account any other factor which, in its opinion, is relevant. Ss18 and 20 which deal with private and temporary permits respectively do not provide clear guidelines.

Tayob v Ermelo Local Road Transportation Board ⁷⁵ provides a ready example of an irrelevant consideration which led to the board's decision being set aside: the applicant's race had nothing to do with his ability as a carrier yet his application was refused because he was an Indian. In Frasers (OVS) Bpk v Voorsitter, Nasionale Vervoerkommissie, ⁷⁶ the second respondent's service was irrelevant to the decision because the Act did not entitle the board or the Commission ⁷⁷ to take it into account.

In a number of cases relevant considerations were not taken ⁷⁸ into account: in the Ratner and Collett Agencies case the service offered by South African Airways should have been considered but was not, while in Bangtoo Bros and Others v National Transport Commission and Others ⁷⁹ the transport needs of the affected community were ignored:

'By dismissing the appeals and refusing to renew the certificates the people in Chatsworth in need

of transport facilities were in effect told: you shall take this medicine whether or not it is good for you, and regardless of your dislike for it; you are offered a Hobson's choice, which is better than no choice at all!

In W C Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others ⁸⁰ the interests of SATS were taken into account, but the general public interest was not considered, and in Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd. ⁸¹ Kotze AJA (dissenting) held that the board should have considered the fact that when the respondent conveyed the goods for which permits were sought (under the authority of temporary permits) no complaints were made about the service. This consideration was of importance when viewed against the numerous complaints made about the service given by SATS when that organization conveyed the goods.

(5) Unreasonableness

The traditional approach to reviewing discretionary acts of boards or the Commission on the basis of unreasonableness has been to apply the case of Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd. ⁸² The test enunciated in that case is predicated on the assertion that unreasonableness is not, on its own, a ground for review: to warrant interference the unreasonableness must be so gross that something else can be inferred from it: either mala fides, ulterior motive or a failure on the part of the body vested with the discretion to apply its mind. ⁸³ This approach to unreasonableness is clearly illustrated by the case of National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd. ⁸⁴ Holmes JA held that decisions of the Commission stand unless it is

found that it did not 'apply its mind to the issues in accordance with the behests of the statute and the tenets of natural justice'⁸⁵ or if 'the Commission's decision was grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind as aforesaid...'⁸⁶

Henning J in Bangtoo Bros and Others v National Transport Commission and Others⁸⁷ criticized Holmes JA's formulation,⁸⁸ while acknowledging that he was bound by Chetty's case,⁸⁸ by suggesting that 'the acknowledgement of degrees of gross unreasonableness might well be regarded as importing a notion of super-superlatives'.⁸⁹

The Appellate Division decisions mentioned above applied the so-called formal standard of unreasonableness.⁹⁰ The court in W C Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others,⁹¹ while paying lip service to the previous decisions appears to have applied an 'extended formal standard': Kotze JA set aside a decision of the Commission because no reasonable evidence supported it:⁹²

'It follows that the conclusion to be arrived at, on the balance of probabilities, is that the Commission, by reason of ignoring the evidence, failed to apply its mind to the question, firstly, whether the appellant discharged the onus of proving that the transportation facilities provided by the Railway Administration were not satisfactory and sufficient to meet the transportation requirements of the mining industry within the area outlined in the application, or to the question, secondly, whether having regard to the circumstances it was expedient in the public interest to grant the permits applied for. It seems clear that on the evidence it should have come to a conclusion opposite to the one it did arrive at and that, in ignoring the cogency of the uncontradicted evidence presented to it, the Commission, in coming to the conclusion that the Railway Administration is able to provide a satisfactory service and that

additional services are not necessary or in the public interest, arrived at a grossly unreasonable decision - one to which no reasonable body could in the circumstances of the present matter have come.'

This decision, in effect, recognizes what many judges and writers have disavowed: unreasonableness per se is a ground for review. It is perhaps a pity that Kotze JA expressed himself in cautious terms. As Baxter points out, the learned judge of appeal made use of the 'gross unreasonableness' terminology in deference to the long line of cases which had applied the 'formal standard'.⁹³

It is submitted that the Greyling and Erasmus case⁹⁴ is a very important one, not only for road transportation law but also for administrative law generally. A number of observations are therefore warranted: the influence of Jansen JA's judgment in Theron en Andere v Ring van Wellington N G Sendingskerk in Suid Afrika⁹⁵ is apparent from the extension of the 'no-evidence' rule, to require of the decision-maker reasonable evidence for the conclusion⁹⁶ reached; Jansen JA postulated the 'extended formal test'⁹⁷ for specific situations viz 'purely judicial' decisions. What is envisaged by this term is a decision which closely⁹⁸ resembles the decisions with which courts are familiar. The decision in the Greyling and Erasmus case⁹⁹ involved a higher policy component and was prima facie 'the very kind of decision to which Jansen JA had conceded the "reasonable evidence" test would not apply'.¹⁰⁰ Despite the caution which Kotze JA exercised in not holding that previous decisions were wrongly decided (i.e. by using the 'gross unreasonableness' terminology) he, in fact, recognized unreasonableness per se as a ground of review.

It is submitted that the approach adopted in the Greyling
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and Erasmus case is an appropriate one for the judicial
control of regulatory bodies. Despite dicta to the contrary
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in the court a quo in that case, it has long been accepted
that rights, and not privileges, are involved when an
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application for a permit is made. It is therefore desirable
that decisions involving the grant or refusal of a permit
should be based on reasonable evidence. The appropriateness
of the symptomatic unreasonableness test is open to question
in the modern administrative state: regulatory agencies
abound and wield considerable power in controlling the
activities of individuals; judicial control is therefore a
very necessary safeguard, especially in a country like South
Africa where the majority of the population do not have
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access to the electoral process and its attendant benefits;
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the Union Steel case dealt with a very different situation
to the one found in transportation regulation; the bounties
which the Minister could give were intended to stimulate the
production of steel and not to regulate the industry; the test
formulated by Stratford JA was, no doubt, appropriate to the
case before him, but a blanket acceptance of it to economic
regulation is, it is submitted, open to doubt. At the time
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of the Union Steel decision, the courts were relatively
unfamiliar with the intervention of government in what had
hitherto been a private domain. This picture has changed,
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but decisions like Chetty evidence no realization of this
fact and the crippling effect an adverse (and unreasonable)
decision can have on the individual. Finally, it is
submitted that fears that, if unreasonableness per se is
accepted as a ground of review, the line between review and
108
appeal will be blurred, are unfounded. The court is not

asked to hold that a decision is wrong, but that it was arrived at incorrectly: the decision-maker has a duty to act fairly, and surely that entails reaching a rational decision based on the evidence and the policy considerations which it is required to consider. If, as in Greyling and Erasmus,¹⁰⁹ most of the evidence points towards the granting of a permit and the board refuses the application, a grave miscarriage of justice has occurred and the court is entitled to intervene.

[C] THE REVIEW OF NON-DISCRETIONARY ACTS

(1) Failure to Comply with Jurisdictional Facts

A statute may require a deciding body to satisfy itself as to the existence or non-existence of certain facts or circumstances before it can exercise any power. Such facts or circumstances are known as jurisdictional facts. Where the existence of a jurisdictional fact is peremptory, a purported exercise of power in its absence will be a nullity.¹¹⁰

The case of Roberts v Chairman, Local Road Transportation Board and Another⁽¹⁾¹¹¹ provides an example of the setting aside of a decision because of the non-compliance with a jurisdictional fact: the City Tramway Co applied to the board for amendments to its permits to authorize a fare increase. The board published particulars in the Government Gazette, as it was required to do in term of s14(1). This section, read with reg 4(1), gave interested parties ten days within which to make representations. The board heard the application prematurely. The steps laid down by the Act for the board to follow were conditions precedent to the exercise, by the board, of any powers. Friedman J accordingly held that the board's decision was invalid:¹¹²

'Thus, if, objectively speaking, the steps prescribed by the Legislature as a prerequisite to the exercise by the Board of its statutory power have not been taken, the purported exercise by the Board of the power is invalid. One of the steps which the Board was required to take was to afford interested persons 10 days within which to object to an application. This the Board failed to do. The decision taken by the Board on 3 July 1979 is accordingly invalid.'

Other examples of jurisdictional facts are to be found in the Act: the body or official issuing a permit must be satisfied as to certain pre-requisites before the issuing of the permit will be valid; ¹¹³ the Minister must satisfy himself that 'it may be expedient in the public interest that any public permit be withdrawn' before instituting an enquiry in terms of s28. Where such a limit is placed on a functionary in largely subjective terms, the existence or non-existence of the particular state of affairs must, it is submitted, be objectively capable of assessment i.e. the Minister's ¹¹⁴ 'reasons to believe' must be objectively acceptable.

(2) Mistakes as to Jurisdiction

Many mistakes as to jurisdiction can be made by a board or the Commission. If the deciding body assumes jurisdiction when it may not, or fails to assume jurisdiction when it should, the result will be set aside on review. No discretion is involved in determining whether the board or Commission has jurisdiction to decide a matter: it either does have or it does not, but the difficulty will lie, in hard cases, in the interpretation of its powers.

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Herbst v Dittmar en 'n Ander provides a clear example of the board acting outside its territorial jurisdiction: the Johannesburg board granted a transfer of permits, issued for

Johannesburg, to Dittmar, whose business was situated in
Rustenburg. Bekker J held:

'Die Johannesburg se plaaslike raad dra kennis van aangeleenthede binne sy gebied en kon geen oorweging skenk kragtens bepalings van die Wet aan die aangeleenthede heersende te Rustenburg nie. Of dit daarvan bewus was en/of dit in die oorweging geneem is, weet ek nie. Indien dit in oorweging geneem is sou dit 'n onreëlmatigheid wees aangesien 'n raad se bevoegheid beperk is tot sy eie gebied.'

The case of Local Road Transportation Board and Another v Durban City Council and Another involved a more complex interpretation of the board's powers. The Council had formed a body called the Durban Transport Management Board, as it was empowered to do in terms of the legislation under which it drew its powers. The Management Board applied for the renewal of the permits which authorized the Council's passenger transportation undertaking. It did not state that it was doing so in the name of the Council. The rules made by the Council relating to the powers and functions of the Management Board said that the latter should act 'in the name of and on behalf of the Council'. The board had, on this basis, upheld an objection that the application by the Management Board was invalid. The court, per Holmes JA, held that the board's decision was invalid, because the provision directing the Management Board to act in the name of the Council was merely directory. Consequently, the application had, in fact, been made on behalf of the Council. In short, the board had erroneously decided that it had no jurisdiction to deal with the merits of the case:

'It (the board) wrongly decided that de_jure there were no certificates in existence and therefore, in effect, that there were no applications before it. Thereby it precluded itself from considering them.

Thus it failed to exercise its discretion in regard to them.'

The case of Nasionale Vervoerkommissie van Suid Afrika v Salz Gossov Transport (Edms) Bpk¹²¹ involved a misdirection by the Commission as to its appellate powers. A board had postponed an application pending the outcome of an enquiry conducted under s25 of the Act. An appeal was lodged (and upheld)¹²² against this decision. The court a quo set aside the Commission's decision on review and this was confirmed on appeal: the decisions to hold an enquiry under s25 and to postpone the application were not acts, directions or decisions as contemplated by s8(1); they were therefore not subject to appeal and the Commission had assumed powers which it did not have.

The issue of standing to object was involved in Polikor Investments (Pty) Ltd v Chairman, Local Road Transportation Board, Cape Town, and Others.¹²³ A board or the Commission is required to determine whether any would-be objectors have standing at a preliminary stage. The importance of this process lies in the fact that an incorrect decision will have an effect on any decision on the merits.¹²⁴ A further complication exists: not only must the deciding body interpret the provisions of the Act relating to standing, but it may be required to go further and deal with the principles found in the common law.¹²⁵ In the Polikor case the court held that the Commission had correctly held that the applicant did not have standing.

[III] REMEDIES

[A] GENERAL

Judicial review per se is not a remedy. It is a process designed to test the validity of administrative action. Only after review proceedings have been successful will the court be in a position to grant a remedy.¹²⁶ The court, on review, performs two separate functions: deciding on the validity of the act and, if it is found to be invalid, providing the appropriate remedy.¹²⁷ If the act is invalid, a remedy will be granted: the maxim ubi ius ibi remedium expresses an underlying principle of South African law and, indeed, the law in most legal systems. It describes the 'correlative nature of basic rights on the one hand and remedial rights on the other'.¹²⁸ The principle was judicially expounded in Ashby v White¹²⁹ as follows:

'If the Plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and, indeed it is a vain thing to imagine a right without a remedy, for want of a right and want of a remedy are reciprocal.'

A characteristic of the South African law of remedies is its flexibility: it is, as Baxter points out, a relatively modern development in our legal system. Despite the influence of Roman Dutch law and English law, the South African law has an indigenous character and has avoided the technicalities which plagued the English system. It is nonetheless comprehensive in nature and provides a wide array of remedies which ensure adequate relief from unlawful acts.¹³⁰

The remedy which an aggrieved party will be granted will depend on the context of the illegality and the purpose of

the relief claimed. In other words, the court will determine an appropriate remedy to counter the harm. It would, for example, be totally inappropriate to ask for a mandamus which would have the effect of compelling an administrative body to exercise its discretion in a particular way. On the other hand such a remedy would be appropriate if the body refused to exercise a discretion vested in it.

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[B] SOURCES OF RELIEF

(1) Appeal

The appeal from acts, directions or decisions of boards to the Commission is the only statutory route to remedies.

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It is also the only internal means of possible redress.

(2) Defence to a Criminal Charge

The invalidity of an administrative act can, where appropriate, be used as a defence to a criminal charge.

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The most ready examples are cases involving alleged contraventions of conditions or regulations.

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(3) Setting aside or Correcting

The nature of road transportation decision-making makes the quashing of invalid decisions of boards or the Commission a common remedy: the complex policy issues involved will very often restrict the court to this remedy. It involves the setting aside of the invalid decision and the remittal of the matter to the tribunal for fresh consideration. In limited circumstances the court will assume jurisdiction to decide

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the matter on its merits.

(4) Interdict

The term 'interdict' is used here to describe a 'prohibitory

interdict'. It is 'a decree whereby the administrative organ is ordered to desist from an act or course of conduct which is causing direct prejudice to the applicant and constitutes an encroachment on his rights'.¹³⁷

The usefulness of the interdict as a remedy lies in the fact that it can be sought as a matter of urgency and, if ordered, will freeze the situation pending final determination. This is because it is unusual for a final interdict to be granted immediately: usually an interim interdict will be ordered to maintain the status quo: it will be made final if the party against whom it is directed does not argue its merits on the return day or does not do so successfully.¹³⁸

(5) **Mandamus**

The remedy of mandamus is a form of interdict: it is a mandatory interdict. It is used to compel action rather than to prevent action. Wiechers therefore says:¹³⁹

'In reality an interdict and a mandamus are the two sides of the same coin; unauthorized action is prevented by means of an interdict and compliance with a statutory duty is enforced by means of a mandamus.'

As a remedy, it is limited in the administrative sphere by the fact that it cannot be used to compel a decision-maker to decide in a particular way, but only to compel the decision-maker to decide a matter. In other words, it cannot interfere with discretion.

(6) **Declaratory Order**

While other remedies 'have a direct effect upon the administrative action in question', the declaratory order does not.¹⁴⁰ Such an order does no more than declare on the legality of actual or pending administrative action:¹⁴¹

'A declaration of rights may be sought by a subject if a clear legal dispute or legal uncertainty exists in regard to the act of an administrative organ. Such an order may also be sought in order to ensure that an administrative organ's attention is drawn to the statutory duty it is obliged to perform. In this way a declaration of rights provides a convenient solution to a legal dispute even if other legal remedies may be available.'

