90/89

CASE NO 4/88

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

ADMINISTRATOR OF THE TRANSVAAL..... First Appellant

DIRECTOR OF HOSPITAL SERVICES.....Second Appellant

SUPERINTENDENT OF BARAGWANATH HOSPITAL..... Third Appellant

and

BEVERLY TRAUB..... First Respondent

LINDA JIVHUHO.....Second Respondent

ZOLELA NGCWABE..... Third Respondent

GIDEON FRAME .....Fourth Respondent

HUBERT HON..... Fifth Respondent

MARK FRIEDMAN..... Sixth Respondent

CORAM: CORBETT CJ, HOEXTER, E M GROSSKOPF, KUMLEBEN, et F H GROSSKOPF, JJA.

DATE OF HEARING: 9 May 1989

DATE OF JUDGMENT: 24 August 1989

/ J U D G M E N T.....

J U D G M E N T

CORBETT CJ:

The Baragwanath Hospital ("the hospital") provides medical and hospital services for the people of Soweto. It also functions as a teaching hospital for the medical faculty of the University of the Witwatersrand. For many years prior to 1987 members of the medical staff at the hospital had complained to the responsible authorities about the conditions prevailing in the wards serving the department of Medicine. It appears that the department was housed in halls that were originally built during World War II. Not only were the buildings old, but in addition the ward facilities, such as bathrooms, toilets, etc, were wholly inadequate. The position was further aggravated by an insufficient number of wards, resulting in gross overcrowding in the existing wards. Occupancy, in terms of the number of patients accommodated in a ward, ranged between

150% and 300% of the numbers which the wards were designed to take. Patients who did not have beds were accommodated on mattresses on the floor. It was extremely difficult, if not impossible, under these conditions to provide proper medical and nursing services; the department was understaffed; and, it is alleged, patients were discharged earlier than they should have been in order to provide beds for incoming patients.

In about September 1987 matters came to a head. On the 5th of that month the South African Medical Journal published a letter signed by 101 doctors, virtually all of whom were employed in the department of Medicine at the hospital. Signatories included Prof A Dubb, then acting head of the department, senior specialists, physicians and others. The letter (which I shall refer to as "annexure M") draws attention to the conditions obtaining in the medical wards at the hospital and emphasizes the inaction of the authorities, despite repeated appeals and pleas over

the years. The language employed in annexure M is strong and abrasive, as the following extract will show:

> "The conditions in the medical wards at the hospital are disgusting and despicable. The attitude of the responsible authorities can only be described as deplorable. The state of affairs is inhumane. Facilities are completely inadequate. Many patients have no beds and sleep on the floor at night and sit on chairs during the day.. The overcrowding is horrendous. Nurses are allocated according to the number of beds, and not to the number of patients. Ablution facilities are far short of accepted health requirements, and ethical standards are undoubtedly compromised. Pleas for help have been met by indifference and callous disregard. Patients and their problems are treated with utter contempt by the authorities. Nothing is done to correct this affront to human dignity. Here is human suffering which cannot be portrayed by mere statistics.
>
> The administration has reacted in two

ways. Firstly, it has been said that improvements cannot be made at the existing hospital, as plans are being made to build a new hospital in Soweto. These statements have proved to be devoid of truth. The passage of time and inquiries at provincial council level have shown that there is no basis or justification for this excuse. Secondly, they say that unfortunately there is no money for new facilities. This answer is utterly hypocritical. An expensive administration block has been erected at the hospital, and a R300-million hospital mainly for whites is planned alongside H.F. Verwoerd Hospital in Pretoria. We have yet to see any evidence of the promised plans to rebuild Baragwanath Hospital. Appeals for help and caring through various channels have been to no avail.

The population of Soweto is very large and resources at Baragwanath are meagre. Influx control has been abolished. How much greater Baragwanath's burden now is. Has there been planning to anticipate this? The attitude of the administrators to the

> problem, and to our attempts to give some semblance of a quality service to the people of Soweto, is just unbelievable! Discharge patients, do not admit 'unnecessary' patients. Do they understand (or care) that premature discharge is the order of the day? Even so, the overcrowding worsens. We are of necessity forced to lower our expectations in the quality of care we can offer our patients. The uncaring, uncompromising attitude to the handling of sick human beings is beyond belief."

The six respondents in this appeal all graduated with the medical degrees MB ChB from the University of the Witwatersrand, the first and fifth respondents at the end of 1985 and the others at the end of 1986. First and fifth respondents both did their internships at the hospital during 1986. During the first half of 1987 first respondent held the position of Senior House Officer ("SHO") in the department of Internal Medicine at the hospital. The position of SHO is held on a six-monthly basis and

appointments are made on application. First respondent applied to serve in the same position during the second half of 1987 and this application was granted. The fifth respondent completed his internship at the end of 1986. Having worked for six months in the departments of Surgery, Obstetrics and Gynaecology, and Medicine, he occupied the position of SHO in the department of Paediatrics in the second half of 1987. The other respondents were, during 1987, interns at the hospital and were due to complete their internship at the end of that year. The respondents were all signatories of annexure M.

In or about September 1987 each of the respondents made application for an SHO post at the hospital for the first six months of 1988, five of them in the department of Paediatrics and one in the department of Medicine. In the case of first and fifth respondents the application was in each case in effect one for an extension of an

existing appointment as SHO (though first respondent would be moving from the department of Medicine to the department of Paediatrics); in the case of the other respondents the application was in each case one for a new appointment as SHO. In accordance with the existing practice the applications were forwarded to the head of the department concerned, who submitted them with favourable recommendations to the Director of Hospital Services, Transvaal (second appellant), whose function it was, under delegated powers, to make appointments to the position of SHO. During November 1987 each of the respondents was notified that his or her application for the post of SHO had not been approved. It is now common cause that the second appellant decided to reject the respondents' applications because they had signed annexure M.

On 30 November 1987 the respondents launched an urgent application in the Witwatersrand Local Division,

citing as respondents the Administrator of the Transvaal (first appellant). the second appellant and the Superintendent of the hospital (third appellant), and claiming the following substantive relief, viz an order -

(1) directing the appellants (respondents below), or any of them, to confirm the respondents (applicants below) in the positions in which they were recommended by the respective departments at the hospital;

(2) alternatively, directing appellants, or any of them, to reconsider the applications of the applicants lawfully and in accordance with the provisions of the relevant ordinances and regulations and directing that this be carried out forthwith.

