

Error of fact

The recognition of error of fact as a ground for judicial review in South African administrative law

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Introduction

Our administrative law is undergoing a seismic shift. Error of fact is emerging as an independent ground of judicial review. This is despite the fact that the Promotion of Administrative Justice Act 3 of 2000 (PAJA), intended to 'cover the entire field' of administrative law, excluded error of fact from the list of grounds for judicial review. But when is an error, in fact, an error of fact? And will recognising this not result in the obliteration of the traditional distinction between appeals and reviews? I wish to explore these two questions, by reference to recent judicial pronouncements.

The recognition of error of fact as a separate head for judicial review is ground-breaking. But it is by no means novel. Under the common law, administrative law recognised error of fact as a ground of review in two distinct circumstances. The first was where error of fact was evidence of failure to apply the mind properly to the issue before the administrative decision-maker. The second was where error of fact led a decision maker to exceed the scope of her jurisdiction. Cases such as *De Bruyn v Director of Education* 1934 AD 252 exemplify the latter category of error of fact. In that case the administrator was empowered to allocate children to particular schools according to their home language; errors in determination of that language resulting in incorrect allocations to the schools were regarded as error of fact leading to the misconception of jurisdiction of the administrator, and could accordingly be set aside.² Cases such as this led to the terminology of 'jurisdictional facts', by which it was intended to mean that only the facts relevant to the jurisdiction of an administrator could ground judicial review. Errors of fact committed *within* jurisdiction did not justify judicial interference.

The 'jurisdictional facts' terminology waxed for a while. But it soon waned. The reason was the scope for reviewing mistakes of fact going to jurisdiction where the powers were discretionary. Could the decision of an administrator who made a mistake of fact on an issue *within* his discretion be reviewed and set aside on that ground alone? This was considered in *SA Defence & Aid Fund v Minister of Justice*³. Corbett J (as he then was) held that '[w]here the statute itself has entrusted to the repository of the power, sole and exclusive function to determining whether in its opinion' a particular fact or state of affairs existed and it made such determination, such decision was not reviewable in a court of law.⁴ So, a further distinction was drawn between discretionary facts and non-discretionary facts. An administrator entrusted to make discretionary decisions could not be reviewed on grounds of error of fact if she acted within her jurisdiction. But there was a further problem. The legislature could insulate a broad category of decisions from review by simply inserting in legislation the words '*in his or her opinion*'. Once this was done, it could be argued that an error of fact as to whether a particular state of

affairs existed was within the discretion of an administrative decision-maker and therefore not reviewable. Lawrence Baxter noted that the jurisdictional facts terminology led to arbitrary results, making it difficult to distinguish between reviewable jurisdictional facts and non-jurisdictional facts which were not reviewable. He proposed that the entire distinction should be dispensed with altogether.⁵

Lurking behind the confusion and arbitrariness alluded to by Baxter was the administrative lawyer's original nightmare: the obliteration of the distinction between review and appeal. So, error of fact never evolved into a self-standing ground of judicial review. In the instances where it received juridical recognition, it was as a variant of error of law (such as jurisdiction) or failure to apply one's mind to an issue. But that is all in the past. A trilogy of recent rulings from the Supreme Court of Appeal (SCA) now shows the potential for error of fact to mature into an independent ground of review. This is a tantalizing prospect. But behind it lurks the danger of erasing the traditional distinction between appeals and reviews. I shall suggest that this danger can be averted by calibrating and applying a clear set of rules as to when an error of fact will lead to the quashing of administrative action by means of judicial review. It is necessary to recapitulate the decisions which have introduced error of fact into our law on judicial review.

Introducing error of fact: *Pepcor Retirement Fund & Another v Financial Services Board & Another*

*Pepcor Retirement Fund & Another v Financial Services Board & Another*⁶ was the first decision where a South African court recognised error of fact as an independent ground of judicial review. The facts were these. In terms of section 14 of the Pension Funds Act 24 of 1956, the Registrar of the Pension Funds is empowered to approve the transfer of a business of a pension fund to another. An application was made for the transfer of the business of a pension fund to another pension fund. This was approved by the Registrar. At the time the application was made, the Registrar was advised by an actuary of the applicant fund that its funding level before and after the transfer was 137%. On appeal, it was common cause that the correct funding level was 151% before the transfer and 606% after the transfer. The method for the calculation of the funding levels had been criticized by the court *quo* as being arbitrary and indefensible, a criticism endorsed by the Supreme Court of Appeal. At the time of the approvals for the transfer, the Registrar was ignorant of the correct funding levels, which had resulted from misstatements by the actuary. The validity of the decision to approve the transfer was subsequently challenged. In argument on appeal, it was accepted

that the approvals fell within the jurisdiction of the Registrar. The issue was whether the errors of fact – the approval based on incorrect facts about the funding levels – could ground the review.