The declaratory order is particularly useful where a statute creates offences. It allows a person to determine his legal position and so regulate his affairs in accordance with the law. The Road Transportation Act creates, inter alia, the offence of failing to comply with the provisions of a permit. The declaratory order is therefore a convenient remedy in cases where the meaning of a regulation or a condition is not clear.
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(7) **Substitution by the Court of its Decision for that of the Deciding Body**

(a) **General**

Review proceedings are aimed at correcting irregularities in the decision-making process of administrative bodies.
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The corrective role of the court does not extend to substituting an invalid decision with its own: it does not have power to deal with the merits and is not usually institutionally competent or entitled to exercise the discretion which the legislature granted to the administrative body.
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Van Blerk JA stated this principle in Krog v Dranklisensieraad vir Gebied 42:
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'Maar dit gaan hier om 'n geval waar die wetgewer die ondersoek aan 'n raad toevertrou het, en nie aan 'n geregshof nie, gevolglik kan die Hof nie, selfs by nietigverklaring van die verrigtinge, administratiewe funksies vir homself aanmatig deur

sy diskresie te substitueer vir dié toevertrou aan 'n raad nie.'

When a court sets aside an administrative decision it therefore remits the matter for fresh consideration, the irregularity having been brought to the attention of the decision-maker.

In limited circumstances the court will go further: it will substitute its decision for that of the deciding body. The court will, in the words of Hiemstra J, depart from the general rule:

- '(i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.
- (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.'

Baxter (who treats Hiemstra J's first ground as two separate grounds) ¹⁴⁷ has identified a further one: 'Where the court ¹⁴⁸ is in a good position to make the decision itself'.

(b) Road Transportation Cases

It is a fairly common feature of road transportation cases that one party asks the court to substitute its decision for that of the board or the Commission. Not surprisingly the courts have shown a reluctance to do so. A factor of high priority in this regard is the policy-laden nature of decisions on the merits. Cases are to be found, however, in which courts have decided against remitting a matter and have

instead come to a finding on the merits.

In Tayob v Ermelo Local Road Transportation Board,¹⁴⁹ the court decided the matter by ordering the board to issue permits to the respondent. The reasons for doing so were given in the following terms:¹⁵⁰

'In the present case, however, the Court granted the order it did, because it was clear on the facts before it that, even assuming that three first class taxis were adequate for the needs of Piet Retief, no complaint had been made against appellant's taxi service and that there was no justification for the more favourable treatment that was meted out to the other applications. It is impossible, again assuming that three first class taxis are adequate, for the local board to rectify the position at this stage, for the Court cannot in these proceedings set aside the granting of exemptions to the other three applicants and order the board to consider on the merits which of the four applicants should be refused an exemption.'

The same course of action was adopted in Bangtoo Bros and Others v National Transport Commission and Others:¹⁵¹ Henning

J did not expressly deal with the question of remittal, but it is implicit in the judgment that the decision on review was so unreasonable that it would have been a waste of time to remit the matter because the result would be a foregone conclusion.¹⁵²

In W.C Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others,¹⁵³ the court also exercised the discretion vested in the deciding body. Kotze JA held that it was entitled to do so, despite the wide discretion in s15(1)(m) which allows the Commission to take into account any relevant factors not mentioned in s15(1), because the Commission relied on the assertion that the appellant had not discharged the onus of proving the requirements of s15(2)(i) and (iii).¹⁵⁴ The court substituted its decision because:¹⁵⁵

'In the present instance, the appellant made out a strong case for the issue of the desired permits to it which should have been granted long ago. It first lodged its application some three and a half years ago and to this day has not received relief. It has obviously been severely prejudiced by the long delay. It seems to me that considerations of fairness require that the appellant should forthwith be granted the relief which it seeks in its notice of motion.'

Where a board or the Commission has stood or fallen on one issue, the courts show less reluctance to decide the matter without further ado. In J S Breytenbach en Seun (Edms) Bpk v Voorsitter, Plaaslike Padvervoeraad en Andere, ¹⁵⁶ for instance, Solomon J found that the applicant had discharged the onus of proving the necessity of the proposed road transportation. At the same time, the second respondent had failed to apply its mind properly. The learned judge therefore found no impediment to ordering that the permits be issued. A similar conclusion was reached in Sonnex (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander, ¹⁵⁷ in which the relative simplicity of the decision and the financial prejudice suffered by the applicant were decisive.

The long period of time which elapsed between the applicant's original application and its success on review resulted in a favourable exercise of discretion in Frasers (OVS) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander, ¹⁵⁸

Stafford J held:

'Hierdie aansoek dateer vanaf 15 Junie 1981 toe die applikant sy aansoek om 'n privaatpermit gedoen het. Dit is nou meer as drie jaar later en indien ek reg is dat die eerste respondent regtens gefouteer het in die handhawing van tweede respondent se appel, moes applikant lank gelede sy privaatpermit gehad het om sy eie goedere te vervoer, soos gevra in Junie 1981 en soos toegestaan deur die Plaaslike Padvervoerraad in Desember 1981.'

The time issue on its own was not sufficient: the fact that a strong case had been made by the applicant was also of importance.

(c) Conclusion

It is apparent from the cases cited that the positive exercise of a discretion by the court in favour of the substitution of the board's or the Commission's decision rests on more than one factor: in all of the cases the strength of the applicant's case was stressed. The court must be satisfied that no hidden policy issues are present which will render it incompetent to make the decision. The court must, in other words, satisfy itself that the decision at which it arrived is a foregone conclusion. ¹⁵⁹ In addition, reliance is usually placed on at least one additional factor which involves the redressing of an inequitable situation apart from the actual misdirection. This may be financial prejudice or the long delay which the applicant has had to endure before successful review proceedings.

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Tayob's case does not fit as easily into the above analysis. By reading the case as a whole it is possible, however, to detect a concern, on the part of the court, for the treatment the appellant would receive from a clearly hostile board if the matter was remitted. It is therefore submitted that part of the motivation for deciding the matter was an apprehension that the board would again display hostility towards the applicant. Two further reasons emerge, the first of which is to be found in the general principles enunciated by Hiemstra J in Johannesburg City Council v Administrator, Transvaal and Another: ¹⁶¹ the end result was a

foregone conclusion because no complaints had been received about the appellant's service and his application was for the renewal of a permit; secondly, it was not possible to decide the matter again because three other operators had already been granted permits.

FOOTNOTES

1. 1906 TH 179, 182; See too Baxter, at 299, who says: 'Administrative Law as it is applied in the courts rests upon the principle of legality. Where a litigant can show that his interests have been harmed as a result of administrative action or inaction not authorized by law, the court may grant him a suitable remedy. Depending on the circumstances, it may set the action aside, grant a declaration of nullity, issue an interdict or even award damages. This process is usually referred to as judicial review...'
2. 1903 TS 111, 115.
3. Wade, 22; Baxter, 300: 'Judicial review is a process which entails external supervision of the way in which the executive has observed the behests of the legislature'.
4. Baxter, at 305, says: 'The primary function of the courts is to apply the law in the resolution of disputes. This provides the justification for their inherent review jurisdiction as we have just seen, but it also limits this jurisdiction to matters involving the legality of administrative action. Without statutory authority, the court may not venture to question the merits or wisdom of any administrative decision that may be in dispute. If the court were to do this, it would be usurping the authority that has been entrusted to the administrative body by the empowering legislation. More than this, the court would be moving beyond its special area or expertise'.
5. Wade, 35.
6. Wade, 22.
7. No 59 of 1959.
8. J Herstein and L Van Winsen The Civil Practice of the Superior Courts of South Africa (3 ed), 754.
9. Leach v Secretary for Justice, Transkeian Government 1965(3) SA 1 (E).
10. Rose Innes, 7; Baxter, 307.
11. See for discussion Evans, 1 - 35.
12. Receiver of Revenue v Sadeen 1912 AD 339.
13. 1934 NPD 226, 245 - 6; See too Baxter, 305, footnote 23 and the cases cited therein.
14. Baxter, 305 - 6.
15. No 87 of 1977.
16. Wade, 22; Baxter, 300.
17. Rose Innes, 13.
18. Wade, 35.

19. Loxton v Kenhardt Liquor Licensing Board 1942 AD 275; see footnote 4 above for the reason for this practice.
20. 1947(4) SA 755 (O), 756.
21. Rose Innes, 14.
22. See for example the Road Transportation Act, s8. See further Ch 12 above.
23. Baxter, at 307, says: 'For instance, in a review a court will seldom substitute its own decision for that of the administrative body in question: it will usually only set it aside or prevent it being implemented'.
24. 1961(3) SA 415 (A), 420 H - 421 A.
25. Rose Innes, 15; see below at 353.
26. 1903 TS 111, 114 - 7.
27. At 115 - 6.
28. See Ch 5, above, at 106.
29. See Ch 5, above, at 118.
30. S5(1).
31. S4(1).
32. See the Road Transportation Act, s5(1)(d) and the Transport (Co-ordination) Act, s4(1)(d) which deal with persons having a financial interest, and the Road Transportation Act, s5(1)(c) which excludes SATS employees.
33. Road Transportation Act, s6(3); Transport (Co-ordination) Act, s4(2).
34. See Ch 5, above at 125.
35. See City and Suburban Transport (Pty) Ltd v Local Road Transportation Board, Johannesburg 1932 WLD 100; Rose v Johannesburg Local Road Transportation Board 1947(4) SA 273(W).
36. See footnote 29 above.
37. 1958(1) SA 65(N), 70A.
38. See Ch 11 below; see too Ratner and Collett Agencies (Pty) Ltd v Chairman, National Transport Commission and Others (TP) 20 March 1985 (case 22195/83) unreported).
39. SWA 3 March 1983 (case A65/84) unreported.
40. Per Kennedy J in Clairwood Motor Transport Co Ltd. v Pillai and Others 1958(1) SA 245(N), 256B.
41. 1966(2) SA 456(N).
42. At 461 H.
43. 1956(2) SA 504(FC).
44. At 513 A - B.
45. 1958(1) SA 245(N).
46. At 256 E.
47. Baxter, 414.
48. Baxter, 414 - 9.
49. 1984(2) SA 245(Tk).
50. No 10 of 1980(Tk).
51. At 252 B - 253 E.
52. At 251 F - 254 B.
53. 1982(4) SA 253 (D).
54. Baxter, 416.
55. Ibid.
56. 1951(4) SA 440 (A).
57. At 447C. Note that as a result of Tayob's case supra the Act was amended by the Motor Carrier Transportation Amendment Act 44 of 1955 to allow for the race of an applicant to be considered. See Ch 3, above, at 62 and 1955 A.S. 39.
58. 1959(2) SA 758(N).
59. At 775 B - C.

60. See too J S Breytenbach en Seun (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Port Elizabeth en 'n Ander (SECLD Judgement delivered between 28 January 1984 and 17 February 1984 (case 300/84) unreported) in which applications for temporary permits were refused because so many had previously been granted to the applicant on a regular basis. Solomon J held that the chairman's statement to this effect 'seems to me to indicate an unwillingness on the part of Second Respondent to consider the applications on their merits, and a failure to apply his mind to material and decisive issues peculiar to the individual applications'.
61. Baxter, 418.
62. 1981(3) SA 109(N).
63. At 113 A - B.
64. TPD 20 March 1985 (case 22195/83) unreported.
65. 1966(2) SA 456(N).
66. At 461 A - E.
67. TPD 29 August 1984 (case 17853) unreported.
68. See too Ratner and Collett Agencies (Pty) Ltd v Chairman, National Transport Commission and Others TPD 20 March 1985 (case 22195/83) unreported.
69. Supra.
70. 1983(4) SA 146(W).
71. At 158C.
72. Craig, 234.
73. Craig, 356.
74. Craig, 44.
75. 1951(4) SA 440(A).
76. TPD 29 August 1984 (case 17853) unreported.
77. But see Asmal's Bus Service (Pty) Ltd and Others v Local Road Transportation Board and Others 1966(2) SA 456(N), 459 C - D, in which it was held that the forth applicant's previous convictions and his attempts to mislead the board were relevant considerations.
78. TPD 20 March 1985 (case 22195/83) unreported.
79. 1973(4) SA 667(N), 689B; see too the remarks of Henning J (at 689C) on the fact that Bangtoo Bros were pioneers in providing transportation for the people of Chatsworth.
80. 1982(4) SA 427(A).
81. 1976(1) SA 887(A), 906H - 907H.
82. 1928 AD 220.
83. At 236 - 7.
84. 1972(3) SA 726(A).
85. At 735F.
86. At 735G; this case was followed in Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1976(1) SA 887(A). 895 A - G.
87. 1973(4) SA 667(N).
88. Supra.
89. Bangtoo Bros case supra 683H; see too the observations of Miller J in Chetty's Motor Transport (Pty) Ltd v National Transport Commission and Another 1972(1) SA 156(N), 159 C - F.
90. Taitz calls the formal standard 'symptomatic unreasonableness': see J Taitz 'But 'Twas a Famous Victory' 1978 AJ 109.
91. 1982(4) SA 427(A).
92. At 448H - 449A.
93. Baxter, 500 - 1.
94. Supra.

95. 1976(2) SA 1(A).
96. See Baxter, 497 - 501 on insupportable decisions.
97. At 20E - H, 24G - 25A, 31.
98. But see Baxter, at 500, who says: 'All the same, it should be remembered that there is no rigid category of "purely judicial" decisions; all kinds of administrative decisions might have "judicial" elements in them, in which case the "reasonable evidence" standard might become appropriate.'
99. Supra.
100. Baxter, 500.
101. Supra.
102. W C Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others TPD 22 May 1979 (case 2029/79) unreported: 'The applicant made much of its alleged right to trade and that it did not seek an indulgence, but a claim of right. I fail to appreciate this approach. It is difficult to conceive how it can be said that the business of hauling goods along public roads is a right, when the exercise of that "right" is dependent upon - (a) proof to the satisfaction of e.g. the Commission that no adequate facilities of a like kind exist; and (b) the favourable exercise of the Commission's discretion in favour of the intending haulier. It is common experience that in an advancing and proliferating community, many individual rights have been lost, some entirely and others replaced by permissions.' (per van Reenen J).
103. Tayob v Ermelo Local Road Transportation Board 1951(4) SA 440(A), 449 B - C.
104. See N E Franklin 'Two Days in the Appellate Division: Reasonableness, Review and Discretionary Administrative Acts 1977 NULR 76.
105. 1928 AD 220.
106. Supra.
107. 1972(3) SA 726(A);
108. See RE Goldblatt 1976 AS 9 - 10.
109. 1982(4) SA 427(A).
110. Rose Innes, 100; see too S A Defence and Aid Fund and Another v Minister of Justice 1967(1) SA 31(C), 34H - 35A.
111. 1980(2) SA 472(C).
112. At 4 76H - 477 A.
113. See s21(2) for the jurisdictional facts which must be found to exist for the valid issue of a permit; see too Cewana v Matiso Bros and Others 1980(3) SA 1068(Tk).
114. See Baxter, 4 61 - 8; see too Sigaba v Minister of Defence and Police 1980(3) SA 535(Tk); Honey v Minister of Police 1980(3) SA 800(Tk); United Democratic Front (Western Cape Region) v Theron N.O. 1984(1) SA 315(C).
115. 1970(1) SA 238(T).
116. At 242H - 243A.
117. 1965 (1) SA 586(A).
118. At 595F.
119. At 596H.
120. At 597H -598A.
121. 1983(3) SA 344(A).
122. See Salz Gossow Transport (Edms) Bpk v Nasionale Vervoerkommissie van Suid Afrika en Andere 1982(1) SA 651 (SWA).
123. 1981(4) SA 782(C).