The application came before Goldstone J on 12 December 1987. Two days later he gave judgment in favour

of the respondents with costs and made an order setting aside the decision of the second appellant in not approving the appointment of each of the respondents. He further directed the first appellant to cause the applications of the respondents to be considered either by himself or by any person to whom he might delegate the duty, other than second appellant and third appellant, as a matter of urgency, and in any event before 31 December 1987, and after the respondents had been afforded the opportunity of a fair hearing. The judgment of Goldstone J has been reported (see Traube and Others v Administrator, Transvaal, and Others 1989 (1) SA 397 (W); and I shall call this "the reported judgment"). With leave of the Judge a quo the appellants appeal to this Court against the whole of the judgment and order.

At this point I digress by pointing out that, although the subsequent history of the matter is not refer-

red to in the papers, it is a matter of public record and is briefly to this effect. Pursuant to the order of Goldstone J the first appellant appointed a Mr Badenhorst, the director of personnel, to consider the applications anew. Written and oral representations were made to him by and on behalf of the respondents. Certain of the respondents thereafter obtained appointments as SHO's at the hospital. One whose application was turned down again took the matter to Court and obtained an order directing that she be appointed to the post for which she had applied (see Traube v Administrator, Transvaal, and Others 1989 (2) SA 396 (T)). Consequently, apart from the question of costs, the issues raised by this appeal do not presently have any practical significance. I now revert to the present case.

In the Court a quo the appellants took the point in limine that the respondents had failed to give to them the written notification required by sec 34(2) of the Public

Service Act 111 of 1984 ("the Act") and that the application should accordingly be dismissed. This point was overruled by Goldstone J (see reported judgment pp 404 I - 405 E). On the merits the learned Judge held that the decision of the second appellant not to appoint the respondents to the positions applied for by them (strictly there was a separate decision in each instance, but it is convenient to speak of "a decision" in the singular) should be set aside as invalid on the ground that the second appellant had not afforded the respondents a fair hearing before taking the decision (see the reported judgment p 404 F-G).

On appeal appellants' counsel contended that the Judge a quo erred in reaching the conclusion which he did, both on the point in limine and on the merits. It will be convenient to consider the merits before the point in limine.

The right which is generally referred to by means

of the maxim audi alteram partem has been discussed and analysed in a number of recent judgments of this Court (see, eg, Strydom v Staatspresident, Republiek van Suid-Afrika, en 'n Ander 1987 (3) SA 74 (A); Omar and Others v Minister of Law and Order and Others; Fani and Others v Minister of Law and Order and Others; State President and Others v Bill 1987 (3) SA 859 (A); Castel NO v Metal & Allied Workers Union 1987 (4) SA 795 (A); Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A); Cabinet for the Territory of South West Africa v Chikane and Another 1989 (1) SA 349 (A)). The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances

thereafter - see Chikane's case, supra, at p 379 G), unless the statute expressly or by implication indicates the contrary. One of the issues in this matter is whether what I shall call "the audi principle" is confined to cases where the decision affects the liberty, property or existing rights of the individual concerned or whether the impact of the principle is wider than this. I shall deal with this issue in due course.

It was submitted on appellants' behalf that the audi principle did not apply in the present case, but that even if it did second appellant did give the respondents a fair hearing and that consequently there was no ground for complaint. I shall consider this latter submission first, for if it is well-founded it obviates the need to enquire into the applicability of the audi principle to the circumstances of this case.

It is not clear from the affidavits precisely

when second appellant took the decision not to appoint the respondents to the SHO posts for which they had applied. The letters conveying the decision to the respondents were dated in four instances 12 November, in one instance 18 November and in another instance (that of 6th respondent) 27 November, 1989. It would seem, however, that the decision must have been taken some time before this, probably towards the end of October, for there are on record letters from Dr Bolton, acting head of the department of Paediatrics, dated 29 October 1987, and from Prof Van Gelderen, chairman of the Medical Advisory Committee ("MAC"), dated 2 November 1987, both addressed to third appellant and expressing concern at the fact that applications for posts of SHO in the Paediatrics department had been turned down by second appellant, apparently because the applicants had signed annexure M. The letters ask that the matter be reconsidered. There was no written

response to these letters, but at a meeting of the MAC held on 11 November 1987 the committee were informed by third appellant that he had been told by second appellant that the decision would not be reversed and that second appellant would not give reasons for his decision. Third appellant did, however, suggest that a meeting with second appellant "might bear some fruit". This meeting eventually took place on 20 November 1987. At this meeting the general problems at the hospital were discussed and the MAC delegates asked second respondent to reconsider his decision. This he agreed to do, but was unable to give a date upon which his decision would be made known. The papers do not reveal any formal notification of a resolve by second appellant not to alter his original decision, but this is obviously what occurred; and it would seem from the date of the letter to sixth respondent that it occurred between 20 and 27 November 1987.

One further matter should be mentioned in this regard. In a supplementary affidavit, filed together with the original notice of motion, first respondent (who deposed to the founding affidavit) stated the following:

> "3 In order to clarify the basis of the applicants argument, I wish to supplement my founding affidavit with the following allegations:
>
> 3.1 None of the applicants were told of any reason that might count against them in the confirmation of their positions before the decisions not to confirm them had been taken.
>
> 3.2 None of the applicants were afforded the opportunity of replying to any such reason in any way whatsoever or of making representations in any form whatsoever.
>
> 3.3 Had we been given the opportunity, we would all have taken it and submitted representations to the authorities. In our representations, we would, inter alia, have drawn the attention of the

> authorities to our dedication to our work, our commitment to improving standards of medical care at Baragwanath Hospital and the various references that were attached to the founding affidavit."

In his answering affidavit second appellant stated in response to this and other supplementary affidavits -

> "Ek word meegedeel dat die eedsverklarings hoofsaaklik submissies bevat waarmee ek nie hoef te handel nie. Ek ontken egter feitlike bewerings teenstrydig met my weergawe."

There is nothing in second appellant's affidavit to suggest that the respondents were at any stage given a hearing.