Cloete JA, writing for a unanimous court, recognised that material error of fact was not an independent ground of review in classical administrative law in South Africa. Having regard to the doctrine of legality, a founding value of the Constitution, he considered that material error of fact had to be an independent ground of review:

'In my view a material mistake of fact should be a basis upon which a court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of the fact material to the decision and which therefore should have been before the functionary, the decision should ... be reviewable ... inter alios the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decision in *Fedsure, SARFU and Pharmaceutical Manufacturers* requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, i.e. on the basis of the true facts; it should not be confined to cases where the common law would recognise the decision as *ultra vires*.'

On the facts, Cloete JA noted that the Registrar was misled on a fact material to his decision.⁷ The converse - although not explicitly stated in the ruling – was that had the Registrar been aware of the correct facts regarding the funding levels, he would have refused the application. Cloete JA was cognisant of the inherent dangers in the recognition of error of fact as a separate ground for review – the potential to eliminate the distinction between review and appeal. He added a caveat:

'Where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary ..., it would not be possible to review and set aside its decision merely because the reviewing court considers that the functionary was mistaken either in its assessment of what facts are relevant, or in concluding that the facts exist.'

This statement might strike one as contradictory in the context of the judgment, read as a whole. Earlier, it will be recalled, it was accepted that the recognition of material error of law was not dependent on jurisdiction. On the facts it had been held that the Registrar had acted *within* jurisdiction. The caveat, it can be said, diminishes the significance of the central part in the reasoning of the court. It renders material errors of fact dependent on jurisdiction. But as we shall see in later judgments, Cloete JA clarified his central thesis: material error of fact is an independent ground of review; it is separate from jurisdiction.

Developments in the United Kingdom

Shortly after the *Pepcor* decision, the Court of Appeal in the United Kingdom delivered an important judgment also departing from the traditional approach there, where error of fact was not

regarded as a separate head of review. In *E v Secretary of State for Home Department*,⁸ the Court of Appeal found that error of fact could be a basis for judicial review. The facts were that two foreign nationals, one from Egypt and another from Afghanistan, had fled their respective countries seeking asylum in the United Kingdom on the ground that they faced persecution in their countries of origin on the ground of their political and religious beliefs. The immigration appeal tribunal, a body responsible for asylum claims, rejected their applications, noting that no credible evidence existed that they faced persecution in their countries of origin. New evidence with a material bearing on the decision of the tribunal emerged subsequent to the handing down of the decision by the tribunal, which justified the applications for asylum. It was argued on behalf of the appellants at the Court of Appeal that the new evidence demonstrated that the tribunal's decision in each case was mistaken and that such mistake could provide grounds for the setting aside of the decision.

The Court of Appeal, having considered the historical treatment of error of fact in the United Kingdom, noted that such a question had 'never received a decisive answer from the courts.'⁹

The court held:

'In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in cooperating to achieve the correct results. Asylum law is undoubtedly such an area. Without seeking lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontested and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) in the tribunal's reasoning.'¹⁰

On the facts, the court found it was wrong for the tribunal to refuse to entertain new evidence which came to its knowledge prior to its announcing its decision, when such evidence would have been material to the outcome of its deliberations. Accordingly, it allowed the appeal and directed the tribunal to hold a fresh enquiry, taking into account the new evidence.

These developments did not go unnoticed in the academic community. Christopher Forsyth and Emma Dring published an article in which they regarded the recognition of error of fact as a separate head of review as representing 'the final frontier' – 'the last step in the development of classical administrative law.' It also represented, the authors noted, the emergence of classical administrative law in a simplified and clear form, ensuring the accountability of administrative decision-makers to the law established over all matters for which they would be accountable.¹¹

Forsyth and Dring noted that the decision in *E v Secretary of State for the Home Department* broke new ground. It identified error of fact as a new ground of judicial review. Perhaps, conscious of the necessity to maintain the difference between appeals and review, the authors stated:

'It is submitted that, ultimately, the suggestion that the recognition of this new ground of review destroys the distinction between review and appeal rests on a misunderstanding of the

nature of an administrative decision. An administrative decision-maker may need to make various findings of law (which he must get right) and he may also need to make findings of fact (which it is submitted he must also get right), but then the decision-maker has to exercise his judgment. This is his realm of autonomy in which he is free to decide as his judgment ordains without any judicial intervention. For so long as the power to review on the ground of error of fact does not intrude into that area of judgment, the distinction between merits and review remains.'