124. See for example Fraser's (OVS) Bpk v Voorsitter, Nasionale Vervoekommissie en 'n Ander TPD 29 August 1984 (case 17853) unreported.
125. Supra.
126. J Taitz The Inherent Jurisdiction of the Supreme Court, 72.
127. Baxter, 677.
128. Taitz op cit 66.
129. 2 Ld Raym 939, 963 (per Holt CJ). The dictum from the case is quoted from Taitz op cit 66 because the relevant report is not available to the writer.
130. Baxter, 674 - 6.
131. Wiechers, 268.
132. See Ch 12 above.
133. See Baxter, 705 - 6; Wiechers, 269 - 270.
134. See for examples S v Aziz and Another 1964(4) SA 83(N); R v Mahabeer 1950(2) SA 744(N); S v Maharaj and Another 1962(3) SA 190(N). For a discussion of these cases see Ch 10 above at 250-3. See too S v Grindrod Transport (Pty) Ltd and Others 1980(3) SA 978(N). This case is discussed in Ch 6 at 149.
135. For case examples see Ch 8 above and above, from 331-349.
136. See below at 353.
137. Wiechers, 267.
138. See Baxter, 686 - 7; for some examples from the cases see Pietermaritzburg City Council v Local Road Transportation Board, 1959(2) SA 758(N) (interim order confirmed); Sing and Co (Pty) Ltd v Pietermaritzburg Local Road Transportation Board 1959(3) SA 822(N) (temporary interdict); Ismail v Local Road Transportation Board, Pietermaritzburg and Northern Districts and Another 1967(4) SA 659(N) (interim interdict confirmed); Marinpine Transport (Pty) Ltd v Local Road Transportation Board, Pietermaritzburg and Others 1984(1) SA 230(N) (interim interdict); Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and Others 1984(3) SA 65(N) (interim interdict).
139. Wiechers, 268.
140. Baxter, 698.
141. Wiechers, 268 - 9.
142. See for examples Ex parte Naidoo 1943 NPD 269; South African Railways and Harbours v Chairman, Bophuthutswana Central Road Transportation Board 1982(3) SA 24(B).
143. See above at 326.
144. Baxter, 681.
145. 1961(3) SA 415(A), 420H - 421A.
146. Johannesburg City Council v Administrator, Transvaal and Another 1969(2) SA 72(T), 76F - G.
147. The two grounds are: where the end result would be a foregone conclusion and where further delay would cause unjustifiable prejudice to the applicant (Baxter, 682-3).
148. Baxter, 684.
149. 1951(4) SA 440(A).
150. At 449D - F.
151. 1973(4) SA 667(N).
152. See especially at 688B - 689F.
153. 1982(4) SA 427(A).
154. At 449E.
155. At 449H.
156. SECLD Judgement delivered between 28 January 1984 and

- 17 February 1984 (case 300/84) unreported.
157. SWA 6 September 1984 (case 111/84) unreported.
158. TPD 29 August, 1984 (case 17853) unreported; see too Local Road Transportation Board and Another v Durban City Council and Another 1965(1) SA 586(A), 598D - 599F.
159. See by contrast Ratner and Collett Agencies (Pty) Ltd v Chairman, National Transport Commission and Others TPD 20 March, 1985 (case 22195/83) unreported.
160. 1951(4) SA 440(A).
161. 1969(2) SA 72(T).

PART FIVE

CRIMINAL ASPECTS OF TRANSPORT REGULATION

CHAPTER 14

THE OFFENCES CREATED BY THE ACT

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[A] INTRODUCTION

[B] THE OFFENCES

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INTRODUCTION

In this chapter the offences created by the Road Transportation Act will be dealt with under four heads: specific offences, general offences, offences committed by passengers and offences contained in the regulations.

The specific offences are those which are central to the object of the legislation: the regulation and control of road transportation. The general offences are those which fulfill an ancillary function to the main object. They are intended to aid those entrusted with the administration of the Act and to protect the public from certain abuses. They are general in the sense that substantially similar offences are found in a number of other statutes. The offences contained in the regulations share much the same purpose as the general offences. They are discussed separately because they emanate from a different source. Being subordinate legislation their validity can be challenged. The offences committed by passengers serve to widen the net of liability beyond the permit holder and his servants. The purpose of these offences is to maintain the regulatory scheme at a micro level i.e. to give effect to the conditions which boards have prescribed for individual permit holders and to provide for the implementation of those conditions despite possible intransigence by passengers.

[I] THE SPECIFIC OFFENCES

[A] INTRODUCTION

The specific offences are intended to provide deterrents, in the form of criminal sanctions, for carriers who ignore or infringe the regulatory scheme of the Act. They provide, in the first place, for the punishment of those who simply function outside of the Act and are therefore not controlled by its provisions and, in the second place, they attempt to ensure (as much as criminal provisions can) that those who have been granted permits or operate under an exemption do so in accordance with the law. The main thrust of the specific offences is, therefore, to prevent outsiders from competing with insiders, to ensure that authorized operators undertake transportation in the approved manner and, possibly, to protect the public from services which do not meet a required standard.

S31 creates six offences. The general effect of the Road Transportation Act was to retain the offences created by its predecessor, the Motor Carrier Transportation Act, but to enact them in a clearer form.¹ The most important offences are those found in s31(1)(a) and s31(1)(b). They are most frequently dealt with by the courts and are central to the functioning of the regulatory machinery embodied in the Act.

[B] THE CENTRAL ELEMENTS OF THE SPECIFIC OFFENCES

The specific offences created by s31(1) will be dealt with below. The central elements of those crimes will be dealt with here. The concept of 'undertaking road transportation' is central to the regulatory scheme. To fall within the provisions of the Act, and thus be liable for any contraven-

tion, an accused must have undertaken road transportation as defined in s1(1). It is therefore possible to isolate the central elements of the specific offences in terms of that section. They are (1) undertaking and (2) road transportation (which consists of a number of sub-elements). Whether mens rea is an element of these offences will be discussed after an outline of the offences themselves.

(1) Undertaking

The Motor Carrier Transportation Act prohibited the 'carrying on' of motor carrier transportation without a certificate or exemption, or the 'carrying on' of transportation which is not in accordance with the certificate or exemption.² While Cooper and Bamford point out that the term 'carrying on' implies a repetition or series of acts,³ the courts have interpreted it to include an isolated instance.⁴ The more precise word 'undertakes' was substituted for 'carries on' in the Road Transportation Act. This word obviously covers isolated instances. It bears no connotation of a repetition or series of acts. Rather it bears the meaning of 'engaging in' or 'entering upon'.⁵

(2) Road Transportation

Subject to the exceptions listed in s1(2), road transportation⁶ means:

- '(a) the conveyance of persons or goods on a public road by means of a motor vehicle for reward;
- (b) the conveyance of persons or goods on a public road by means of a motor vehicle in the course of any industry or trade or business;
- (c) the conveyance of persons on a public road by means of a hired bus;
- (d) the conveyance of goods on a public road by means of a hired motor vehicle.'

Milton and Fuller say that it is essential that the charge should specify in which way the accused undertook road transportation. If the State does not specify which form of transportation is alleged to have taken place, the indictment will be fatally defective.⁷ The individual components of this definition will now be dealt with.

(a) Conveyance

In most cases the element of conveyance, by nature of the factual circumstances, is self evident. Conveyance is nonetheless an integral part of the definition of road transportation.⁸ In *S v Julies*, the appellant argued successfully that he had not conveyed persons. He was charged, as the owner of an omnibus, after he had let the omnibus to a certain Mrs Wagenaar who used it to take a group of persons from Murraysburg to Graaff-Reinet. Unknown to the appellant each passenger had contributed to the cost of hiring the vehicle. In acquitting the accused, Kannemeyer J relied on the analogous case of *Legg v Railway Passenger Assurance Co*⁹ in which four men had embarked on a fishing venture. To reach their destination they hired a vehicle and shared the costs of doing so. After a subsequent accident one of the party, who happened to be a passenger, sued the third party insurer on the ground that he had been conveyed for reward. In rejecting the passenger's argument, De Villiers JP held:¹⁰

'The true position on the facts was that all four of them had joined together for a common purpose, to hire the use of this car for a fishing expedition. Properly regarded they were conveying themselves. It is merely an accident of language that the petitioner, not being the driver "was being conveyed".'

In a similar way, Kannemeyer J concluded, the appellant could not be said to have conveyed the passengers in the omnibus, or to have permitted their conveyance. What he may have done was to permit them to convey themselves.

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With respect, this judgment is correct. Some measure of participation or knowledge must be present on the part of the owner of the vehicle. Hiring out the vehicle and washing his hands of any further details cannot be sufficient.

(b) On a Public Road

A public road is defined in s1(1) of the Act as 'any road declared or recognised as a public road under any law, and includes any road, street or thoroughfare or other place (whether a thoroughfare or not) to which the public or any section of the public has a right of access'.

In the case of Flying Lotus (Pty) Ltd v Chairman, National Transport Commission and Another,¹² Didcott J was called upon to decide whether disputed sections of a route were 'private roads'. These stretches had not been declared or recognised under any law to be 'public roads' but in laying down guidelines, Didcott J held that this was not the end of the matter. The test to be applied to determine whether a road is a public road within the meaning of the Act consists of a possible twofold enquiry. The first question to be asked is whether the road is recognised as, or has been declared to be, a public road. If this enquiry is answered in the affirmative the road in question will be a public road. If it is answered in the negative, a further question must be asked: does the public or any section of the public have a right of access to it? If a right of access exists, the road

is a public road. The State must allege and prove that the unlawful road transportation took place on a public road within the meaning of the Act.¹³

(c) By Means of a Motor Vehicle

(i) General Definition

The definition of a motor vehicle excludes motor bicycles, but includes any vehicle 'designed or adapted for propulsion or haulage on a road by means of any power other than human or animal power and without the aid of rails, and includes any trailer, but does not include such vehicle also designed or adapted exclusively for towing another vehicle, and not used for the conveyance of goods'.¹⁴

Note that s1(1) of the Act defines a bus as 'a motor vehicle designed or adapted for the conveyance of more than 9 persons (including the driver)'. From this definition it is possible to describe the characteristics of a motor vehicle for the purposes of the Act: (a) the vehicle must be capable of movement; (b) this capability must be independent of guides such as rails. This raises the question as to whether an electric bus is a 'motor vehicle' because while it operates on a road and not on rails, its power source comes from overhead lines. Thus while it travels on a road it can only do so in a limited sense, viz. while it has rails above it as a source of power; (c) the power to propel the vehicle must come from fuel, because vehicles driven by animal or human power fall outside the definition. The type of fuel that is used by the vehicle is immaterial; (d) trailers are motor vehicles if they are towed by a vehicle which falls within the definition. A trailer which is propelled or pulled by human or animal power falls outside the scope of

the definition; (e) the vehicle must be used for conveyance. Thus a towtruck would fall outside the definition unless it was used to convey, and not to tow, other vehicles; (f) the number of wheels the vehicle has is of no relevance as long as it is not a motor bicycle.

(ii) The Vehicle's Source of Power

Would a vehicle with two sources of power, one human and the other mechanical, fall within the scope of the definition?

¹⁵
In R v Flettermán the issue was whether a pedal cycle was a motor vehicle for the purposes of the Transvaal Motor

¹⁶
Vehicles Ordinance. It consisted of a bicycle with a small petrol-driven motor attached to the handlebars. This motor could be engaged by the rider, but was only of use in propelling the machine on downward slopes, or on level ground in the absence of a headwind. De Wet J, in reaching the conclusion that the pedal cycle was not a motor vehicle, isolated what he considered to be the essential features with regard to the propulsion and source of power of the vehicle:

'It seems to me that this definition envisages a vehicle which has as an integral part of its equipment, an engine which provides motive power except on the occasions, rare in modern times when the engine breaks down through mechanical failure. It also envisages that the engine should be substantially its sole and only motive power. Unless these two conditions are fulfilled it would not be correct to say that the vehicle is "self propelled".'

While the definition in the Ordinance under consideration in Flettermán's case ¹⁷ differs from that in the Road Transportation Act, it is submitted that in a similar case the principles which De Wet J developed could be applied. In other words where a dispute arises in relation to a vehicle

with a mechanical source of power and a human or animal source, the questions to be asked are: (a) is the mechanical source of power an integral part of the machine? and (b) is it substantially the sole source of motive power?

(iii) Other Characteristics

In R v Kaperi¹⁸ the appellant was charged with contravening s77 of the Roads and Road Traffic Act of Southern Rhodesia.¹⁹ He owned a lorry which was not in a mechanical state to travel under its own power. In order to move it he had it towed while he steered it. The Act defined a motor vehicle as 'any vehicle propelled by mechanical or electrical power and intended or adapted for use or capable of being used on roads'.

In deciding whether the lorry was a motor vehicle for the purposes of the Act, Clayden FJ held that the fact that the lorry was, at the time, incapable of moving under its own power did not mean that it was not a motor vehicle. With regard to the word 'propelled' the court held that 'the word "propelled" refers to a quality of the vehicle, and not to actual motion. A vehicle does not become or cease to be a motor vehicle as it starts or stops'.²⁰

Clayden FJ went on to hold that the word 'intended' related to the original design of the vehicle. If it was the intention of the manufacturers or makers of the machine that it be used on roads, then it is a motor vehicle for the purposes of the Act. The word 'adapted' refers to a motor vehicle not originally made to be used on roads but later altered for this purpose.²¹ Finally the phrase 'or capable of being used on roads' was interpreted as follows:²²

'The meaning is not that any vehicle, to be a motor vehicle, must be capable of use in the sense of being "in going order". The phrase is an alternative to "intended" and "adapted". So that if a vehicle has mechanical means of propulsion it is a "motor vehicle" within the Act if it was made to be used on roads, or in any way able to be used on roads.'

The conclusion reached by the learned judge as to the characteristic of mobility of a vehicle was:

'And it seems to me that a vehicle does not cease to be a "motor vehicle" because its means of propulsion are defective, unless they be so defective that it has not in effect means of propulsion at all. Short of that stage the fact that the vehicle was not in working order does not alter its character as a motor vehicle.'

It is submitted that substantially the same meanings will be given to the words 'designed or adapted' in the Road Transportation Act as were given to the words 'intended' and 'adapted' in the Rhodesian legislation. Similarly the word 'propulsion' will bear the corresponding meaning that 'propelled' was given by Clayden FJ.

(d) For Reward

(i) General

Milton and Fuller say that the crucial aspect of road transportation is the notion of reward. A perusal of the case law bears out this observation because most contraventions of the Act involve conveyance for reward. The words 'for reward' have not been defined in the Act and many problems have arisen as to their meaning. It is submitted, however, that a definition can be gleaned from the numerous decisions of our courts dealing with both road transportation and motor vehicle insurance.

(ii) The Definition of Reward

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The case of Kitching v London Assurance Co. dealt with a claim for damages against the defendant (excipient) as a result of a motor accident. It was necessary to decide whether the plaintiff's wife (on whose behalf the proceedings were instituted) was conveyed for reward within the meaning of the Motor Vehicle Insurance Act.