On the basis of these facts appellants' counsel contended that the respondents were given a fair hearing. In this regard reliance was placed upon the meeting between representatives of the MAC and second appellant on 20 November 1987. It was conceded by counsel that this meeting

obviously took place after the original decision had been taken, but it was contended that this constituted sufficient compliance with the audi principle.

This argument was not raised in the Court a quo; nor was it made one of the grounds for the application for leave to appeal. That aside, the argument must in my opinion fail, for at least two reasons. Generally speaking, in my view, the audi principle requires the hearing to be given before the decision is taken by the official or body concerned, that is, while he or it still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken (see Blom's case, supra, at p 668 C-E; Omar's case, supra, at p 906 F; Momoniat v Minister of Law and Order and Others; Naidoo and Others v Minister of Law and Order and Others 1986 (2) SA 264 (W), at p 274 B-D). Exceptionally, however, the dictates of natural justice may be satisfied

by affording the individual concerned a hearing after the prejudicial decision has been taken (see Omar's case, supra, at p 906 F-H; Chikane's case, supra, at p 379 G; Momoniat's case, supra, at pp 274 E - 275 C). This may be so, for instance, in cases where the party making the decision is necessarily required to act with expedition, or where for some other reason it is not feasible to give a hearing before the decision is taken. But the present is, in my opinion, not such a case. There is no suggestion that the decision whether or not to appoint the respondents to the posts applied for by them had to be taken in a hurry: in fact all the indications are to the contrary. Nor is there any basis for concluding that for some other reason a hearing prior to the decision was not feasible.

Furthermore, the meeting of 20 November can by no stretch of imagination be regarded as a fair hearing given to the respondents. None of the respondents was

present; and there is no indication that the members of the MAC delegation were in any way authorized by any of the respondents to make representations on his or her behalf. Nor does it appear that the delegation did more than ask the second appellant to reconsider his decision. This would be a far cry from making the kind of individual representations described in par 3 of first respondent's supplementary affidavit (quoted above). And finally, although the members of the MAC delegation may have surmised that the decision of the second appellant was in general motivated by the respondents' signature of annexure M, the attitude of second respondent at that stage seems to me to have been one of secrecy in regard to the precise reasons for his decision. At a fair hearing the respondents would have been entitled to be told the reasons for the contemplated rejection of their applications.

For all these reasons the argument that the

respondents were in fact given a fair hearing must fail. I turn now to the question as to whether they were entitled to such a hearing.

As I have said, the power to make the appointments in question was vested by way of delegation in the second appellant. Such delegation had taken place in terms of sec 8 of the Act. It is common cause that sec 10(1) of the Act governed the exercise by second appellant of this power. It reads:

> "In the making of any appointment or the filling of any post in the public service -
>
> (a) no person who qualifies for the appointment, transfer or promotion concerned shall be favoured or prejudiced;
>
> (b) only the qualifications, level of training, relative merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer concerned, and such condi-

> tions as may be prescribed or as may be directed by the Commission for the making of the appointment or the filling of the post, shall be taken into account."

Thus, one of the criteria which the second appellant had to take into account when considering whether or not to appoint the respondents to the posts applied for by them was the "suitability" (Afrikaans: "geskiktheid") of each of the respondents. In his answering affidavit second appellant averred -

> "...dat die geskiktheid van 'n aansoeker ook beoordeel word op sy algemene persoonlikheidshoedanighede en optredes wat alle bekende aspekte van sy persoonlikheid en optrede insluit. Hierdie kriteria dek 'n wye veld."

He further dealt at length with annexure M. While conceding that the halls in which the department of Internal Medicine was housed were old and did not conform to the requirements of a modern teaching hospital, that certain of the facilities, such as bathrooms and toilets, could be criticized and that there was overcrowding in certain sectors of the hospital, second appellant in general rejected the allegations in annexure M that nothing had been done by the responsible authorities to alleviate the situation or that the attitude of the authorities was one of indifference and disregard. Second appellant further described in detail what had been done and broadly ascribed the inability to overcome the problems in the department of Medicine to the rapidly increasing population of Soweto (which meant increasing demands for medical and hospital services) and the lack, from time to time, of the public funds necessary

to finance improvements. Second appellant disputed a number of allegations in the letter and, in particular, took exception to the statement that the new R300m hospital to be built alongside the H F Verwoerd Hospital in Pretoria was "mainly for whites". This statement, he said, was untrue: in fact, the extension to the H F Verwoerd Hospital would provide approximately 900 additional beds for black patients, and none for whites. Moreover, this misstatement created the impression that the authorities were guilty of racial discrimination. Second appellant characterized the contents of annexure M as prejudicial to the department of Hospital Services and as being in certain respects defamatory and insulting. It had also caused friction and division as between certain medical personnel and the hospital administration. Because the respondents had made themselves party to the allegations contained in annexure M he considered that they were unsuitable for appointment

in a professional capacity at the hospital. For that reason he turned down their applications.

A major portion of respondents' replying affidavit is devoted to annexure M, to second appellant's criticisms thereof and to a justification of the averments contained in annexure M. This raises a number of factual disputes, which obviously cannot be resolved on the affidavits. This was recognized by Goldstone J, who proceeded to consider the matter on the assumption that second appellant's allegations of fact were correct (see reported judgment p 400 B). I shall do the same, also taking into account facts alleged by the respondents and not disputed by the appellants.

It seems to me, however, that annexure M is really of historical importance only. It explains the reason why second appellant decided not to appoint the respondents to the posts of SHO applied for by them. The real issue

is not whether the averments in annexure M are true or false, nor whether annexure M provided good grounds for second appellant's decision, but rather whether second appellant was entitled to take this decision without giving the respondents an opportunity to be heard. I turn to this issue.

In the founding affidavit and in the replying affidavit it was alleged by the respondents that they were all properly qualified, committed and highly competent doctors; and that, in accordance with a practice which had existed "for decades", they were selected on merit, from a large pool of applicants, for the position of SHO by the heads of the departments concerned, who recommended their appointment to the second appellant. This is not disputed. It was also alleged that in the past it had long been the practice for second appellant to approve the appointment of persons so recommended "as a mere matter

of course". It was pointed out that second appellant did not know applicants personally or what their prospects, plans or preferences were, whereas the head and members of the relevant department did. Accordingly second appellant understandably "always acted formally to confirm an appointment effectively catalysed and perfected by the university authorities". Indeed, members of the medical faculty could not remember a single instance of an application, duly recommended by the departmental head, which had not been so confirmed, save for cases of formal defects in the application, which could be remedied. More particularly, in the case of an SHO, the invariable practice, so it is stated, had always been that his application for re-appointment was automatically confirmed after the expiry of the first six-month period. Save for the occasion giving rise to the present litigation (as far as first and fifth respondents are concerned), this practice had never

been departed from. This, too, is not disputed.