Although the authors recognised that the recognition of error of fact as a ground of review narrowed the scope of decision making by administrators, they noted that this was a positive development. The principal reason for this view was that the recognition of error of fact as a ground of review heralded the arrival of the final stage in the development of classical administrative law. Administrative law, they contended, was now infused with human rights law. This added the requirement to ensure accountability of administrative decision-makers, not simply with regard to the traditional administrative law grounds of review such as *ultra vires* and procedural fairness, but also in relation to 'all elements' of the decision.

Further developments in South African law

The theme of the recognition of error of fact as a ground of review has been taken up in two judgments by the Supreme Court of Appeal. In *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman of the State Tender Board v Snell Digital (Pty) Ltd & Others*¹² Plasket AJA endorsed error of fact as a ground of review. That case concerned a decision of a tender board to blacklist a company on the ground that it had submitted inaccurate information in its application form. The 'inaccurate **information**' pertained to the date when its directors were appointed to its board. The tender board had found that the directors in question had been appointed *after* the closing date of the tender submission. The facts that were found to exist by the Supreme Court of Appeal were that the directors in question had been appointed on 20 January 2000, *prior* to the closing date of the tender. As such the tender board made its decision on the basis of incorrect facts.

Relying on the *Pepcor* judgment, Plasket AJA found that the decision by the tender board was based on an error of fact and on that basis reviewable. He held:

'The STB erred factually when it concluded that the second to sixth respondents had been appointed on 11 February 2000, after the tender had been submitted. If the STB had taken its decision based on the proper facts it could not have concluded that the respondents had made fraudulent misrepresentations to it. Its factual error was material as it was the direct cause of the decision to blacklist the respondents.'¹³

Although it is correct that Plasket AJA set aside the decision on the basis of irrationality and unlawfulness, it is nevertheless significant that he found that error of fact was an independent basis for the setting aside of the decision. In his judgment, he added a further point – 'materiality'. He found that the incorrect facts relied upon by the tender board were material because they constituted the basis for the decision, an important limitation to the kind of error of fact which will justify judicial review. A fact

which has no bearing on the outcome will not be regarded as material.

Ten years after *Pepcor*, Cloete JA returned to the topic of errors of fact and judicial review. In *Dumani v Nair & Another*¹⁴ errors of fact were considered in the context of the exercise of disciplinary powers. In this case, a magistrate had been found guilty at an internal disciplinary enquiry and a recommendation had been made for his removal from office. He challenged the decision on the grounds that his removal had been predicated upon material misdirections of fact, entitling the court to review the convictions and to reconsider the matter in its entirety. It was accepted by the Supreme Court of Appeal that an error of fact had occurred in relation to the manner in which the evidence was understood and evaluated by the disciplinary committee. The Supreme Court of Appeal made two vital findings. First, it narrowed the scope of a *fact* which could be a ground of judicial review to a fact which was 'established in the sense that it is uncontroversial and objectively verifiable.'¹⁵ The second was that even if there had been a misdirection by the disciplinary committee with regard to the manner in which the evidence was evaluated, that would not result in the convictions being reviewable on the ground of material error of fact.

Conclusion

The recognition of error of fact as an independent ground for review represents the coming of age of our administrative law. By introducing this ground of review, our courts are taking a further step away from the era where administrative law was a 'depressing area of South African law'.¹⁶ Administrative law is finally catching up with another branch of our law – constitutional law.¹⁷ By recognising error of fact as a ground of review, administrative law can connect with constitutional law through the constitutional principle of accountability. Our courts can ensure that administrative functionaries account, not simply for the process by which decisions are made or their powers are exercised, but in regard to all material elements of the decisions and the content of the decisions. There is no reason, premised on principle, why administrative action must be insulated from scrutiny on the ground of material errors of fact. The principle of separation of powers has often been invoked in circumstances such as this; it has often been suggested that recognising error of fact as a ground for review will violate the principle of separation of powers. But that invocation is mistaken. Judicial review, for error of fact, is concerned not with decisions taken by the legislature or the executive, whose office can be linked to the exercise of democratic will. The decisions under discussion are limited to administrative action. They are not concerned with executive or legislative action. It is correct that there are pragmatic considerations, connected to administrative efficiency of the State, why our courts must, at times, show deference to decisions of administrative functionaries. These include matters of policy and expertise. The problem is that we often elevate such concerns to matters of constitutional principle. But we should not. As long as it is recognised that the judicial unwillingness to set aside administrative action is based on pragmatism and the protection of the public interest, rather than the principle of separation of powers, there should be no threat either to the public interest or to foundational constitutional principles.