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Herbstein AJP defined the word 'reward' as: 'a return or recompense made to or received by a person for some service or merit'. This definition has generally been accepted in other cases dealing with conveyance for reward. In S v Singh where Caney J separated the concepts of 'conveyance for reward' and 'conveyance in the course of any industry, trade or business', the following definition emerged:

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'It is unnecessary to decide the limits of the word reward, but I think clearly the word envisages material gain. It need not necessarily be a fare in the sense of a fare paid by a passenger;'

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In Kitching's case Watermeyer J said:

'...any sum of money, no matter how it is arrived at, which is given as a quid pro quo to the person who undertakes the conveyance of the passengers is a 'reward' within the meaning of the Act and this is so regardless of whether it results in profit to the conveyor or not.'

The meaning given by the learned judge should be read within the context of the case because it has been held that the reward does not have to comprise of money.

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While the definitions of reward mentioned above are clear, application to a particular set of facts may prove difficult. Obviously grey areas exist around the meaning of

the word. In this regard Bresler J, in S v Stassen and Another,³³ pointed out that where an equivocal word or ambiguous sentence leaves sufficient doubt as to its true meaning, the court should, especially when dealing with a penal statute, give the benefit of the doubt to the subject. The learned judge suggested that Parliament could have clarified its intention by adding words such as 'or in expectation of any gain or any advantage whatsoever, whether direct or indirect'.³⁴

(iii) The Test for Reward

For conveyance to be for reward, the quid pro quo must be for the conveyance and not for any incidental or ancillary service.³⁵ In R v Wilson³⁶ the appellant conveyed 20 empty drums and 35 pockets of acid cement for X. When the appellant was asked how much she would charge for the work, she replied that she would not charge anything except a 'handling fee' of 1 pound. This was for off-loading the goods at a certain destination. Golding AJ held that the test 'is whether the carriage or haulage of passengers or goods is for hire or reward'.³⁷

The conclusion reached by the court was that the charge was not made for the transport of the goods, but for the off-loading thereof.³⁸ In Kitching's case Watermeyer J also made the point that the reward must relate to the conveyance:

'It is not enough that the reward should be given for something other than conveyance as, for example, where the passenger hires the services of a driver or the use of a car, for the passenger is then not paying for being conveyed even though the payment may result in his being transported'.

(e) In the Course of any Industry, Trade or Business

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The case of R v Angamia set out a test for conveyance in the course of business, as well as outlining the approach to determining whether conveyance is in the course of industry or trade. The facts were that the appellant, the owner of a shop, had, after delivering goods to a nearby quarry, repeatedly given lifts to his shop to men working at the quarry. The purpose of the conveyance was to enhance the goodwill of the shop among potential customers. In this sense, the court found that it was clearly related to the business, because the appellant would not have done what he did if he had not owned the shop. Hiemstra J set out the

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test to be applied as follows:

'What is the overriding cause of the presence of the passengers on the vehicle? If it is the interest of the business, more than mere considerations of courtesy or generosity, the conveyance is in the course of business. Whether the presence of the passengers will be demonstrably lucrative to the owner of the vehicle is irrelevant.'

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In the light of Angamia's case it is possible to draw two distinctions between conveyance for reward and conveyance in the course of any industry, trade or business. The first distinction relates to the motive for the conveyance. In the case of conveyance for reward the motive of the conveyor is irrelevant. All that matters is that a reward is accepted. In the case of conveyance in the course of any industry, trade or business the motive for the conveyance must be linked to the industry, trade or business. In other words the conveyor must act in order to enhance the goodwill or profits of the industry, trade or business concerned. The second distinction turns on the channelling of any gain derived from the conveyance. Where conveyance is for reward,

the gain goes directly to the conveyor but where the conveyance is in the course of industry, trade or business the gain is channelled through that undertaking to the recipient.

(f) By Means of a Hired Bus or Motor Vehicle

The meanings of the terms 'bus' and 'motor vehicle' have been dealt with above. The meaning of the word 'hired', in the context of the Act, will be examined here.

It is submitted that, without the aid of a statutory definition, the meaning of the word 'hired' should be arrived at by a factual examination of a possessor's relationship to the vehicle: the word must be given its ordinary meaning of paying for or availing oneself of a thing or service which is let out.⁴² There is however, one qualification: the word 'owner' is defined in the Act in terms of 'the law governing the registration of motor vehicles in force in that area'. The Road Traffic Ordinances of the four provinces are identical in this regard, save for one addition to the definition in the Transvaal Ordinance.⁴³ An 'owner'⁴⁴ includes:

- '(a) a joint or part owner of that vehicle;
- (b) a person having possession of that vehicle by virtue of a hire-purchase or suspensive sale agreement, or by virtue of an agreement of hire providing for the hire of such vehicle for a period of not less than 12 months, but does not include the seller or lessor under any such agreement; or
- (c) a motor dealer who is in possession of a used vehicle for the purpose of sale.'

This definition will have to be borne in mind in determining whether a vehicle is hired or not, i.e. the meaning of 'hired' must be modified in accordance with meaning of owner

in the ordinances.

It should be noted that the person requiring a permit is the hirer of the vehicle and not the owner. Where a board had issued permits to Rent-A-Bakkie, which did not convey persons or goods, but merely made vehicles available for hire, it was held in South African Railways and Harbours v Chairman, Bophuthatswana Central Road Transportation Board and Another 45 that the board's action was a nullity. Hiemstra CJ held that the person conveying is the person who hires the vehicle, not the owner thereof. The hirer may have to apply for a permit if he wishes to convey persons or goods for 46 reward.

[C] AN OUTLINE OF THE OFFENCES

(1) Unauthorized Road Transportation

S31(1)(a) makes it an offence for any person to undertake road transportation 'except under the authority of a permit authorising such road transportation'. S31(1)(a) has been held to be applicable in the following cases: where conveyance was undertaken by means of a vehicle which had been used as a substitute, in contravention of s1(2)(f); 47 where it was alleged that conveyance was in contravention of a 48 regulation; where a worker transported his colleagues to work, for reward, without the authority of a permit; 49 where an accused gave a lift to two strangers who unloaded his vehicle for him as a recompense; 50 where a person operated a 'pirate-taxi'; 51 and where a company had conveyed goods in the course of its business without the authority of a permit. 52

S31(1)(b) complements s31(1)(a) by providing:

'Any person who being the holder of a permit, undertakes road transportation other than in accordance with the provisions of such permit, or, subject to the provisions of section 12A, contravenes or fails to comply with any condition or requirement of a permit or any provision of section 24 shall be guilty of an offence.'

A change under s31(1)(b) was appropriate where: a company transported goods which did not fall within a list of goods specified in a permit;⁵³ an accused overloaded his vehicle by conveying more passengers than a condition attached to his permit allowed;⁵⁴ and a company attempted to convey an abnormal load beyond a distance limit set by a board as a condition.⁵⁵

The distinction between the subsections was discussed in S v Everson:⁵⁶ s31(1)(a) will apply when a person undertakes road transportation either without a permit or in contravention of the provisions of the Act itself; s31(1)(b) applies when a permit holder infringes conditions or requirements which a board or the Commission has imposed.

(2) Refusal to Convey Persons or Goods

S31(1)(c)(i) imposes a duty on a permit holder to convey any person who, or any goods which, he is authorized to convey. He may only refuse to do so if he has sufficient reason. The onus of proving that a refusal was justified rests upon the accused. It is submitted that the reason for the creation of this offence is to be found in the policy underpinning the legislation: transportation is regulated, inter alia, to allow for the coordination of services in the public interest; the right to convey must, therefore, be accompanied by an obligation to provide services without favour; to allow the carrier to pick and choose would make it difficult,

if not impossible, for a board or the Commission to assess transportation needs accurately and consequently to co-ordinate services properly.

It is submitted that the meaning of the term 'without sufficient reason' will depend on the circumstances of each case. An operator would clearly be justified in refusing to convey persons or goods, if, to do so would constitute an offence under a statute or the common law. Would a taxi driver avoid liability, however, if he refused to convey a person whom he knew to be a prostitute and whom he was sure was going to visit a client? It is submitted that in order to deal adequately with a question like this, an objective approach to the meaning of the term 'without sufficient reason' must be adopted. This would enable such issues as public policy to play a part in determining the sufficiency of the reasons for refusal. ⁵⁷ On this basis it is suggested that the answer to the above question would be in the affirmative: objectively speaking a taxi driver would be justified in refusing to convey someone whom he knew to be involved in an immoral activity. A subjective test would tend to militate against the smooth functioning of transportation. Such an approach would, for instance, have to take cognisance of any number of personal attitudes and, perhaps, prejudices of the permit holder. By using an objective test sufficient reason for refusal would not exist where a taxi driver refused for moral, religious or political grounds to convey a soldier in uniform. If a subjective approach was used these factors would have to be taken into account and would result in the acquittal of the driver. The overall effect, on the transportation system which the Act

seeks to establish, would be disastrous.

(3) **Unauthorized Tariff Increases**

A board or the Commission has the power to attach require-⁵⁸ments or conditions to a permit, relating to tariffs. S12A allows for a limited increase in tariffs after an increase in the price of petroleum fuel but prior to an application to have a permit amended to reflect the increase. Subject to the provisions of s12A, a permit holder may not charge a tariff which is not in accordance with that set down as a condition of the permit or which a permit holder may be required to publish. S31(1)(c)(ii) makes it an offence to contravene the above provisions relating to tariffs.

(4) **The Type of Remuneration**

It is an offence, in terms of s31(1)(c), for a permit holder to accept remuneration for conveyance in any form other than money. Conveyance on a set-off basis (except where authorized in s1(2)) or for payment in kind is therefore unlawful.

(5) **Other Offences**

S31(1)(d) makes it an offence for a permit holder to convey goods if to do so contravenes any prohibition contained in a notice in the Government Gazette published under s2(f), s2(g) or s2(gA). S2 grants the Minister of Transport Affairs various powers. For the purpose of s31 these include: first, the power to declare any public road between any two places or areas, or between any place and area, to be a transportation route. The effect of the declaration is to prohibit the conveyance of goods on any other route except
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the transportation route; secondly, the power to prohibit the conveyance of any goods or a specified kind or category

of goods on any day or between specified hours of any day,
within an area or over a route;⁶⁰ thirdly, the power
to 'prohibit the conveyance of goods which are loaded
on a goods vehicle in a specified manner from a specified
date'.⁶¹ The above prohibitions override the provisions of
a permit.

S31(1)(e) affects both permit holders and carriers operating
under a s1(2) exemption. It creates an offence for contra-
vening 'any prohibition contained in a proclamation
contemplated in s43(1)(d) or (e)'. In terms of s43, the
State President has the power to prohibit the holder of a
permit or a person conveying goods in terms of s1(2) from
conveying 'to or from a specified place or area or between
specified places or areas as specified in the proclamation,'
as long as the conveyance crosses the borders of South
Africa. Such a proclamation has the effect of overriding
anything to the contrary contained in a permit.

In terms of s31(1)(f) it is an offence for a permit holder to
make a permit available to any other person for transporta-
tion which has not been authorized by the Act.

(6) Justifications for Contraventions

S31(2) contains two provisos. The first deals with conduct
which would have constituted a breach of s31(1)(b) in the
absence of s31(1)(d). In other words, where a condition or
requirement which is attached to a permit, conflicts with a
prohibition promulgated by the Minister dealing with
transportation routes, the conveyance of certain goods or the
loading of a goods vehicle, or a proclamation issued by the
State President in terms of s43(1)(d) or (e), a breach of

s31(1)(b) will not constitute an offence. In this situation the permit holder is required to ignore the provisions of the permit: compliance with s31(1)(d) or (e) takes preference.

The second qualification to s31(1) deals with the refusal of a permit holder to convey persons or goods which the permit authorizes him to convey. The permit holder's refusal (apart from him having a sufficient reason) is sanctioned by s31(2)(b) if 'at the time of such refusal, he has discontinued the road transportation authorized by his permit or any part of such road transportation after having given such notice as may be prescribed by regulation, and where part only of such road transportation has been so discontinued, the refusal related to the part so discontinued'.

[D] MENS REA

(1) Mens Rea and Statutory Offences

Mens rea, usually in the form of dolus, is an element of all common law crimes. This is not necessarily the case in statutory offences. Mens rea may be excluded as an element, thus creating strict liability, or it may be expressly or impliedly included in the penal provisions of a statute.⁶²

There is a reluctance on the part of the courts to decide, in the absence of express indications, that strict liability was intended by the legislature.⁶³

This proposition was stated by Botha JA, in S v Arenstein:⁶⁴

'The general rule is that actus non facit reum nisi mens sit rea, and that in construing statutory prohibitions or injunctions, the legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable.'

The majority of statutory penal provisions give no express indications as to whether mens rea is an element of the offences which they create. To arrive at the intention of the legislature the courts take certain factors into account: the language and context of the prohibition, the object and scope of the statute, the nature and extent of the penalty which is imposed and the ease with which the prohibition could be avoided if mens rea is held to be an element.⁶⁵ The usual form of mens rea required, if a statute is construed in such a way as to include it, is dolus.⁶⁶ At the same time it should be noted that a proper construction of a particular statute may point to culpa as the necessary form of mens rea.

(2) Mens Rea and the Specific Offences

The two most important specific offences are those contained in s31(1)(a) and s31(1)(b): undertaking road transportation without a permit or in contravention of the Act, and undertaking road transportation contrary to the provisions of any conditions or requirements attached to a permit. These offences will be concentrated on because of their importance.

S31(1)(a) gives no indication as to whether mens rea is an element of the offence which it creates. One case, R v Leyland,⁶⁷ has held that strict liability was intended by the legislature, but it must be seen as wrongly decided: later cases have uniformly held that mens rea, in the form of dolus, is an element of the offence.⁶⁸ Botha AJ examined the issue fully in S v Mathebula.⁶⁹ He held that:

(a) nothing in the language or context of the section pointed to strict liability; (b) the object of the Act was, inter alia, to regulate transportation and so the object did not suggest the exclusion of mens rea; (c) the penalties for

contraventions of the section were relatively severe, indicating that the legislature did not intend innocent conduct to be punished; and (d) a reliance on a lack of mens rea could not be easily used to avoid liability because if the permit holder had no knowledge of the contravention, the driver could nonetheless be convicted. The learned acting judge concluded that no special reasons existed for holding that mens rea did not form an element of the offence.

Whether mens rea forms part of the offence created by s31(1)(b) is less clear. In R v Dickinson⁷⁰ a condition relating to an operator's time-table was contravened by a driver. The permit holder had no knowledge of the infringement and the driver had acted against specific instructions.⁷¹ Greenberg JP confirmed the appellant's conviction:

'The actual terms of the legislation may show that a person may be guilty no matter how free from any evil intention he may have been. One class of case where this will apply is where a privilege is granted to a person and it is provided that he must exercise such privilege in a certain way.'

He held further that it was no excuse for a permit holder to say that he acted to the best of his ability in ensuring that the condition was not breached. By placing the fulfillment or non-fulfillment of the condition into someone else's hands, the permit holder must bear the responsibility if that person does not adhere to his instructions.

The facts in S v Glover and Another⁷² were virtually on all fours with those in Dickinson's case.⁷³ James JP held that the first appellant, the permit holder, was liable for the act of her servant. His reasons for this conclusion were that he was not convinced that Dickinson⁷⁴ and Combrinck⁷⁵

were wrongly decided, that they had remained unchallenged for 38 years and that it was in the interests of judicial continuity to follow the ratio decidendi in those cases. He did suggest, however, that the time had come for the Appellate Division to give the question its attention.