In the respondent's replying affidavit it was also pointed out (and this is not in dispute) that the appointments sought by the respondents -

> "....were not simply casual appointments. They are appointments forming part of the permanent structure of medical administration in South Africa, and are essential components in an evolutionary and hierarchical development of professional graduation in the Provincial Administration pertaining to hospitals. A medical student acquires an academic degree in the expectation and the object of first obtaining employment, experience and skill as a senior house officer, thereafter graduating to the status of a registrar, and thereafter further graduating to the status of a specialist. This kind of progression is carefully structured by the university concerned acting in close co-operation with the hospital administration. No medical student would ever embark upon a medical course of six years on the risk that upon his graduation the question as

> to whether he would ever get a position as an intern, and ever qualifying as a medical practitioner would be dependent entirely on the arbitrary discretion of the second (appellant)."

That this system was a well-established one was stressed in another passage in the affidavit reading -

> "Over a period of at least 30 years graduating medical students are placed into internship through the university, and after a person remains a senior house officer for a period of 18 months, he becomes a medical officer or registrar. There is further progession from that status to other positions."

Respondents also emphasized that upon being taken into employment by the hospital administration "pursuant to this well-established practice and structure of professional progress" they were required to make compulsory pension contributions with a view to receiving a permanent pension

on reaching the age of retirement. If employment were to be prematurely terminated all that the respondents would be entitled to is a return of their capital contributions, plus a nominal amount of interest. Another benefit flowing from employment was membership of a medical aid scheme.

In the founding affidavit and in the replying affidavit there is reference to what is termed a "legitimate expectation". In the founding affidavit it is alleged that all the respondents, because of their qualifications, previous service in the hospital and recommendations from their prospective heads of department, had a legitimate expectation that their appointments would be "confirmed". And in the replying affidavit it is said that respondents' claim to a hearing arises from the fact that the decision of the second appellant refusing confirmation of the respondents' respective appointments affected their legal rights and interests, as well as from the fact that in all

the circumstances they had a legitimate expectation to be heard before their appointments were not confirmed.

Respondents stated furthermore that appointment to the posts for which they had applied and for which they were qualified was crucial to their immediate professional development and that they would be seriously prejudiced in their careers if they were not able to obtain these appointments. In practice, having been found "unsuitable" for appointment by the second appellant, they would not be able to obtain professional employment, and pursue their academic and professional careers, at any other teaching hospital in the Transvaal, and probably in the rest of the country as well. This also does not appear to be in dispute. Indeed, it is of the essence of the appellants' case that the respondents' signature of annexure M established their unsuitability for this professional appointment.

I return now to the question as to what the scope of application of the audi principle is. As I have stated, the classic formulations of the principle refer to decisions prejudicially affecting an individual in his liberty, property or existing rights. In the present case, obviously, the question of liberty does not arise. Nor is it suggested that second appellant's decision not to approve respondents' appointments affected their property. In the Court a quo, however, it was held that the decision undoubtedly prejudicially affected the rights of the respondents (see reported judgment at p 400 I), Goldstone J adding -

> "Not only does the decision deny their appointments, but it also could prejudicially affect their professional careers. A decision that a professional person is unsuitable for a post is potentially of the utmost importance and will, if it remains, be a permanent blot on his good name."

Later in his judgment the learned Judge stated that where

the suitability of an applicant was in issue and an adverse decision had serious consequences to the person concerned, both in relation to his application and in relation to his career, then in the absence of a clear provision to the contrary in the statute, fairness demanded that he be entitled to be heard before he was made to suffer such an adverse decision. Goldstone J further found that the Act did not contain any such provision to the contrary (see reported judgment at p 401 C-E). With reference to the principle of "legitimate expectation" (upon which I will elaborate later), Goldstone J said (reported judgment at p 402 C):

> "In the present case s 10 of the Act obliged the second respondent to have regard, inter alia, to the suitability of the applicants. Their claim to a hearing, before being adversely held unsuitable, arises therefore from a statutory duty and not from a legitimate expectation."

I am not persuaded, with respect, that the second appellant's decision could be said to have prejudicially affected the respondents in their existing rights. Clearly they had no right to be appointed to the posts applied for by them. No doubt, provided that they qualified for the appointment, the second appellant was under a statutory duty, in terms of sec 10(1) of the Act, to consider their applications without favour or prejudice and in the light of the criteria laid down, viz their qualifications, level of training, relative merit, efficiency and suitability; and there was vested in the respondents a correlative statutory right that their applications be so considered. But that, in my view, is as far as it goes. Second appellant's refusal to appoint them, as such, did, therefore not affect an existing right. This brings me to the concept of a legitimate expectation.

The phrase "legitimate expectation" was evidently

first used in this context by Lord Denning MR in the English case of Schmidt and Another v Secretary of State for Home Affairs [1969] 1 All ER 904 (CA), at p 909 C and F. The case concerned a decision by the Home Secretary not to extend the study permits of two aliens who were studying in the United Kingdom. It was contended, inter alia, that the Home Secretary had failed to observe the precepts of natural justice in that he had not given the students a hearing before taking this decision. The contention failed. Lord Denning referred to the decision of the House of Lords in Ridge v Baldwin and Others [1963] 2 All ER 66 (which has proved to be a veritable watershed in modern English administrative law) and stated that the speeches in that case show -

> ".... that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations.

> It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

In the case before the Court Lord Denning held that the students concerned had not had any right, or indeed any legitimate expectation, of being allowed to stay once their permits had expired.