But the emergence of error of fact as a ground for review

carries with it an inherent danger. Unless carefully managed, it will finally abolish the distinction between appeals and reviews. This is probably one of the reasons the legislature made no provision for errors of fact when PAJA was enacted. I propose that the judgments surveyed in this article show that the distinction between reviews and appeals can be maintained if error of fact is confined to the following circumstances:

- (a) The error of fact must be capable of objective determination. But what does this mean? I suggest that this category can refer to two scenarios. The first is that scenario in *Dumani v Nair* where the primary function of an adjudicative body is the resolution of conflicting versions of evidence. In this category, an error of fact must relate to evidence produced, that has not been properly challenged or answered. In this sense, the evidence which is left unchallenged can be regarded as objectively verifiable. But this must not be confused with a mistake committed in the *evaluation* of the evidence or the weight to be given to a particular type of evidence. The second category of objectively verifiable facts consists of a set of circumstances which must exist before a body can be said to exercise its powers. Take, for instance, a statute which confers benefits to persons who reach a particular age (say, 60) for old age pensions. So an administrator who rejects an application for an old age pension on the ground that a person is not 60 when the true facts are that she is 60 commits a reviewable error of fact of the other requirements discussed here are met:
- (b) A distinction must be drawn between the *findings* of fact and the *evaluation* of the established facts. The findings of fact must correlate to the correct facts. An administrator cannot find, for instance, that a person is younger than 60, when in fact he is 60 or older. However, the manner in which she evaluates the correct facts must be an area of autonomy, free from judicial interference. This can happen, for instance, where two witnesses present mutually destructive versions and an administrative body, such as the Magistrates Commission, accepts one version and rejects the contrary version. The mere fact of the rejection of a version – even on factually incorrect grounds – should not be enough to warrant judicial interference.
- (c) A final threshold question should be materiality. A distinction should be drawn between a fact which is *relevant* and a fact which is *material*. Relevant facts are not necessarily material facts. On the other hand, all material facts are relevant. Relevance is easy to establish, in the sense that a fact is relevant if it pertains to the decision at issue. On the other hand, a material fact should be confined to a fact which is determinative of the outcome of a decision. To be clear, the mere fact that a decision-maker has omitted a relevant fact or taken into account an irrelevant fact must not be grounds for review for error of fact. It is only when an excluded fact or included fact is determinative of the outcome that judicial review ought to be granted on grounds of error of fact. There is a further point to be made. The mere fact that a fact is relevant to the outcome should also not be sufficient. It must be demonstrated that the fact in issue would have *changed* the outcome.

These three elements to material error of fact must co-exist. In the absence of one element, a court should not find that a material

error of fact existed, justifying interference. To do otherwise is to blur the distinction between appeals and reviews, rendering our administrative law a failed science. **A**

Endnotes

- ¹ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 95.
- ² Lawrence Baxter *Administrative Law* p 459.
- ³ 1967 (1) SA 31 (C).
- ⁴ At 34-35.
- ⁵ Lawrence Baxter *Administrative Law* p 459-460.
- ⁶ [2003] 3 All SA 21 (SCA).
- ⁷ At para 50.
- ⁸ [2004] EWCA Civ.49 (2 February 2004).
- ⁹ At para 44.
- ¹⁰ At para 66.
- ¹¹ Christopher Forsyth and Emma Dring 'The Final Frontier: The Emergence of Material Error of Fact as a Ground for Judicial Review' in Christopher Forsyth, Elliot, Swati Jhaveri, Michael Ramsten and Anne Scully-Hill (eds) (2010) 45 *Effective Judicial Review: A Cornerstone of Good Governance* 260.
- ¹² 2012 (2) SA 16 (SCA).
- ¹³ At para. 36.
- ¹⁴ 2013 (2) SA 274 (SCA).
- ¹⁵ At para. 32.
- ¹⁶ As described by Barry Dean in 'Our Administrative Law: A Dismal Science?' 1986 *SAJHR* 164.
- ¹⁷ It will be recalled that in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) Chaskalson P (as he then was) recognised the constitutional foundations of modern administrative law in South Africa. Administrative law, he noted, is 'built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them'.



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