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S v Reids Transport (Pty) Ltd and Another dealt with an alleged offence committed by the permit holder personally. The appellants argued that they did not know that the conveyance in question was unlawful. In setting aside the conviction Eksteen J held:

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'In the light of these circumstances it seems to me that the evidence shows that the appellants acted in the bona fide belief that they were entitled to do what they did, and that they were fortified in this belief by the legal advice they had obtained. It follows that the State has failed to prove that they acted with the requisite mens rea and that the conviction therefore cannot stand.'

This dictum indicates that the learned judge considered mens rea, in the form of dolus, to be necessary to support a conviction. The only qualification of the mistake made by the appellants was that it was bona fide (i.e. honest). No mention was made of the reasonableness of the mistake, which would indicate the objective enquiry characteristic of mens rea in the form of culpa. Furthermore, if no mens rea was required at all, the mistake, whether bona fide or reasonable, would have been immaterial to liability.

Although no cases have been decided on the remaining offences of s31, it is submitted that mens rea is essential for conviction. Nothing in the language or objects of these provisions points to a construction in which mens rea plays no part.

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[111]

GENERAL OFFENCES

[A] INTRODUCTION

S33 of the Act contains a number of offences which may be seen as general offences for two reasons: first, the type of offences described in the section may be found in a great number of statutes dealing with a wide variety of subjects and, secondly, the scope and intention of the offences is different to those created by ss31 and 32. The latter offences deal with the direct objects of the legislation, namely the regulation and control of road transportation, while the s33 offences are designed to aid those entrusted with the administration of the Act and to protect the public at large from abuses by persons who do not hold positions of authority.

[B] THE OFFENCES

S33(a) makes it an offence for a person to make any writing which falsely purports to be a permit or other document issued under the Act or to alter, deface, mutilate or add to such a document. In creating this offence, the legislature has expressly provided for mens rea in the form of dolus by requiring intent to deceive on the part of the culprit.⁷⁹

The second offence created by s33 deals with uttering.

Uttering is, in broad terms, the passing off of a false or forged document as genuine.⁸⁰ S33(b) provides that a person shall have committed an offence if he knows that certain writing is not a permit or other document issued under the Act but nonetheless utters such writing, permit or other document or uses it for the purposes of the Act. The offence

also embraces the uttering or using of documents which the accused knows are instruments issued under the Act which have been altered, defaced, mutilated or added to. It should be noted that knowledge on the part of the accused is an essential element of s33(b).⁸¹

The Act prescribes the manner in which permits or distinguishing marks may be transferred. To effect a transfer the written consent of a competent board or the Commission is required.⁸² To deter persons from transferring permits or distinguishing marks in any other way, s33(c) makes any unauthorized transfer an offence.

To aid in the policing of the Act, s11 allows the Director General: Transport Affairs to appoint any officer or employee of the Department of Transport Affairs to the position of road transport inspector.⁸³ It is an offence, in terms of s33(d), to pretend to be an inspector, whether by words, conduct or demeanour.⁸⁴ Furthermore, it is an offence to wilfully obstruct, hinder or interfere with an inspector in the exercise of his powers or the performance of his duties.⁸⁵ It is submitted that, by virtue of the use of the words 'pretend' in s33(d) and 'wilfully' in s33(e), the legislature did not intend liability without fault: first, Burchell and Hunt say that the word 'wilfully' has generally been held to import mens rea in the form of intention. The learned authors concede that the word has also been interpreted as 'voluntarily' which carries no connotation of mens rea but the weight of the authority is against this construction;⁸⁶ secondly, the word 'pretend' carries an implication of a conscious effort to deceive. Indeed, the most helpful meaning of 'to pretend' speaks of professing to

have a particular quality or to hold oneself out to be something which one is not. ⁸⁷ In addition the very nature of the offence created by s33(d) militates against the possibility of a blameless infringement.

S9(1) grants a board or the Commission power, inter alia, to call any person to appear before it as a witness for the purpose of giving evidence, or to produce any book, plan or other document or article in his possession or under his control. Failure or refusal to appear before a board or the Commission without sufficient reason is an offence.

Similarly, a person will commit an offence if he appears, but fails or refuses to answer to the best of his knowledge any questions lawfully put to him, or to produce any book, plan or other document or article which he is required to produce. ⁸⁸ In providing that failure to comply with s9(1)(b) and (c) is punishable, the Act has qualified this by stating specifically that liability will only result if the failure or refusal is without sufficient reason. The onus of proving a sufficient reason is cast upon the accused. While no cases have been decided as to what constitutes a sufficient reason, it is submitted that if a witness can claim a privilege, his refusal to give evidence will be sanctioned. Secondly, on wider grounds, where no privilege exists, assistance may be derived from cases involving s189(1) of the Criminal

⁸⁹ Procedure Act. This section provides that a witness who refuses to be sworn, answer questions or produce documents may so refuse if he has a 'just excuse'. The cases are in conflict as to whether a just excuse simply means a legal excuse (that the witness is not compellable) or that it is humanly intollerable for the witness to give evidence. While

the decisions appear to favour the former view, Hoffman and Zeffertt commend the latter view, mainly because it is more humane.⁹⁰

It should be remembered that s189(1) of the Criminal Procedure Act applies to criminal proceedings and so, in hearings before tribunals such as boards or the Commission, the narrow view expressed above may not be appropriate.

S33(g) is closely related to s33(f). It creates an offence for knowingly making any false statement, whether orally or in writing, in connection with any application, appeal,⁹¹ enquiry or investigation under the Act.

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The Road Transportation Amendment Act has created two further general offences by the addition of ss33(h) and 33(i). The former creates the offence of preparing a document which incorrectly describes goods which are to be conveyed. The mental element of the offence comprises of an intention to deceive and knowledge that the description is incorrect. S33(i) relates to public or private permits. It is an offence in terms of this sub-section to obtain a permit of this type knowing that one has already been issued to another person in respect of the vehicle concerned.

[IIII] OFFENCES COMMITTED BY PASSENGERS

[A] INTRODUCTION

In addition to drivers, owners or permit holders, passengers can also commit offences in terms of the Act. Part of the object of the statute is to ensure the smooth functioning of a co-ordinated transport system. To achieve this end tariffs are regulated, routes are prescribed, time-tables are laid

down and, in keeping with the policy of segregation, certain vehicles are reserved for certain classes (race groups). The two offences, embodied in s32, which may be committed by passengers should be seen as measures which form part of the internal regulatory machinery of the Act. The main object of the section is to place some of the responsibility on the passenger in ensuring that the provisions of the Act itself or a particular permit are adhered to. It is designed, furthermore, to cover a possible loophole where a passenger ignores the orders of a conductor or driver to leave the vehicle. The permit holder or his servant may escape conviction, in the absence of s32, for a breach of the Act simply because he was unable to eject the passenger. The section aims at avoiding these types of violations by placing the responsibility for upholding the provisions of the Act on the passenger in certain circumstances.

[B] THE OFFENCES

S32(1) makes it an offence for a person to enter a vehicle in which that person may not be conveyed by virtue of the terms of a permit or any other law. The offence is committed either when the accused enters the vehicle despite objection by the conductor or person in charge or, having entered, refuses or fails to leave it on being requested to do so by the conductor or person in charge. When this stage has been reached, the accused has committed an offence and may be forcibly removed by a police officer.

S32(2) creates the offence of entering a portion of a vehicle set aside for members of a class to which the accused does not belong. To commit the offence the accused must enter the

portion of the vehicle despite objection by the conductor or the person in charge. S32(2) does not apply if the accused entered the portion in order to gain access to the portion set aside for members of his class, or for the purposes of alighting from the vehicle. The second manner of committing this offence is by refusing to leave the portion when asked to do so by the conductor or person in charge.

[IV] OFFENCES CONTAINED IN THE REGULATIONS

[A] INTRODUCTION

A number of offences are contained in the regulations. The purpose of the offences is to compel persons to observe the regulations and to ensure the smooth functioning of certain aspects of the Act. They are thus comparable to the general offences created by the Act itself. They differ from the offences contained in the statute in that they are subordinate legislation. Therefore the rules of interpretation which apply to this category of law-making will be applicable. Furthermore, the scope for defending a charge framed in terms of an offence contained in the regulations is wider, because the validity of the enactment itself can be challenged.

[B] THE OFFENCES

Offences are created by four regulations which will be dealt with in turn.

(1) Regulation 27(a)

Reg 27(a) makes a contravention of, or a failure to comply with, regs 13, 17, 23, 24 and 25 an offence. Thus, the following would carry criminal sanction: (a) failure to maintain a distinguishing mark in a legible state

or to apply for a duplicate if the distinguishing mark is damaged, lost or not clearly legible and failure to affix the distinguishing mark to the vehicle in the proper way; ⁹⁴ (b) failure, by the holder of a public permit, to notify a board or the Commission of a change of address within 10 days of the change. The notification must be in writing and be delivered either by hand or by registered post; ⁹⁵ (c) failure by a permit holder, to submit returns to a board or the Commission if required to do so. Returns must be submitted within 10 days of the end of each calendar month on the prescribed form. They must contain the following information: in the case of passenger conveyance, the number of passengers conveyed during the previous month and the distance covered in the process within each area and/or on every route specified in the permit. Urban and rural areas are to be shown separately. In the case of the conveyance of goods, the total mass of the goods in kilograms, as well as the information relating to distances and routes mentioned above must be given. It is not possible to give the exact mass of the goods conveyed, an estimate will suffice. If the permit holder did not convey persons or goods during a month this fact must be communicated to the board or the ⁹⁶ Commission; (d) failure to keep records or deal with records in accordance with the regulation. Reg 24 requires that permit holders keep accurate records on every vehicle in respect of every trip made by it. The record must show the same information which the returns contain. They must be completed by the driver or conductor in the case of passenger conveyance at the end of each forward and return journey. When goods are conveyed the holder or his employee

must complete the records upon receipt of the goods. The records must be kept on the vehicle by the driver or conductor and be made available for inspection upon request by an authorized officer. Records must be kept by the permit holder for 12 months; ⁹⁷ (e) failure to paint the particulars required by s24(1)(c) onto both sides of the vehicle in a clear way and in letters and figures which conform to the dimensions specified by regulation s(2). ⁹⁸

(2) Regulation 27(b)

Reg 27(b) makes contraventions of, or failures to comply with regs 2, 3(3), 3(4), 7(3), 7(5) and 10(3) punishable. The following are therefore offences: (a) failure by persons whose operations are exempted by ⁹⁹ ss1(2)(j), ¹⁰⁰ 1(2)(v), ¹⁰¹ 1(2)(w), ¹⁰² 1(2)(x) and ¹⁰³ 1(2)(y) to paint onto their vehicles (in a colour which shows up clearly against the background) identifying particulars which comply with the specifications set out in reg 2(2). ¹⁰⁴ In the case of decentralized industries a failure to supply the Commission with the following information will be punishable in terms of reg 27(b): the full business and postal address of the industry; the full registered name or style of the industry; a description of the decentralized industrial area in which the industry is situated; and a copy or photocopy of the registration certificate of the vehicle to be used. ¹⁰⁵ Furthermore any change in the above information must be communicated to the Commission within seven days and, if a vehicle is replaced, a copy or photocopy of its registration certificate must be sent to the Commission prior to the vehicle commencing service; ¹⁰⁶ (b) failure to return to a board or the Commission a replaced public permit after

its amendment and the issue of a new permit. The return of the replaced permit must be made within 10 days of the issue of the new permit and must be delivered either by hand or by registered mail; ¹⁰⁷ (c) the same considerations apply when a public permit has been transferred. A new permit will be issued and the old one must be returned; ¹⁰⁸ (d) the same offence is created in relation to private permits when these are amended; ¹⁰⁹ (e) failure to return a private permit to a competent board or the Commission within 10 days in the following circumstances: when the private permit has lapsed in terms of s29(2)(a) (i.e. when the holder ceases to carry on the industry, trade or business in respect of which the permit was issued) and if the authority conferred by the permit has lapsed in terms of s29(2)(b) (i.e. if two or more places are specified in the permit and the holder ceases to carry on the industry, trade or business at any, but not all of those places, the authority conferred by the permit in respect of those places lapses); ¹¹⁰ (f) failure to lodge forthwith, a permit with a board or the Commission following a successful application for the suspension of the operation of an act, direction or decision of a board in terms of s8(3)(b). The permit must be delivered by hand or by registered post. ¹¹¹

(3) Regulation 27(c)

Reg 27(c) makes a contravention of, or failure to comply with, regs 26(2)(b), (c), (d), (e), (f), (g), (h) and (i) criminal offences. The offences contained in these provisions are aimed at assisting authorized officers in the policing of the Act. The offences are: (failure, by a driver, to supply an authorized officer with his (the

driver's) name and address (and documentary evidence in support thereof), the name and address of the owner of the vehicle and particulars regarding the business for which the vehicle is being used;¹¹² (b) failure, by a driver or person in charge of a vehicle, to produce documents or other records on request;¹¹³ (c) failure, by any person on a motor vehicle believed to be used for road transportation or any person who is believed to have recently been on such a vehicle to furnish the following information: the person's full name and address (supported by documentary evidence); whether he paid for the conveyance or has to pay for it; and the name and address of the person to whom payment has to be made;¹¹⁴ (d) failure, by a driver or any person on a motor vehicle, to provide the name and address of the consignor and consignee of goods being conveyed or about to be conveyed on the vehicle. The names of the places between which the conveyance is to take place must also be furnished;¹¹⁵ (e) failure, by a driver or conductor, to produce records, required by reg 24, for inspection;¹¹⁶ (f) failure by a person, when an inspector lawfully enters premises in connection with an investigation, to answer questions, furnish information, hand over books or documents, explain entries in the books or documents or allow the inspector to make extracts or copies of them;¹¹⁷ (g) failure by a driver or person in charge of a vehicle used for road transportation to produce any documents which have been issued by a board or the Commission or a local authority in respect of that vehicle and which are required by law to be kept on the vehicle;¹¹⁸ (h) failure by a driver or person in charge of a vehicle used for road transportation to hand over the permit and distinguishing mark because the vehicle is so defective

that it is a possible danger to persons or property. The use of the vehicle must cease until the defects have been remedied and so continuation of such use will also constitute an offence.

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(4) Regulation 27(d)

Reg 27(d) creates the offence of damaging, removing or failing to stop at a sign (described in reg 26(2)(a)) which an inspector may use to stop vehicles for the purpose of determining whether road transportation is being undertaken in them.

FOOTNOTES

1. 1977 AS 410.
2. S9(1).
3. W E Cooper and B R Bamford, South African Motor Law, 705.
4. S v Leshaba, S v Mahlangu, S v Mamele 1968(4) SA 576(T); Bonadei Construction (Pty) Ltd en Andere 1968(1) SA 550 (SWA), 553H - 554A.
5. Concise Oxford Dictionary.
6. S1(1).
7. J R L Milton, assisted by N M Fuller South African Criminal Law and Procedure Vol III 'Statutory Offences', 615 - 6; see too S v Theunsus Transport (Pty) Ltd 1981(2) SA 469(E).
8. 1971(2) SA 525(E).
9. 1952(3) SA 624(C).
10. At 628.
11. Julies' case supra, 528F.
12. 1982(4) SA 253(D); see too S v Dillon 1983(4) SA 877(N).
13. Milton and Fuller op cit 616.
14. S1(1).
15. 1953(4) SA 163(T).
16. No 17 of 1931. The Ordinance defined a motor vehicle as 'a vehicle self propelled by mechanical or electrical power.'
17. Supra.
18. 1960(2) SA 163(FC).
19. No 50 of 1953.
20. At 163H.
21. At 164B.
22. At 164E - F.
23. At 164F - G.
24. J R L Milton and N M Fuller South African Criminal Law and Procedure Vol III 'Statutory Offences', 613; see too W E Cooper and B R Bamford. South African Motor Law, 680.