Although in Schmidt's case it was found that there was no scope for the application of the concept of a legitimate expectation, there have been a large number of subsequent decisions in England (including some of the House of Lords) accepting the concept as an integral part of the rules relating to the audi principle. In some of these cases the party claiming the benefit of the principle has been held to have had such a legitimate expectation, in others not. A useful and comprehensive overview and

analysis of the relevant decisions is to be found in an article by Prof. Robert E. Riggs, published in (1988) 36 American Journal of Comparative Law, pp 395 ff. In an epitomical first paragraph to his article Prof Riggs states:

> "Since the landmark decision of Ridge v. Baldwin, handed down by the House of Lords in 1963, English courts have been in process of imposing upon administrative decision-makers a general duty to act fairly. One result of this process is a body of case law holding that private interests of a status less than legal rights may be accorded procedural protections against administrative abuse and unfairness. As these cases teach, a person whose claim falls short of legal right may nevertheless be entitled to some kind of hearing if the interest at stake rises to the level of a 'legitimate expectation.' The emerging doctrine of legitimate expectation is but one aspect of the 'duty to act fairly,' but its origin and development reflect many of the concerns and difficulties accompanying the broader

> judicial effort to promote administrative fairness. As such, it provides a useful window through which to view judicial attempts to mediate between individual interests and collective demands in the modern administrative state."

This appears to be a fair summing up of the situation.

In order to illustrate the nature and scope of "the doctrine of legitimate expectation", as it is sometimes now called (see eg. R v Secretary of State for the Home Department, ex parte Ruddock and others [1987] 2 All E R 518 (QB), at p 528 h), I shall refer briefly to some of the more pertinent and authoritative decisions of the English courts. The first of these is Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) and Others [1971] 1 All ER 1148 (CA). The appellant in that case had been elected by his fellow workers as their shop steward for the ensuing year. By the rules of the respondent trade union the election was

subject to approval by the district committee of the union. The latter held a meeting at which it was decided to refuse such approval. The appellant was not invited to the meeting, nor were reasons given for the committee's decision. The appellant brought an action against the respondent for an order declaring the decision to be invalid. The action failed; and on appeal the decision of the trial judge was affirmed by a majority. The case is of importance and interest for the exposition of the legal principles involved by Lord Denning MR, who gave the dissenting judgment in the Court of Appeal. On the question as to whether the decision of the committee was reviewable he said (at p 1153 h-j):

> "It is now well settled that a statutory body, which is entrusted by a statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other

> hand, or what you will. Still it must act fairly. It must, in a proper case, give a party a chance to be heard:....."

He held further that the same principle applied to certain domestic bodies, which had quite as much power as statutory bodies. He then proceeded (at p 1154 f-h):

> "Then comes the problem: ought such a body, statutory or domestic, to give reasons for its decision or to give the person concerned a chance of being heard? Not always, but sometimes. It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given: see the cases cited in Schmidt v Secretary of State for Home Affairs. But, if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard.

> I go further. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand."

Referring to the appellant's case, Lord Denning said (at p 1155 b-c):

> "Seeing that he had been elected to this office by a democratic process, he had, I think, a legitimate expectation that he would be approved by the district committee, unless there were good reasons against him. If they had something against him, they ought to tell him and give him a chance of answering it before turning him down. It seems to me intolerable that they should be able to veto his appointment in their unfettered discretion."

The concept of a legitimate expectation, as giving a basis for challenging the validity of the decision

of a public body on the ground of its failure to observe the rules of natural justice was given the stamp of approval by the House of Lords in O'Reilly v Mackman and others and other cases [1982] 3 All ER 1124, at pp 1126 j - 1127 a (see also Findlay v Secretary of State for the Home Department and other appeals [1984] 3 All ER 801, at p 830 b-c; Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935, at pp 944 a - e, 949 f - j, 954 e - h; Leech v Parkhurst Prison Deputy Governor; Prevot v Long Larton Prison Deputy Governor [1988] 1 All ER 485, at p 496 d) and by the Judicial Committee of the Privy Council in Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346.

It is clear from these cases that in this context "legitimate expectations" are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis (Attorney-General

of Hong Kong case, supra, at p 350 c). The nature of such a legitimate expectation and the circumstances under which it may arise were discussed at length in the Council of Civil Service Unions case, supra. The following extracts from the speeches of Lord Fraser and Lord Roskill are of particular relevance:

> "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law ..... Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue..... per Lord Fraser at pp 943 j - 944 a." (My emphasis.)

> "The particular manifestation of the duty

> to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had 'a reasonable expectation' of some occurrence or action preceding the decision complained of and that that 'reasonable expectation' was not in the event fulfilled" - per Lord Roskill at p 954 e.

After indicating that the phrases "reasonable expectation" and "legitimate expectation" were to be equated and having expressed a preference for the latter, Lord Roskill continued (at p 954 g) -

> "The principle may now said to be firmly entrenched in this branch of the law. As the cases may show, the principle is closely connected with 'a right to be heard'. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations,..... ...."

The reference in Lord Fraser's speech to "a regular practice" is illustrated, for example, by O'Reilly's case, supra, in which it was stated by Lord Diplock that, although under prison rules remission of sentence was not a matter of right but of indulgence, a prisoner had a legitimate expectation based upon "his knowledge of what is the general practice" that he would be granted the maximum remission of one-third if by that time no disciplinary award of forfeiture of remission had been made against him. In public law, said Lord Diplock (see pp 1126-7)-

> "...such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted outwith the powers conferred on it by the legislation under which it was acting; and such grounds

would include the board's failure to observe the rules of natural justice: which means no more than to act fairly towards him in carrying out their decision-making process, and I prefer so to put it."

In the case of McInnes v Onslow Fane and another [1978] 3 All ER 211 (Ch) (an application for a boxer's manager's licence, which was refused by the boxing board of control) Megarry V-C distinguished three types of decisions which may be encountered when the court is asked to intervene :

(1) decisions in forfeiture cases, ie where the decision takes away some existing right or position, as where a member of an organization is expelled or a licence is revoked;

(2) decisions in application cases, ie the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organization or a licence to do certain

acts; and

(3) decisions in expectation cases, which differ from the application cases only in that the applicant -

> "...has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority: ...." (at p 218 c).

