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NO. 4 OF 2015

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COUNTY ASSEMBLIES FORUM (CAF)
P. O. Box 73552 - 00200,
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FAIR ADMINISTRATIVE ACTION

ARRANGEMENT OF SECTIONS

PART I – PRELIMINARY

Section

1. Short title
2. Interpretation

PART II – FAIR ADMINISTRATIVE ACTION

3. Application
4. Administrative action to be taken expeditiously, efficiently, lawfully etc
5. Administrative action affecting the public
6. Request for reasons for administrative action

PART III – JUDICIAL REVIEW

7. Institution of proceedings
8. Period for determination of applications and appeals
9. Procedure for judicial review
10. Rules
11. Orders in proceedings for judicial review

PART IV – MISCELLANEOUS

12. Principles of common law and rules of natural justice
 13. Regulations
 14. Transition provisions
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FAIR ADMINISTRATIVE ACTION

[Date of assent: 27th May, 2015.]

[Date of commencement: 17th June, 2015.]

AN ACT of Parliament to give effect to Article 47 of the Constitution, and for connected purposes

[Act No. 4 of 2015.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Fair Administrative Action Act, 2015.

2. Interpretation

In this Act, unless the context otherwise requires—

"administrative action" includes—

- (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

"administrator" means a person who takes an administrative action or who makes an administrative decision;

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for the administration of justice;

"decision" means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be;

"empowering provision" means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action is taken or purportedly taken;

"failure", in relation to the taking of a decision, includes a refusal to take the decision;

"state organ" has the meaning assigned to it under Article 260 of the Constitution; and

"tribunal" means a tribunal established under any written law.

PART II – FAIR ADMINISTRATIVE ACTION

3. Application

- (1) This Act applies to all state and non-state agencies, including any person—
 - (a) exercising administrative authority;
 - (b) performing a judicial or quasi-judicial function under the Constitution or any written law; or
 - (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

4. Administrative action to be taken expeditiously, efficiently, lawfully etc

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

5. Administrative action affecting the public

(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—

- (a) issue a public notice of the proposed administrative action inviting public views in that regard;
- (b) consider all views submitted in relation to the matter before taking the administrative action;
- (c) consider all relevant and materials facts; and
- (d) where the administrator proceeds to take the administrative action proposed in the notice—
 - (i) give reasons for the decision of administrative action as taken;

Fair Administrative Action

- (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and
 - (iii) specify the manner and period within the which such appeal shall be lodged.
- (2) Nothing in this section shall limit the power of any person to—
- (a) challenge any administrative action or decision in accordance with the procedure set out under the Commission on Administrative Justice Act, 2011 or any successor to the Commission on Administrative Justice under section 55 of the Commission on Administrative Justice Act, (No. 23 of 2011);
 - (b) apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law; or
 - (c) institute such legal proceedings for such remedies as may be available under any written law.

6. Request for reasons for administrative action

(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.

(2) The information referred to in subsection (1), may include—

- (a) the reasons for which the action was taken; and
- (b) any relevant documents relating to the matter.

(3) The administrator to whom a request is made under subsection (1) shall, within thirty after receiving the request, furnish the applicant, in writing, the reasons for the administrative action.

(4) Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

(5) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure.

PART III – JUDICIAL REVIEW

7. Institution of proceedings

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to—

- (a) a court in accordance with section 8; or
- (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if—

- (a) the person who made the decision—
 - (i) was not authorized to do so by the empowering provision;

- (ii) acted in excess of jurisdiction or power conferred under any written law;
- (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
- (iv) was biased or may reasonably be suspected of bias; or
- (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action or decision was procedurally unfair;
- (d) the action or decision was materially influenced by an error of law;
- (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
- (f) the administrator failed to take into account relevant considerations;
- (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
- (h) the administrative action or decision was made in bad faith;
- (i) the administrative action or decision is not rationally connected to—
 - (i) the purpose for which it was taken;
 - (ii) the purpose of the empowering provision;
 - (iii) the information before the administrator; or
 - (iv) the reasons given for it by the administrator;
- (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- (k) the administrative action or decision is unreasonable;
- (l) the administrative action or decision is not proportionate to the interests or rights affected;
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;
- (n) the administrative action or decision is unfair; or
- (o) the administrative action or decision is taken or made in abuse of power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that—

- (a) the administrator is under duty to act in relation to the matter in issue;
- (b) the action is required to be undertaken within a period specified under such law;
- (c) the administrator has refused, failed or neglected to take action within the prescribed period.

8. Period for determination of applications and appeals

An application for the review of an administrative action or an appeal under this Act shall be determined within ninety days of filing the application.

9. Procedure for judicial review

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

10. Rules

(1) An application for judicial review shall be heard and determined without undue regard to procedural technicalities.

(2) The Chief Justice may make rules of practice for regulating the procedure and practice in matters relating to judicial review of administrative action.

11. Orders in proceedings for judicial review

(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order—

- (a) declaring the rights of the parties in respect of any matter to which the administrative action relates;
- (b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;
- (c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;
- (d) prohibiting the administrator from acting in a particular manner;
- (e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;
- (f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;
- (g) prohibiting the administrator from acting in a particular manner;
- (h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;
- (i) granting a temporary interdict or other temporary relief; or

- (j) for the award of costs or other pecuniary compensation in appropriate cases.

(2) In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order-

- (a) directing the taking of the decision;
- (b) declaring the rights of the parties in relation to the taking of the decision;
- (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
- (d) as to costs and other monetary compensation.

PART IV – MISCELLANEOUS

12. Principles of common law and rules of natural justice

This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.

13. Regulations

(1) The Cabinet Secretary may, in consultation with the Commission on Administrative Justice, make regulations for the better carrying out of the provisions of this Act.

(2) Regulations made under subsection (5) shall, before publication in the *Gazette*, be approved by Parliament.

14. Transition provisions

(1) In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done.

(2) Despite subsection (1)–

- (a) if, and in so far as it is impracticable in any proceedings to apply the provisions of this Act, the practice and procedure obtaining before the enactment of this Act shall be followed; and
- (b) in any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to the procedure to be adopted.

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