25. 1959(3) SA 247(C).
26. No 29 of 1942.
27. At 249D.
28. R v Mainline Distributors (Pty) Ltd 1957(4) SA 123(N), 124 H; R v Ntsime 1960(3) SA 701(T), 702H; S v Harris 1971(2) SA 116(R), 118C.
29. 1962(3) SA 799(N).
30. At 801F.
31. 1959(3) SA 247(C), 251G - H.
32. R v Ntsime 1960(3) SA 701(T); S v Mpata 1962(2) SA 136(C).
33. 1965(4) SA 131(T), 134C.
34. At 134E.
35. R v Mainline Distributors (Pty) Ltd 1957(4) SA 123(N); S v Harris 1971(2) SA 116(R).
36. 1962(3) SA 363(SR).
37. At 364D.
38. 1959(3) SA 247(C), 252B - C.
39. 1958(3) SA 433(T).
40. At 436C - D.
41. Supra.
42. Claassen Dictionary of Legal Words and Phrases Vol 1; see too De Jager v Sisana 1930 AD 71, 81.
43. W E Cooper Motor Law Vol 1, 50; s1(c) of the Transvaal Road Traffic Ordinance 21 of 1966 does not appear in the ordinances of the other provinces.
44. Transvaal Road Traffic Ordinance 21 of 1966, s1.
45. 1982(3) SA 629(B).
46. See too S v Chetty 1975(3) SA 98(N).
47. S v Everson 1980(2) SA 913(NC).
48. S v Grindrod Transport (Pty) Ltd and Others 1980(3) SA 978(N); the prosecution did not succeed because the regulation was held to be ultra vires.
49. S v Khotle 1981(3) SA 937(C).
50. S v Nene 1982(2) SA 143(N); the accused escaped conviction as a result of the application of the maxim de minimis non curat lex.
51. Sigodolo v Attorney-General and Another 1985(2) SA 172(E); the applicant had been convicted under s31(1)(a) but the conviction, sentence and forfeiture of his vehicle were set aside on review because of irregularities at the pre-trial stage of the proceedings.
52. S v Premier Wire (Pty) Ltd 1985(2) SA 252(E); the issue in this case was whether compulsory forfeiture of the vehicle used for the conveyance was in accordance with the provisions of s36 of the Act.
53. S v Reids Transport (Pty) Ltd and Another 1982(4) SA 197(E); S v Alex Carriers (Pty) Ltd en 'n Ander 1985(3) SA 79(T).
54. S v Makhatini 1984(2) SA 685(N).
55. S v Heidi Vervoer (Edms) Bpk en 'n Ander 1985(3) SA 543(NC).
56. 1980(2) SA 913(NC), 918D - 919A.
57. See the analogous case of S v Engeldoe's Taxi Service (Pty) Ltd and Another 1966(1) SA 329(A).
58. See Ch 10 below on conditions.
59. S2(f).
60. S2(g)
61. S2(gA).
62. E M Burchell and P M A Hunt South African Criminal Law

- and Procedure Vol 1 'General Principles of Criminal Law' (2 ed by E M Burchell, J R L Milton and J M Burchell), 215 - 6.
63. Burchell and Hunt op cit 216.
 64. 1964(1) SA 361(A), 365C.
 65. S v Arenstein supra 365D.
 66. Burchell and Hunt op cit 220 - 1.
 67. (1933) 50 SALJ 230: the bland report of the case gives no reasons for the conclusion but merely states that the prohibition 'is absolute, and absence of mens rea is no defence'. (at 230 - 1).
 68. See for example S v Bonadei Construction (Pty) Ltd en Andere 1968(1) SA 550(SWA), 553F; S v Everson 1980(2) SA 913(NC), 921B; contrast S v Khotle 1981(3) SA 937(C) in which culpa was required.
 69. 1972(1) SA 495(T).
 70. 1939 TPD 211; see too R v Combrinck 1939 TPD 213.
 71. At 212.
 72. 1978(2) SA 41(N).
 73. Supra.
 74. Supra.
 75. Supra.
 76. 1982(4) SA 197(E).
 77. At 199C; but see by contrast the case of S v Khotle 1981(3) SA 937(C) in which S v De Blom 1977(3) SA 513(A) was also applied. It is submitted that the preferable view is that the accused's ignorance should be tested subjectively and not objectively. The enquiry in Khotle's case should have been as to whether his ignorance was bona fide, and not whether it was reasonable. A further ground for attacking the decision is that to expect any motorist to be familiar with all the laws relating to motor vehicles is, in view of the policy expressed in De Blom, unrealistic and smacks of the ignorantia juris rule.
 78. See for example S v Engeldoe's Taxi Service (Pty) Ltd 1966(1) SA 329(A) in which the offence was similar to that in s31(1)(c)(i) of the present Act. The court (per Van Blerk JA) held that an absence of mens rea would result in the acquittal of the accused (at 332E).
 79. For a general discussion of similar offences see 6 LAWSA para 401 - 2.
 80. J Burke Osborn's Concise Legal Dictionary (6 ed)
 81. For a general discussion on similar offences see 6 LAWSA, para 406.
 82. S12(3); see too Ch 7, above, at 160.
 83. For the powers, duties and functions of inspectors see reg 26.
 84. For a discussion of this type of offence see 6 LAWSA, para 408.
 85. S33(e); see too 6 LAWSA, para 411.
 86. E M Burchell and P M A Hunt South African Criminal Law and Procedure Vol I 'General Principles of Criminal Law' (2 ed by E M Burchell, J R L Milton and J M Burchell), 218.
 87. Concise Oxford Dictionary.
 88. S33(f).
 89. No 51 of 1977.
 90. L H Hoffmann and D T Zeffertt South African Law of Evidence (3 ed), 283 - 4.

91. For a general discussion of this type of offence see 6 LAWSA, para 426.
92. No 8 of 1983.
93. For analagous examples see Ch 10 above.
94. Reg 13.
95. Reg 17.
96. Reg 23.
97. Reg 24.
98. Reg 25.
99. The conveyance by a hotel of its guests.
100. The conveyance of its own goods by a decentralized industry.
101. The conveyance of goods within an exemted area.
102. The conveyance of goods for reward within a 40 kilometre radius of the carrier's place of business.
103. The conveyance of a carriers own goods within an 80 kilometre radius of his place of business.
104. Reg 2(1).
105. Reg 2(3).
106. Reg 2(4).
107. Reg 3(3).
108. Reg 3(4).
109. Reg 7(3).
110. Reg 7(5).
111. Reg 10(3).
112. Reg 26(2)(b).
113. Reg 26(2)(c).
114. Reg 26(2)(d).
115. Reg 26(2)(e).
116. Reg 26(2)(f).
117. Reg 26(2)(g).
118. Reg 26(2)(h).
119. Reg 26(2)(i).

CHAPTER 15

PRESUMPTIONS AND PROOF

INTRODUCTION

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- (2) The Provisions of Section 34
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[III] PRESUMPTIONS WHICH CREATE A DUTY TO ADDUCE EVIDENCE

[A] GENERAL

[B] THE EVIDENTIAL PRESUMPTIONS

- (1) Permits
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(3) The Operation of the Presumptions

INTRODUCTION

Presumptions are generally classified under three heads: irrebuttable presumptions of law, presumptions of fact and rebuttable presumptions of law. Ss34 and 38 of the Road Transportation Act contain a number of rebuttable presumptions of law. Such a presumption may be defined as a rule 'compelling the provisional assumption of a fact'. The effect of a presumption on the burden of proof depends, when it appears in a statute, on the formulation employed by the draftsman. When a statute says that something is presumed to have happened until the contrary is proved, the onus in respect of that fact is cast upon the person against whom the presumption operates. If, on the other hand, the statute says that a fact constitutes prima facie proof of another fact, an evidentiary burden only is cast upon the person affected to meet a prima facie case.

The presumptions contained in s34, s38(1) and ss38(2) and (3) will be discussed separately below on a functional basis: s34 presumes connivance, permission or tacit authorization on the part of a permit holder, s38(1) contains five rebuttable presumptions of involvement in offences aimed at various groups and ss38(2) and (3) deal with evidential presumptions relating to offences concerning permits and other documents.

[I] THE PRESUMPTIONS WHICH SHIFT THE ONUS

[A] THE PRESUMPTION OF CONNIVANCE, PERMISSION AND TACIT AUTHORIZATION

(1) General

In the law of delict strict liability can be imposed on a master for the wrongs of a servant. McKerron says that this doctrine cannot be justified on logical grounds but should rather be seen as being based on considerations of social policy. At common law no such principle exists in our criminal law. Liability is based on fault and the only deviations from this general rule are those brought about by statute. Where legislation expressly provides for this form of liability, the limits of liability and the onus of proof are matters which depend on a construction of the relevant provision. In the criminal law the justification for the imposition of liability on a person other than the actor is different from that in delict. Middleton and Stoker say:

'Justification for the imposition of vicarious liability by the legislature is generally sought in the difficulties which would otherwise confront the state in attaching liability to a principal or master for the acts or omissions of his servant or agent in the conduct of certain trades or businesses.'

(2) **The Provisions of Section 34**

S34 of the Act imposes liability on a permit holder for acts or omissions of a manager, agent or employee. To avoid conviction the permit holder must avail himself of two of three defences which the section provides. S34(1) reads:

'Whenever any manager, agent or employee of the holder of a permit does or omits to do any act which it would be an offence under this Act for such holder to do or omit to do, then, unless such holder proves that -

- (a) he did not connive at or permit such act or omission; and
- (b) he took all reasonable measures to prevent an act or omission of the nature in question; or
- (c) an act or omission, whether legal or illegal, of the character of the act or omission charged did not under any conditions or in any circumstances fall within the scope of the authority or the course of the employment of such manager, agent or employee,

such holder shall be deemed himself to have done or omitted to do that act and be liable to be convicted and sentenced in respect thereof, and for the purpose of paragraph (b) the fact that he forbade an act or omission of the nature in question shall not by itself be regarded as sufficient proof that he took all reasonable measures to prevent such act or omission.'

In addition to liability being imposed on the permit-holder, the manager, agent or employee can also be convicted.

S34(1) therefore creates rebuttable presumptions of connivance, permission and tacit authorization.

S34 is made to apply to all offences created by the Act. At the same time it should be noted that the section seeks to impose liability on the holder of a permit. Thus, it is submitted, the existence of a valid permit is an essential for the operation of s34. Whether the section applies to the offence created by s31(1)(a) will depend on the circumstances. This section makes road transportation undertaken by any person punishable, 'except under the authority of a permit authorizing such road transportation'. Where a permit exists and s31(1)(a) has been infringed s34 can come into operation, but where the transportation is undertaken in the total absence of a permit the general principles of criminal law will apply to determine the

liability of an employer. The remaining offences in s31 all presuppose the existence of a permit so s34 clearly applies.

(3) The Means of Rebutting the Presumption

S34 does two things: first, it creates liability for a permit holder for acts or omissions of a manager, agent or employee; secondly, it provides the accused with the benefit of two alternative means of rebutting the presumption. S193 of the Liquor Act ¹⁰ contains a provision which is essentially similar to s34(1). Cases dealing with s193 will be used to explain the means of rebutting the presumption because there are no decided cases on this aspect of road transportation. At the same time it should be noted that s193 is more severe: it encompasses a wider range of persons for whose acts or omissions the licensee will be liable ¹¹ and the grounds of rebuttal are more difficult to establish because all three must be proved. In terms of the Road Transportation Act, a permit holder is required to prove two grounds: either a lack of connivance or permission and the taking of reasonable steps, or a lack of connivance or permission and that the act or omission fell outside the scope of authority or course of employment of the manager, agent or employee.

The following discussion will aim at providing meanings for the key elements of the grounds available to a permit holder to enable him to rebut the presumption.

(a) 'Connivance or Permission'

The first requirement of s34(1) which a permit holder must prove in order to escape liability is that he did not connive with the manager, agent or employee in respect of the unlawful act or omission and that he did not permit it.

It is submitted that the meaning which should be attached to the word 'connivance' is 'tacit permission' or 'passive acquiescence' on the part of the permit holder. Thus actual knowledge or wilful blindness will be a prerequisite of connivance. Permission, by contrast, implies the actual (express or implied) granting of leave or license to either do an act or omit to do something which should be done.

In the case of R v Megson and Another¹² which involved a
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contravention of the Liquor Act in force at the time,
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Tindall J dealt very briefly with connivance and permission:

'But as he (the Magistrate) accepted the evidence of the second accused that he had warned the first accused against supplying at unauthorised hours, it is to be inferred that he was satisfied that the first accused was acting without the connivance or permission of the second accused.'

It is submitted that a permit holder who either connived at or permitted an unauthorized act or omission would, nonetheless, be guilty of the offence under the common law if s34 did not exist. Liability would arise either because the permit holder was a principal offender, having the necessary mens rea, or as an accessory. The position is clear where the accused has permitted the act or omission. It is submitted that the necessary mens rea will exist too if the accused tacitly permitted or passively acquiesced in the commission of the offence.

(b) 'Reasonable Steps'

The meaning of 'taking reasonable steps' is, in general, an
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objective enquiry which depends on the facts of each case.

It should be remembered that for the purpose of the permit holder taking reasonable steps, it is insufficient to

show that he forbade the act or omission. Kruger says that a liquor licensee would not have taken reasonable care if he appointed a barman of such a low moral or intellectual standard that the latter probably could not conduct affairs of the bar in accordance with the many legal provisions which attach to that occupation.

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In S v Banur Investments (Pty) Ltd and Another,¹⁷ a record clerk served customers, and in so doing, contravened the Liquor Act¹⁸ by selling quantities of liquor less than the minimum prescribed by the Act in respect of wholesale liquor licenses. She served customers because, at the time, the two salesmen were not in the shop. The second appellant gave evidence to the effect that he, as a director and manager of the shop, had explained to the record clerk what her duties were. Further he had not expressly forbidden her from selling liquor. Bekker J found that, in the circumstances, reasonable care had not been taken and then went on to outline what he considered reasonable care, in this case, to mean:¹⁹

'It seems to me that, being aware that employees might do unauthorised things, it would have been the simplest thing and quite within the bounds of reasonableness for second appellant to have instructed Mrs Luttig, whose duties kept her behind the counter in the shop, that she was not allowed to sell liquor to customers and/or to have instructed her should a customer arrive at a time when both salesmen were absent, to call him to the shop. He could also have given the salesmen instructions that he should be called if circumstances arose which necessitated their absence from the shop at one and the same time. This he did not do and his omission in my opinion renders it well nigh impossible for him to discharge the onus resting on him.'

In the case of R v Megson and Another, the first accused served a glass of beer to a person on a Sunday. He was a general helper to the second accused who was the licensee. One of Megson's duties was to clean the bar. He was engaged in this activity when the offence occurred. In dealing with the licensee's conduct in ensuring that Megson did not contravene the Act, Tindall J held:

'The second accused admitted that he had had occasion to admonish the first accused for treating people to drinks. Knowing that the first accused was not to be relied on, the second accused should not have given him such an opportunity for breaking the law on the Sunday in question.'