McGarry V-C continued (p 218 d- f):

> "It seems plain that there is a substantial distinction between the forfeiture cases and the application cases. In the forfeiture cases, there is a threat to take something away for some reason; and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges (which, in Ridge v Baldwin, Lord Hodson said were

three features of natural justice which stood out) are plainly apt. In the application cases, on the other hand, nothing is being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges. Instead, there is the far wider and less defined question of the general suitability of the applicant for membership or a licence. The distinction is well-recognised, for in general it is clear that the courts will require natural justice to be observed for expulsion from a social club, but not on an application for admission to it. The intermediate category, that of the expectation cases, may at least in some respects be regarded as being more akin to the forfeiture cases than the application cases; for although in form there is no forfeiture but merely an attempt at acquisition that fails, the legitimate expectation of a renewal of the licence or confirmation of the membership is one which raises the question of what it is that has happened to make the applicant unsuitable for the membership or licence

for which he was previously thought suitable."

(See also R v Secretary of State for the Environment, ex parte Brent London Borough Council and others [1983] 3 All ER 321 (QB), at p 354 f - h).

As these cases and the quoted extracts from the judgments indicate, the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken. As Prof. Riggs puts it in the article to which I have referred (at p 404) -

"The doctrine of legitimate expectation is construed broadly to protect both

substantive and procedural expectations."

In practice the two forms of expectation may be interrelated and even tend to merge. Thus, the person concerned may have a legitimate expectation that the decision by the public authority will be favourable, or at least that before an adverse decision is taken he will be given a fair hearing. And in passing, I must say, with respect, that I do not agree with the statement of Goldstone J in Mokoena and Others v Administrator, Transvaal 1988(4) SA 912 (W), at p 918 E to the effect that legitimate expectation refers to the rights sought to be taken away and not to the right to a hearing.

A frequently recurring theme in these English cases concerning legitimate expectation is the duty on the part of the decision-maker to "act fairly". As has been pointed out, this is simply another, and preferable, way of saying that the decision-maker must observe the principles of natural justice (see O'Reilly's case, supra, at pp 1126 j - 1127 a; Attorney-General of Hong Kong case, supra, at p 350 g - h; Council of Civil Service Unions case, supra at p 954 a - b). Furthermore, as Lord Roskill explained in the last quoted case, the phrase, "a duty to act fairly", must not be misunderstood or misused. It is not for the courts to judge whether a particular decision is fair. The courts are only concerned with the manner in which the decisions was taken and the extent of the duty to act fairly will vary greatly from case to case. Many features will come into play including the nature of the decision and the relationship of those involved before the

decision was taken (see p 954 b - c); and a relevant factor might be the observance by the decision-maker in the past of some established procedure or practice. It is in this context that the existence of a legitimate expectation may impose on the decision-maker a duty to hear the person affected by his decision as part of his obligation to act fairly. (See p 954 e; cf Lloyd and Others v McMahon [1987] 1 All ER 1118 (HL), at p 1170 f - g).

Another feature of the modern English administrative law which emerges from a study of the aforementioned cases, and others, is that the old classification of decisions into judicial, quasi-judicial and administrative no longer seems to have any relevance in this sphere. In R v Gaming Board for Great Britain, ex parte Benaim and another [1970] 2 All ER 528 (CA), Lord Denning MR stated that the "heresy" to the effect that the principles of natural justice apply only to judicial proceedings, and

not to administrative proceedings, was "scotched" in Ridge v Baldwin. This was confirmed by Lord Diplock in O'Reilly's case, supra, at p 1130 a, and by Lord Oliver in Leech's case, supra, at p 505 e, where the latter stated that -

> "....the susceptibility of a decision to the supervisory jurisdiction of the court does not rest on some fancied distinction between decisions which are 'administrative' and decisions which are 'judicial' or 'quasi-judicial'."

I turn now to our law. In recent years there have been a number of cases in provincial divisions in which the traditional scope of the principles relating to the observance of natural justice (in particular the precept audi alteram partem) has been extended to decisions affecting a person who has no existing right, but merely a legitimate expectation (see Everett v Minister of the Interior 1981(2) SA 453 (C), at pp 456 - 7; Langeni and

Others v Minister of Health and Welfare and Others 1988(4) SA 93 (W), at p 96 B - 98 A; Mokoena's case supra at pp 918 C - 920 B; Lunt v University of Cape Town and Another 1989(2) SA 438 (C), at pp 447 D - 448 D; cf Sisulu v State President and Others 1988(4) SA 731 (T), at p 737 G - H). This extension has taken place on the persuasive authority of the English decisions referred to above. In the matter of Castel NO v Metal and Allied Workers Union 1987(4) SA 795 (A) this Court had occasion to discuss the legitimate expectation principle. The case concerned the refusal by the chief magistrate of Durban to grant permission, in terms of sec 46(3) of the Internal Security Act 74 of 1982, for the holding of an open-air gathering. The decision was attacked by the applicant (a trade union) on the ground, inter alia, that the chief magistrate had failed to observe the audi principle. This Court held that the decision did not affect any right of the appli-

cant's, nor did it entail legal consequences to it, and that accordingly, on the authority of the majority judgment in Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (A), the audi principle did not apply. The Court (per Hefer J A) went on to consider an argument based on legitimate expectation (at p 810 E - 811 A):

> "By urging upon us the great inequity which the principle in Laubscher's case may, in his submission, bring about (and has brought about in later cases) and the pressing need for legal reform, applicant's counsel invited us to extend the principle in order that relief may be granted in cases where an administrative decision, which does not affect a person's rights but nevertheless involves serious consequences to him, is taken without observance of the audi alteram partem rule. Such a result may be achieved, it was suggested, by adopting the approach presently in vogue in the Courts in England and certain other countries which affords relief in cases where there is no pre-existing right but the person concerned has what is

sometimes referred to as a 'legitimate expectation'. (Wade Administrative Law 5th ed at 464-5. An illustrative discussion of the topic appeared in 1987 SALJ 165 in an article 'Legitimate Expectation and Natural Justice: English, Australian and South African Law' by John Hlophe.)

Counsel's invitation must be declined. The majority judgment in Laubscher's case has been consistently followed and applied in a long line of decisions, including several in this Court. I am not unmindful of the serious and, in certain respects, justified criticism which has been levelled at some of the decisions and at the principle involved. (See eg Baxter Administrative Law at 577 et seq; John Hlophe's article supra; Taitz 'The Application of the Audi Alteram Partem Rule in South African Administrative Law' 1982 THRHR 254.) It may well be that there is indeed a need for legal reform. But it would be idle to explore the possibility of reform in the present case. Even if the 'legitimate expectation' approach were to be adopted, there is no room for its application here. Applicant's

> counsel submitted that the applicant had a legitimate expectation that it would receive a fair hearing, and that its application would not be refused on grounds which it had not been afforded an opportunity to refute. There is, however, no factual basis for such a submission. Unlike the English and Australian cases on which counsel relied, nothing had happened before the application for authority was submitted and nothing happened thereafter which could have caused the applicant to entertain such an expectation; there is not even an allegation in its affidavits that it in fact did entertain it. I am by no means sure that this case would in England be classified as a 'legitimate expectation' case. There is nothing in the case which calls for an extension of the accepted principle."

I do not read these remarks as closing the door upon an extension of the existing grounds for applying the audi principle to include the case where a legitimate expectation is shown to have existed. As the above-quoted

passage from the judgment emphasizes, there was in that case no factual basis for such a legitimate expectation. Nor do I think that Laubscher's case, supra, poses an insuperable obstacle to such extension. In that case, which was decided on exception, the appellant had been refused the written permission which in terms of sec 24(1) of the Native Trust and Land Act 18 of 1936 he required to enter upon Trust property. He challenged the validity of the refusal, inter alia, on the grounds that the authority concerned had failed to observe the audi principle. This ground was ordered to be struck out by the Judge of first instance and his decision was upheld on appeal. Schreiner JA, delivering the majority judgment, said of the appellant at p 549 E - F):

> "He clearly had no antecedent right to go upon the property and the refusal did not prejudicially affect his property or his liberty. Nor did it affect any legal right

> that he already held. It can be said to have affected his rights only in the sense that it prevented him from acquiring the right to go on to the property; to the same extent but no further it may be said to have involved legal consequences to him."

The question as to whether a person who had no antecedent right, but an antecedent legitimate expectation, could lay claim to the benefit of the audi principle did not arise for decision. This is not surprising seeing that at that stage the doctrine of legitimate expectation had not yet been conceived in the land of its birth. Moreover, since the case was decided on exception, it is not possible to say whether the facts would have justified the application of this doctrine, as it has been developed in English law.

The question which remains is whether or not our law should move in the direction taken by English law and give recognition to the doctrine of legitimate expectation, or some similar principle. The first footsteps

in this direction have already been taken in certain provincial divisions (see the cases quoted above). Should this Court give its imprimatur to this movement; or should it stop the movement in its tracks?

In the Council of Civil Service Unions case, supra, at p 953 h Lord Roskill observed that since about 1950 as a result of a series of judicial decisions in the House of Lords and in the Court of Appeal there had been "a dramatic and, indeed, radical change in the scope of judicial review"; and that this change had been described "by no means critically, as an upsurge of judicial activism". One aspect of this change in the scope of judicial review was, of course, the evolution of the legitimate expectation principle. And it was evolved, as I read the cases, in the social context of the age in order to make the grounds of interference with the decisions of public authorities which adversely affect individuals co-extensive

with notions of what is fair and what is not fair in the particular circumstances of the case. And it is of interest to note that likewise in Australia (see Cunningham v Cole and Others (1982-3) 44 ALR 334, where the judgment contains an extensive review of the authorities; and the discussion in (1985) 59 ALJ 33) and New Zealand (see Chandra v Minister of Immigration [1978] 2 NZLR 559) it has been found necessary, or at any rate desirable, to extend the scope of judicial review to include cases of legitimate expectation.

In my opinion, there is a similar need in this country. There are many cases which one can visualize in this sphere - and for reasons which I shall later elaborate I think that the present is one of them - where an adherence to the formula of "liberty, property and existing rights" would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which ap-

peared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration.

In general it is probably correct to say that

a person who applies for appointment to a post is not entitled to be heard before the authority concerned decides to appoint someone else or to make no appointment. The present case, however, exhibits certain distinctive features which, in my view, take it out of the general rule. The first feature is that this is no ordinary appointment. As the evidence indicates, the appointment of a young doctor to the post of SHO is a rung, and an essential one at that, in the ladder of professional progress in the hospital hierarchy. Refusal to appoint an applicant to such a post constitutes a set-back to his professional career; and, where the ground of refusal is unsuitability, also an impugnment of his professional reputation. The second, and perhaps more significant, feature is the practice which had existed for decades and in terms of which an application for the post of SHO carrying the recommendation of the departmental head had invariably, and as a matter of mere

give the respondent a fair hearing before he took his decision. In other words, the audi principle did apply.

Second appellant denied respondents their appointments as SHO because of their signature of annexure M. I shall assume, in appellants' favour, that his decision was taken pertinently with reference to the criterion of suitability and was not a punitive action. Nevertheless because he ignored the audi principle second appellant's decision was, in my opinion, fatally flawed. In the circumstances of this case his omission to give the respondents a hearing and to apprise them of the ground upon which he was contemplating a rejection of their applications constituted a failure on his part to observe the precepts of natural justice or, in other words, a failure to act fairly.

It was argued by appellants' counsel that the second appellant's decision was neither judicial nor quasi-judicial, but purely administrative in nature; and that,

formality, been granted by the Director of Hospital Services. And in the case of first and fifth respondents there is the further feature that the practice had always been to extend automatically the incumbency of a post as SHO, when applied for. (I shall, however, leave out of account the question of pension rights.)