Turning attention back to the Road Transportation Act it may be concluded that a permit holder, in order to avoid liability under s34, must take positive steps to ensure that managers, agents or employees do not contravene the Act. Constant supervision by way of inspectors or personal checks may, in certain circumstances be reasonable. On the other hand such factors as the reliability, intellect or character of a driver or other employee may play a part.

(c) 'Scope of Authority or Course of Employment'

In defining the term 'course of employment' McKerron says that the test usually applied is: 'Did the servant do the act while about the business of his master or did he do it while on his own business and for his own purposes?'

The term 'within the scope of the authority' is, it is submitted, wider, although the two terms may overlap. Thus, to use an example cited by Kruger, where a cook whose sole duty lies in the kitchen, enters the bar and unlawfully serves liquor, the licensee would escape liability in the absence of

negligence. The scope of the cook's authority or the course of the cook's employment surely precludes serving customers.

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Kruger concludes:

'The excuse would, however, fail if it were shown that in some circumstances it was within the cook's authority to serve drink - for instance, that on occasions of pressure of business he was required to assist the barman in the sale of liquor.'

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So, in R v White and Another, when a barman sold liquor to two 'natives', the licensee could not escape liability

because it was within the scope of a barman's employment to

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sell liquor. Gardiner JP went on to hold:

'The fact that the sale was illegal does not absolve the licensee, for in ascertaining what was the scope of authority, or the course of employment, one has to look at the character of the act, and if the act be of the character of acts within the scope of the authority or the course of the employment of the barman, it matters not whether the particular act in question was legal or illegal.'

In the field of road transportation this part of s34(1) will probably be used least as a defence. Most unlawful acts or omissions will probably be perpetrated by drivers, so it would be impossible in the large majority of cases for the permit holder to raise s34(1)(c), along with a lack of connivance or permission, to avoid liability. If, however, a conductor drove a bus and in the process committed an offence, the permit holder would escape conviction because driving would not fall within the scope of authority or course of employment of the conductor. If, on the other hand, it was shown that the conductor was, from time to time used as a driver, this excuse will most probably not avail the permit holder.

[B] OTHER PRESUMPTIONS OF INVOLVEMENT IN OFFENCES

(1) **General**

S38(1) contains five presumptions which shift the onus from the State to the accused. Their effect is to lighten the burden which the State has to bear in prosecuting cases in terms of the statute and to force the accused to raise a defence if possible. In other words, the accused cannot simply challenge the evidence of the State. He must adduce evidence of his own to dispute a case against him which exists the moment the presumption comes into operation. The justification for the existence of this formidable set of presumptions is found in the nature of the crimes and the administrative difficulty of policing the Act. In other words, to make the statute effective, a drastic change to the normal rules of procedure and evidence was seen as necessary. This will work towards a higher conviction rate because the State's task is easier and the deterrent value of the offences will in turn be enhanced.

(2) **The Presumptions**

The first presumption is of general application. It presumes that any person who has conveyed persons or goods, or permitted the conveyance of persons or goods, undertook road transportation, unless the contrary is proved.²⁶ Thus the onus would be on the accused to prove that the conveyance was not for reward or not in the course of any industry, trade or business or, in some way to show that it did not fall within the definition of road transportation in s1(1).

Secondly, if it is proved that conveyance of persons or goods took place in contravention of s31(1)(a), the owner of the

vehicle in question is presumed to have conveyed the persons or goods. To rebut this presumption the owner must prove two things; first, that he was not the driver and secondly, that he did not authorize or permit the contravention.²⁷

The third presumption relates to the consignor, owner and any person who acted on behalf of the consignor or owner of goods which were conveyed in contravention of s31(1)(a). They are presumed to have conveyed the goods unless it is proved that they did not know that such goods were being conveyed or could not prevent the conveyance.²⁸

Fourthly if a person is found in possession of any writing falsely purporting to be a permit issued under the Act, or of a permit which has been altered, defaced, mutilated or added to in contravention of s33(a), that person will be presumed to have made the writing or to have altered, defaced, mutilated or added to the permit in question. The onus lies on the accused to prove the contrary.²⁹

The fifth presumption concerns persons who undertook road transportation in contravention of s31(1) in that the goods conveyed were not authorized by a permit, or were conveyed otherwise than in accordance with the provisions of a permit. Such persons will be presumed to have known what the goods concerned were, unless it is proved that, despite proper care, they could not have known.³⁰

(3) The Operation of the Presumption Contained in s38(1)(a)

(a) The Onus

The Motor Carrier Transportation Act contained a presumption in s11(1)(a) which was similar to that contained in

s38(1)(a). The main difference is that, in the old Act, the presumption applied to 'any proceedings' while in the current Act it applies to 'any prosecution'.³¹

The effect of the presumptions created by s38(1) is to cast the onus onto the accused.³² He must prove on a balance of probabilities that the conveyance which he undertook or permitted did not constitute road transportation as defined.

(b) The Application of the Presumption

The presumption created by s11(1) of the Motor Carrier Transportation Act has been dealt with extensively by the courts. As this section corresponds almost exactly to s38(1)(a), cases dealing with the old Act are of considerable importance.

In order to bring the presumption into operation the State must bring the accused within the four corners of the Act. Thus it must be proved beyond reasonable doubt that conveyance took place in a motor vehicle and it must allege that the conveyance was for reward, in the course of industry, trade or business or undertaken by means of a hired motor vehicle or hired bus.³³ In addition the State must show either that the accused conveyed persons or goods or permitted the conveyance to take place. The case of S v Azels and Another³⁴ provides a clear example of the application of this principle. In this case the first appellant ran the transport business while the second appellant was the driver. They were charged with a contravention of s9(1) of the Motor Carrier Transportation Act. The prosecution arose as a result of the conveyance of doors and empty drums. The conveyance of the former was

authorized by a permit but the conveyance of the latter was not.

The Appellate Division confirmed the conviction of the second appellant. He actually conveyed the drums and so the presumption applied to him. At this stage the onus shifted onto him and he bore the task of proving on a balance of probabilities that the conveyance was not for reward. He was unable to discharge this onus. The position of the first appellant was different. He did not convey the drums so, to secure a conviction, the State was required to prove that he permitted the conveyance. To bring the presumption into operation and thus shift the onus, it was required to prove the granting of permission beyond reasonable doubt. This the State failed to do and consequently no onus rested on the accused to disprove the allegation that the conveyance was
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for reward.

(b) The Unrepresented Accused

(i) General

The presumption created by s38(1)(a) may not be relied upon by the State if the accused is unrepresented and was not informed of the provisions of the section containing the
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presumption. In S v Mkize, the appellant was acquitted on this basis. He had been charged with conveying passengers for reward and, in conducting his own defence, called only two witnesses. Both were passengers at the time of the alleged offence and they testified to the effect that their conveyance was not for reward. Mkize did not call any of the eighteen remaining passengers. Fannin J said that the appellant may have thought, in the absence of knowledge of

the presumption, that he had done enough to avoid conviction.

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The learned judge held:

'It seems to me in the highest degree desirable, especially in the circumstances of a case like this, for an accused person who is unlikely to be aware of the specific provisions of the law, and who is defending himself, to be warned of any presumption of this sort which may operate against him in terms of the statute.'

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Similarly in S v Khumalo, where the accused was not warned of the presumption, Phillips AJ held that the magistrate had a duty to warn him. This omission disentitled the State from relying on the presumption. Consequently the onus never shifted and the State was required to prove all the elements of the offence beyond reasonable doubt. The appeal was allowed because the State had made no attempt to prove that the conveyance had been for reward.

(ii) The Basis of the Rule

The rule that an unrepresented accused must be warned of a presumption is not embodied in the Act. It has evolved by means of practise. Thus in S v Ntuli and Another,³⁹ James J held that there was no fixed rule as to warning the accused but, in such a situation, the court has a duty to consider the evidence very carefully to ensure that the accused is not prejudiced by the omission.

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In S v Nabo Kotze J went further. The learned judge, with the support of the Judge President and other members of the Eastern Cape bench, set out the procedure to be followed in such a case: first, the nature of the onus which rests upon the accused should be read out to him; secondly, an

explanation of how the onus could be discharged should be made; and thirdly, the manner in which the explanation was given should be detailed verbatim on the record.

The case of S v Shangase and Others makes it clear that the rule is of general application. The case involved alleged offences in terms of the abuse of Dependence-producing Substances and Rehabilitation Centres Act. Harcourt J said that a warning about the existence of, and effect of, presumptions had been applied, inter alia, to offences in terms of the Dangerous Weapons Act, the Liquor Act. and the Stock Theft Act.

Where a warning has not been given the acquittal of the accused does not necessarily follow. This will only occur if the court finds that the absence of a warning had the effect of prejudicing the accused.

(4) An Explanation of the Remainder of s38(1)

The presumptions contained in ss38(1)(b), (c), (d) and (e) were not contained in the Motor Carrier Transportation Act. They are innovations created by the Road Transportation Act. There are no reported cases dealing with these presumptions but, it is submitted, the principles applicable to s38(1)(a) will apply to the remainder of s38(1). Thus, in s38(1)(b) the State would be required to prove a contravention of s31(1)(a). It must be proved beyond a reasonable doubt. Once the commission of the offence has been established the onus will shift onto the owner. He will have to prove on a balance of probabilities that he was not the driver and that he did not authorize or permit the vehicle to be used for the conveyance in question. Similarly, when a consignor or owner

of goods is charged, the State must prove a contravention of s31(1)(a) before the onus shifts. To escape conviction the consignor or owner will be required to prove a lack of knowledge as to the conveyance or that he was unable to prevent the conveyance. For the presumption contained in s38(1)(d) to come into operation, the State must prove the following: the falsity of the document purporting to be a permit or illegal alterations to, defacing of, mutilation of, or additions to a permit; possession of the document; and an intent to deceive. Once these requirements have been proved, the onus will rest on the accused to prove that he did not make the writing, or alter, deface, mutilate or add to the permit. The presumption created by s38(1)(e) applies to a contravention of any provision of s31(1). It only embraces the conveyance of goods not authorized by a permit or conveyed otherwise than in accordance with the provisions of a permit. To bring the presumption that the person knew what the goods were, into operation, the onus rests on the State to prove conveyance by that person and a contravention of the Act envisaged by s38(1)(e). When this has been established the onus shifts and the accused must prove that he could not have known what the goods were despite having taken proper care.

[III] PRESUMPTIONS WHICH CREATE A DUTY TO ADDUCE EVIDENCE

[A] GENERAL

Hoffman and Zeffertt quote Glanville Williams in suggesting that rebuttable presumptions of law be classified under two heads: persuasive presumptions and evidential presumptions. The former shift the onus from one party to another while the latter simply create a duty to adduce evidence. Wording

such as that found in s38(2) and s38(3) create evidential presumptions. In a leading case dealing with the validity of a will, Stratford CJ said:

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'His view is that a presumption of law only settles the matter provisionally and casts upon the opponent the duty of producing evidence. When such evidence is produced the presumption as a rule of law vanishes; what remains is an inference of fact the value of which must be considered in the light of all the evidence. This means that if the party seeking to persuade the jury fails in affirmative persuasion he fails to discharge the burden of proof (which has not been shifted by the presumption) and should be non-suited'.

The operation, in a criminal case, of a presumption which creates a duty to adduce evidence is as follows: the onus of proving guilt beyond a reasonable doubt never leaves the State, but at the same time, the accused must adduce some evidence. In other words, the accused may not rely on silence. Once evidence on the part of the accused has been adduced, the presumption ceases to apply. It is then simply a matter of the probative value to be given to the evidence of the State and that of the accused. The requirement of proof of guilt beyond a reasonable doubt remains and so, in adducing evidence, the accused only has to create a reasonable doubt as to his guilt, i.e that his explanation is reasonably possible.

[B] THE EVIDENTIAL PRESUMPTIONS

The Act contains two evidential presumptions. These are found in s38(2) and s38(3). They relate to offences connected with certain documents and their contents. These documents, namely permits and documents dealing with the registration of vehicles are central to the functioning and effectiveness of the Act.

(1) **Permits**

S38(2) deals with permits. It relates to any document which purports to be a permit issued under the Act or a copy of a permit, certified to be a true copy by a person who purports to be an officer of the board or the Commission which issued the original. On production, in any prosecution under the Act, such a document will be admissible in evidence and it will be prima facie proof of two things: first, that it is a validly issued permit or a true copy of a validly issued permit and secondly, that every statement contained in it is true.

(2) **Documents Dealing with the Registration of Vehicles**

The second presumption relates to documents dealing with the registration of motor vehicles. This sub-section is also limited to prosecutions under the Act. A document which fulfills certain requirements shall be admissible in evidence and be prima facie proof of the correctness of the statements which it contains. To bring the presumption of correctness into operation the document must relate to a specified vehicle under a law which deals with the registration of vehicles, the vehicle must be registered in the name of the person named in the document and it must purport to be issued by an authority charged with the registration of motor vehicles.

(3) **The Operation of the Presumptions**

In Mabena v Brakpan Municipality,⁵¹ the appellant was charged with a contravention of s9(1) of the Motor Carrier Transportation Act. It was alleged that he had undertaken road transportation which was not authorized by the Act. The court

a quo accepted the evidence of an inspector who stated that the accused had conveyed 11 passengers while only being entitled to carry a maximum of six. The permit (or a copy) was not produced. One of the points raised by the Crown on appeal was that, in terms of s11(2) (the present s38(2)), there was a prima facie case against the appellant. His failure to adduce evidence therefore converted prima facie proof into proof beyond reasonable doubt. Williamson J rejected this argument because, he said, it could not apply in a situation where the Crown had failed to establish an essential factor, namely the contents of the permit.⁵² It is submitted that if the permit was produced and Mabena had wished to challenge its contents the following would pertain: S11(2) would have applied so that a duty lay on Mabena to adduce some evidence; once he had done so the presumption would have fallen away and the inference of fact created would have had to be considered in the light of all of the evidence;⁵³ if Mabena had not adduced any evidence the correctness of the contents of the permit would have been assumed.

FOOTNOTES

1. L H Hoffmann and D T Zeffertt South African Law of Evidence (3 ed), 414. (Hereafter referred to as Hoffman and Zeffertt).
2. 9 LAWSA para.
3. Hoffmann and Zeffertt, 418.
4. R G McKerron The Law of Delict (7 ed), 90.
5. E M Burchell and P M A Hunt South African Criminal Law and Procedure Vol I 'General Principles of Criminal Law' (2 ed by E M Burchell, J R L Milton and J M Burchell), 386.
6. Burchell and Hunt op cit 387.

7. 6 LAWSA para 385; but see C R Snyman Strafreg, 216 who says: 'Die beleidsoorweging vir die skepping van sodanige aanspreeklikheid is dat die werkgewer aangespoor sal word om toe te sien dat mense in sy diens die regsvoorskrifte nakom; hy mag nie skuil agter die foute van sy werknemers nie; hulle foute word aan hom noegedig; hy het sy bevoegdhede aan hulle gedelegeer en daarom handel hy deur hulle.'
8. S34(2).
9. See Ch 14 above at 379.
10. No 87 of 1977.
11. The section creates a presumption of connivance, permission and tacit authorization for acts or omissions of managers, agents, employees, members of the licensee's family, members of a manager's family and casual helpers.
12. 1931 TPD 371.
13. No 30 of 1928.
14. At 372.
15. A Kruger Lansdown's South African Liquor Law (5 ed), 423. (Hereafter referred to as Kruger).
16. Kruger, 423.
17. 1969(1) SA 231(T).
18. No 30 of 1928.
19. At 234H.
20. 1931 TPD 371.
21. At 372 - 3.
22. R G Mckerron The Law of Delict (7 ed), 95.
23. Kruger, 424.
24. 1934 CPD 60.
25. At 62.
26. S38(1)(a).
27. S38(1)(b).
28. S38(1)(c).
29. S38(1)(d).
30. S38(1)(e).
31. For the meaning of the words 'any proceedings' see R v Ramatlo 1955(1) SA 14(T).
32. R v Ntsini 1956(3) SA 641(E), 664(H); S v Mkize 1966(4) SA 280(N).
33. S v Chetty 1975(3) SA 980(N), 982 C - D.
34. 1975(1) SA 723(A).
35. See too S v Khumalo 1979(4) SA 480(T), 481, where Phillips AJ held: '...where the vehicle has been driven by a person other than the accused who is the owner, the State must show beyond a reasonable doubt that the accused was aware of the use to which the vehicle was being put or allowed the driver to use the vehicle as he wished.'; see further S v Julies 1971(2) SA 525(E) and S v Chetty 1975(3) SA 980(N).
36. 1966(4) SA 280(N).
37. At 282 C; see too S v Chetty supra, 982 A - B.
38. 1979(4) SA 480(T).
39. 1967(3) SA 721(N); this case involved a prosecution in terms of the Mental, Dental and Pharmacy Act 13 of 1928.
40. At 722 F - G.
41. 1968(4) SA 699(E); this case involved a prosecution in terms of the Dangerous Weapons Act 71 of 1968.
42. At 701 G - H.
43. 1972(2) SA 410(N); see too S v Andrews 1982(2) SA 269(NC).

44. No 41 of 1971.
45. No 71 of 1968.
46. No 87 of 1977.
47. No 57 of 1959.
48. S v Andrews 1982(2) SA 269(NC), 272G; this case dealt with the presumption in s245 of the Criminal Procedure Act 51 of 1977.
49. Hoffmann and Zeffertt, 418.
50. Tregea v Godart 1939 AD 16, 32 - 3.
51. 1956(1) SA 179(T).
52. At 182E.
53. Tregea v Godart supra, 32 - 3.

CHAPTER 16

THE CHARGE AND PROCEDURE

[I] THE CHARGE IN GENERAL

[A] SETTING OUT THE CHARGE

[B] THE PROVISIONS OF THE CRIMINAL PROCEDURE ACT

[C] A JUMBLE OF CHARGES

[D] CHARGES IN THE ALTERNATIVE

[E] CURING DEFECTS IN THE CHARGE BY EVIDENCE

[II] THE PROCEDURAL DIFFERENCES BETWEEN s31(1)(a) and s31(1)(b)

[A] CONFUSION OF THE TWO OFFENCES

[B] THE PERMIT

[C] PUBLIC ROADS

[I] THE CHARGE IN GENERAL

[A] SETTING OUT THE CHARGE

In R v Maloi and Another¹ it was held that a charge sheet set out the charge sufficiently where it only contained the following averments: that the appellants had no authority to convey passengers; that they conveyed passengers; and that this took place on a public road in the district of Johannesburg. R v Matsapula,² on the other hand, held that a charge was fatally defective, where the charge sheet was drawn up so badly that the accused could not ascertain what case he was required to meet. Ramsbottom J, who described the charge sheet as being drawn in an extremely slovenly manner, held that the charge sheet must inform the accused of the way in which the Act was allegedly infringed and, when a presumption exists which shifts the onus, what the accused is required to prove to avoid conviction. Thus the charge must aver that conveyance took place in a motor vehicle on a public road and that the conveyance was either for reward, in the course of industry, trade or business, undertaken by means of a hired motor vehicle or a hired bus. Furthermore it should also be stated whether passengers or goods had been conveyed.³ Similarly, in S v Theunsus Transport (Pty) Ltd and Others,⁴ Addleson J held that a charge which did not allege that the transportation was for reward or in the course of industry, trade or business was fatally defective.

[B] THE PROVISIONS OF THE CRIMINAL PROCEDURE ACT

The Criminal Procedure Act⁵ requires that the charge must provide such particulars about an alleged offence which would be reasonably sufficient to inform the accused of the case to be met.⁶ In addition, s84(3) provides that in criminal

proceedings 'the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient'.

Ss31(1)(a) and 31(1)(b) do not on their own describe offences. It is only when read with the definition of road transportation in s1 that the prohibitory wording of the two sub-sections acquire any meaning. S1 sets out the types of road transportation envisaged by the Act and the elements of each. Whether a charge sheet which follows the wording of s31(1)(a) or (b) describes the offence adequately has been dealt with in a number of cases.

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In R v Matsapula the court held that a charge sheet merely setting out the wording of s9(1) of the Motor Carrier Transportation Act did not disclose an offence. A contrary decision was reached in R v Maloi and Another.⁸ Maritz J held that, by alleging that the appellants did not hold a permit to convey passengers and that they did convey passengers on a public road in a certain district, the charge sheet set out the requirements of the charge adequately. De Villiers J, in concurring, held that the charge sheet complied with s127(2)(a) of the Criminal Code then in operation.⁹ Both judges stressed that the appellants (who were represented in the court a quo) could have asked the Crown for further particulars.

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Ogilvie Thompson J, in R v Leibrandt,¹¹ had the choice of following either Maloi¹² or Matsapula. He held that the former case had been wrongly decided. The learned judge held that the words of s9(1) cannot be regarded as the 'words creating the offence' within the meaning of s127 of the

Criminal Code and thus the charge sheet did not
disclose an offence:

'The words of s9 of the Act do not in themselves create the offence: the offence is created by the words of s9 only when such words are construed as conveying the special meaning laid down in the definition clause.'

A similar decision was reached in R v Freitag. Jennett J held that s127(2)(a) of the Code could only apply if the words of the enactment used in the charge create the offence in full. To describe the offence fully, reference must be made to s1 which defines motor carrier transportation.

It is submitted that the view of the law expressed in Matsapula and followed in Leibrandt and Freitag should be seen as preferable. Not only is the weight of authority in favour of such an interpretation but an important policy consideration also lends support to this approach: in criminal proceedings the accused should have enough information at his disposal to conduct a proper defence. The minimum which he should be able to expect is an outline of the offence and its elements, especially in the case of a technical offence created by a statute such as the Road Transportation Act. At the same time, this does not place undue pressure on the State. It merely requires prosecutors to do their jobs properly.

Thus, in setting out the charge, reference must be made to the definition of road transportation in s1 of the Act. This term can mean one of four things: conveyance of persons or goods for reward; conveyance of persons or goods in the course of any industry, trade or business; conveyance of

persons by means of a hired bus; or the conveyance of goods by means of a hired motor vehicle. In order to inform the accused sufficiently of the case he has to meet, the manner in which the Act was allegedly contravened must be stated.

[C] A JUMBLE OF CHARGES

The slovenly charge sheet which was held to be fatally defective in *R v Matsapula* ²⁰ read as follows:

'that the accused had wrongfully and unlawfully carried on motor carrier transportation by having conveyed or by having permitted conveyance by means of a motor vehicle TAJ 296 of persons to wit passengers for reward / in the course or for the purpose of furthering any industry, trade or business of whatever nature.'

In describing the charge as nonsense and a jumble of two different charges, Ramsbottom J proceeded to attempt an interpretation of it: ²¹

'The charge as framed does not make it clear to the accused what he is charged with. Is he charged with carrying passengers for reward? Or is he charged with carrying passengers in the course of a business? Or is he charged with carrying passengers for reward in the course of a business? I think that it is the last meaning which this charge naturally bears.'

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In *S v Mjijwa* the sufficiency of the following charge was a ground for appeal:

'The said accused did wrongfully and unlawfully carry on motor carrier transportation by having conveyed or having permitted the conveyance of persons / goods, to wit 24 Bantu passengers and personal effects for reward, in the course of any industry, trade or business or by means of a hired vehicle.'

In deciding that the charge was defective, Jennett JP held: ²³

'Apart from that it seems to me that the comma compels one to read the charge as meaning that the

conveyance was for reward either in the course of any industry etc., or by means of a hired vehicle. Read in that way the charge is clearly a jumble of two offences with an alternative of - a jumble of another two offences.'

A charge sheet which contains a jumble of charges discloses no offence because the offence alleged in it does not exist. As may be seen from the examples cited above, elements of one offence are mixed with elements of others. Such a situation may be distinguished from instances where the charge is not set out with sufficient clarity on the one hand ²⁴ and where the charges are set out in the alternative on the other.

[D] CHARGES IN THE ALTERNATIVE

While a charge sheet disclosing a jumble of charges will be defective, a charge sheet disclosing one or more ways in which the alleged offence was committed will be acceptable if these allegations are made in the alternative. ²⁵ Thus, in § v Chetty ²⁶ the charge sheet was held to be competent where it alleged that the road transportation in question consisted of conveyance of flour for reward, or in the course of industry, trade or business or by means of a hired motor vehicle. The accused knew from this that to avoid conviction he had to prove, if the presumption in s11(1) of the Motor Carrier Transportation Act came into effect, that he had not conveyed in any ²⁷ of the three distinct ways mentioned in the charge sheet. ²⁸ The charge sheet in § v Koehanyana mentioned the three ways of contravening s31(1)(a) of the Road Transportation Act. In linking the three it used the words 'and/or'. It was argued that it was defective because it contained a jumble of charges. Zietsman AJ held that while the form of the charge was not satisfactory it was, nonetheless, competent because it contained all necessary averments and he was satisfied

that the appellant had not been prejudiced. The learned
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acting judge held:

'Die beskuldigde is deur 'n prokureur verteenwoordig. Daar was geen aansoek om nadere besonderhede tot die klagstaat nie, en dit is duidelik van die oorkonde dat die beskuldigde van die begin af geweet het wat die bewerings teen hom is en dat hy nie deur die feit dat die klagstaat verskillende ander misdade ook openbaar benadeel is nie.'

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It was on this basis that Matsapula's case was distinguished.

It may be argued that if a charge sheet stating the offences in the alternative is competent, a charge sheet linking the offences with 'and/or' will also be. If they were stated in the alternative the accused would have to prove, once the onus had shifted, that he did not convey in any of the prohibited ways. The addition of the word 'and' will make no difference. It is superfluous because the ways of undertaking road transportation are mutually exclusive i.e. if conveyance is for reward, it cannot be in the course of
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industry, trade or business.

At the same time it must be conceded that the charge sheet will disclose a jumble of charges. Even though such a charge sheet may be more elegantly phrased than the one in § v
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Mjijwa, the result is almost identical. It will disclose, on the one hand, a series of alternative charges, and on the other, a jumble of charges. Bearing in mind the dangers of too formalistic an approach, it is submitted with respect that Zietsman AJ should have held that the charge sheet did not disclose an offence. By allowing alternative charges, the courts have made a concession which is, no doubt,

necessary. To go further and allow the type of charge sheet which was used in Koehanyana's case³³ is, it is submitted, an unwarranted extension of the expediency principle.

[E] CURING DEFECTS IN THE CHARGE BY EVIDENCE

S88 of the Criminal Procedure Act³⁴ provides that defects in the charge may be cured by evidence in the trial unless the defect was brought to the notice of the court before judgment. The corresponding section (s179 bis) of the 1955 Act³⁵ was interpreted by Van Rhyn J in S v A.R. Wholesalers (Pty) Ltd and Another.³⁶ The learned judge held that, in order to cure a defect by evidence, it was necessary to examine the evidence as a whole. This raised the issue of what the legislature meant by the word 'evidence'. The learned judge reached the conclusion that evidence did not include the invocation of statutory provisions and presumptions:³⁷

'Na my mening "herstel" getuienis nie die gebrek in 'n klagstaat indien die getuienis dieselfde gebrek openbaar as die klagstaat nie omrede sulke getuienis die beskuldigde net so in die duister laat as wat die gebrekkige klagstaat doen. Indien die woord "getuienis" in art. 179 bis die byhaal van wetsbepalinge en statutêre vermoedens insluit kan 'n beskuldigde skuldig bevind word sonder dat hy op 'n enkele stadium weet wat die essensie is van die misdryf hom ten laste gelê.'

It has been held that the existence of the presumption in s38(1)(a), (formerly s11(1)) makes it more important that the accused is informed fully of the case he has to meet.³⁸

[III] THE PROCEDURAL DIFFERENCES BETWEEN S31(1)(a) AND S31(1)(b)

[A] CONFUSION OF THE TWO OFFENCES

S31(1)(a) and s31(1)(b) create (in conjunction with s1) two

different offences. The former seeks to punish persons who undertake road transportation either without any authority or outside of the provisions of a permit. The latter seeks to punish persons who breach a condition of a permit. The difference is thus between the elements of a permit which emanate from the Act itself and those which are added onto the permit in the discretion of a board or the Commission. 39

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The appellant in S v Essa was convicted in the court a quo in terms of s9(4) of the Motor Carrier Transportation Act. It was alleged in the charge that by substituting a vehicle in a manner which was contrary to s7(1)(d), he had thereby failed to comply with a provision of the permit. Hefer J held that the conviction should be set aside because Essa had done nothing contrary to a condition. He had contravened s9(1) because he had failed to comply with a requirement of the Act itself.

[B] THE PERMIT

S31(1)(a) can be infringed by a non-permit holder or by a person who conveys contrary to the provisions of a permit. S38(1)(a) creates a presumption to the effect that any person who conveys, or permits the conveyance of goods or persons is presumed to have undertaken road transportation. It is therefore unnecessary for the charge sheet to refer to the existence of a permit in a prosecution in terms of s31(1)(a). 41

S31(1)(b) creates the offence of failing to comply with a condition or requirement of a permit. This offence refers to a permit holder. The charge sheet must allege that the accused is the holder of a valid permit and that a condition or requirement has been contravened. In R v Singh, a 42

charge was addressed to the appellant as the owner of a motor vehicle. The prosecutor in the court a quo applied to amend the charge to refer to Singh as the holder of the permit. This was granted but the competence of the amendment was one of three grounds of appeal. In dealing with the charge sheet Carlisle AJP observed that the charge sheet 'disclosed no offence unless and until it alleged that the appellant was the holder, or the servant of the holder, of the certificate'.⁴³

[C] PUBLIC ROADS

A public road is defined as any road which has been declared or recognised to be a public road under any law. Included in the definition are roads, streets, thoroughfares or other places to which the public or any section of the public has a right of access.⁴⁴

In R v Mohaleomathe and Others,⁴⁵ the appellants had been convicted in the court a quo for contravening s9(1) of the Motor Carrier Transportation Act. On appeal it was argued that the charge sheet disclosed no offence because it merely repeated the words of the section. In setting aside the conviction, Van den Heever AJP held that the elements of the offence had to appear in the charge sheet. The learned Acting Judge President said in this regard:⁴⁶

'Here we have merely a label (i.e. to carry on motor carrier transportation), which is explained elsewhere in this and other Acts; here it is used merely as the object of the prohibition. But the label does not contain the elements of the offence, viz. that the act was committed on a public road or for reward or various other requisites.'

Similarly, in R v Bonthuys,⁴⁷ where the charge sheet omitted to allege that the offence took place on a public road, the appeal was allowed. This same point was raised in R v Mlumbi⁴⁸

44. Road Transportation Act, s1; see too Flying Lotus (Pty) Ltd v Chairman, National Transport Commission and Another 1982(4) SA 253(D).
45. 1944 ●PD 117.
46. At 119.
47. 1946 CPD 275.
48. 1949(3) SA 113(E).
49. 1949(2) SA 167(E).
50. At 169.
51. 1982(4) SA 253(D).