These features, taken in conjunction with one another, constituted good ground, in my opinion, for each of the respondents having a legitimate expectation that once his or her application for the post of SHO had been recommended by the departmental head concerned, second appellant's approval of the appointment would follow as a matter of course; and/or a legitimate expectation that in the event of second appellant contemplating a departure from past practice, in the form of a refusal to make the appointment for a particular reason - especially where that reason related to suitability - the second appellant would

therefore, the audi principle, and generally the requirements of natural justice, did not apply. It is true that our courts have used the classification of acts or decisions into judicial or quasi-judicial on the one hand and purely administrative on the other hand in order to determine whether the actor or decision-maker was obliged, when exercising his powers, to observe the rules of natural justice, and more particularly the audi principle. As has been pointed out by, amongst others, Prof M Wiechers Administratiefreg 2 ed, p 141, this classification and its application in administrative law to questions such as the justiciability of acts or decisions on the ground of a failure to observe the dictates of natural justice appear to have been derived from English law. English law itself has now,as I have indicated, discarded it. Furthermore, there have been warnings in the past by our courts against a too-ready adoption of this classification as a solution for

a particular legal problem. In the case of Pretoria North Town Council v Al Electrical Ice-Cream Factory (Pty) Ltd 1953 (3) SA 1 (A) Schreiner JA stated at p 11 A-C:

> "The classification of discretions and functions under the headings of 'administrative', 'quasi-judicial' and 'judicial' has been much canvassed in modern judgments and juristic literature; there appears to be some difference of opinion, or of linguistic usage, as to the proper basis of classification, and even some disagreement as to the usefulness of the classification when achieved. I do not propose to enter into these interesting questions to a greater extent than is necessary for the decision of this case; one must be careful not to elevate what may be no more than a convenient classification into a source of legal rules. What primarily has to be considered in all these cases is the statutory provision in question, read in its proper context."

In a dissenting judgment delivered in the case of South

African Defence and Aid Fund and Another v Minister of Justice 1967 (1) SA 263 (A) Williamson JA said of this classification (at p 278 C-D):

> "I, however, fear the rigidity which such classification and labelling may induce. I appreciate the value, in its proper sphere, of a scientific analysis and subdivision under proper nomenclature of the applications in practice of a legal principle. I think, however, it is possible that, in the case of the basic principle of 'fair play' under consideration, an undue limitation may be placed upon its scope by an attempt to define its applicability entirely by means of type or class tests. The essential feature in each instance is, I think the true meaning and effect, in the surrounding circumstances, of the enabling statutory provision."

And in Oberholzer v Padraad van Outjo en 'n Ander 1974 (4) SA 870 (A) Rumpff CJ stated (at p 875 in fin - 876 B):

> "Die Hof a quo het bevind dat die funksie

> van die Padraad 'administratief' was en dat dit derhalwe nie nodig was om appellant 'n geleentheid te gee om op die bewerings van mev Conradie te antwoord nie. Hierdie etikettering van 'n funksie, sonder meer, is m.i. gevaarlik en kan lei tot oorvereenvoudiging van die vraag of geregtigheid in besondere omstandighede geskied het of nie. Die doel, bewoording en samehang van wetgewing wat ter sprake is en die aard van die belang van 'n persoon wat deur optrede deur sodanige wetgewing geraak word, moet noukeurig oorweeg word....."

(See also remarks of Goldstone J in the more recent case of Langeni and Others v Minister of Health and Welfare and Others, supra, at p 96 B-G.)

One of the difficulties in applying this classification is to determine precisely what is meant by the terms "quasi-judicial" and "purely administrative" (see the discussion of this in Baxter Administrative Law, pp 344-8, 575-6). In the Defence and Aid case, supra, Botha JA,

delivering the majority judgment, said (at p270 B-D) -

> "It is quite clear from a long series of cases in this Court..... that, apart from other possible requirements, the incorporation of the maxim audi alteram partem can only be implied where a -
>
> > 'statute empowers a public official to give a decision prejudicially affecting the property or liberty of an individual'
>
> or, what amounts to the same thing, where a statute empowers a public official to exercise, in relation to the property or liberty of an individual, quasi-judicial functions."

This dictum appears to define "quasi-judicial" in terms of the effect which the decision has upon the individual concerned. On this basis a classification as quasi-judicial adds nothing to the process of reasoning: the court could just as well eliminate this step and proceed straight to the question as to whether the decision does

prejudicially affect the individual concerned. As I have shown, traditionally the enquiry has been limited to prejudicial effect upon the individual's liberty, property and existing rights, but under modern circumstances it is appropriate to include also his legitimate expectations. In short, I do not think that the quasi-judicial/purely administrative classification, relied upon by counsel, is of any material assistance in solving the problem presently before the Court.

For these reasons I agree with the conclusion reached by the Judge a quo to the effect that the decision of the second appellant to turn down the applications of the respondents for the posts of SHO at the hospital was invalid by reason of his failure to accord the respondents a fair hearing before taking the decision.

This brings me to the procedural point in limine raised by the appellants, viz. the failure by the respon-

dents to follow the procedure laid down by sec 34 (2) of the Act. The relevant portions of sec 34 read as follows:

> "(1) No legal proceedings shall be instituted against the State or any body or person in respect of any alleged act in terms of this Act, or any alleged omission to do anything which in terms of this Act should have been done, unless.....
>
> (2) No such legal proceedings shall be commenced before the expiry of at least one calendar month after a written notification, in which particulars as to the alleged act or omission are given, of intention to bring those proceedings has been served on the defendant."

It is common cause that no written notification such as that referred to in sec 34(2) was given in the present case. Goldstone J held, however, that the requirements of sec 34(2) did not apply to the legal proceedings brought by the respondents in that they did not rely for their cause of action on any act in terms of the Act or any omission

to do anything which should have been done in terms of the Act (see reported judgment at p 405 C). It was argued on appeal that in thus holding the Judge a quo erred.

Sec 34(2) undoubtedly hampers the ordinary rights of an aggrieved person to seek the assistance of the courts; and indeed, as Goldstone J points out (reported judgment p 405 D), it confers no discretion upon the court to truncate the period of notice in exceptional circumstances. The subsection should consequently be restrictively construed and not extended beyond its expressed limits (see Avex Air (Pty) Ltd v Borough of Vryheid 1973 (1) SA 617 (A), at p 621 F).

The respondents' cause of action is based upon the second appellant's omission to give them a fair hearing before deciding to turn down their applications. The right to a fair hearing and the corresponding obligation to afford it derive from the common law (see Attorney-General, Eastern

Cape v Blom and Others 1988 (4) SA 645 (A), at p 662 F-I; Staatspresident en Andere v United Democratic Front en 'n Ander 1988 (4) SA 830 (A), at pp 871 E - 872 E). In the circumstances I do not think that respondents' application was blocked by the provisions of sec 34(2). If there be any ambiguity or uncertainty about the meaning of the sub-section, then a restrictive approach to its interpretation would tend to support this conclusion.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT

HOEXTER JA)
E M GROSSKOPF JA)
KUMLEBEN JA) CONCUR
F H GROSSKOPF JA)