INSTRUCTIONS TO STUDENTS
Students are required to answer THREE questions.

Note: In all questions, unless the question indicates otherwise, you are to assume that the administrative action in question is administrative action as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000.
Question 1

(a) Sakkie de Kock, a wealthy game farmer from Limpopo province, wants to import six black rhinoceroses from Botswana for his farm. In order to do so, he requires a permit from the Department of Environmental Affairs, in terms of the National Environmental Management: Biodiversity Act 10 of 2004. After submitting the application, three weeks later he receives this letter from the Department:

Dear Mr de Kock

Application for import permit

Your application for a permit in terms of s 57 read with Chapter 7 of the National Environmental Management: Biodiversity Act 10 of 2004 for the import of six black rhinoceroses (*Diceros bicornis*) dated 2 February 2011 refers. We regret to inform you that your application for such permit has been declined because of lack of compliance with current Departmental policy on the importation of pachyderms.

You have the right to appeal to the Minister in terms of s 94 of the Act. Such appeal must be addressed to the Minister at the above address and reach these offices within 30 days of the date on this letter.

Yours faithfully

Dr. T Mncwabe
Chief-Director: Biodiversity

De Kock responds, asking for reasons for the decision, but there is no reply. He approaches you for advice, indicating that he does not know how to take the matter forward as he cannot appeal without knowing why the decision was made. Advise him fully, including reference to applicable case law.

Note: Outside strict biological classification, the term ‘pachyderm’ is commonly used to describe elephants, rhinoceroses, and hippopotamuses.
(b) The Registrar of Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies decides to cancel the registration of a pesticide called Total Antslaught, an insecticide for killing ants. The Registrar is authorized by the Fertilizers, Farm Feeds and Agricultural Remedies Act 36 of 1947 (FFARSA) to do this by s 4 of the FFFARSA, which provides:

(1) The registrar may cancel the registration of any [agricultural remedy] at any time if he is satisfied that it is contrary to the public interest that such [agricultural remedy] shall remain registered.

The Registrar has made this decision on the basis of experiments carried out by the Department of Agriculture, which indicate that the insecticide is a persistent pollutant (i.e. that it does not break down in the environment). Shortly after he has made the decision, he is informed by the relevant scientists that there was a material error in the data involved in the experiments and that the conclusion is inconclusive.

Realising that the decision is based on a factual error, the Registrar wishes to know whether he has standing (locus standi) to challenge his own decision. Explain fully.

(5)

(c) Section 52(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 provides as follows:

Notice of profitability and curtailment of mining operations affecting employment

52. (1) The holder of a mining right must, after consultation with any registered trade union or affected employees or their nominated representatives where there is no such trade union, notify the Board in the prescribed manner-

(a) where prevailing economic conditions cause the profit to revenue ratio of the relevant mine to be less than six per cent on average for a continuous period of 12 months; or

(b) if any mining operation is to be scaled down or to cease with the possible effect that 10 percent or more of the labour force or more than 500 employees, whichever is the lesser, are likely to be retrenched in any 12-month period.

(2) The Board must, after consultation with the relevant holder, investigate

(a) the circumstances referred to in subsection (1); and

(b) the socio-economic and labour implications thereof and make recommendations to the Minister.

(3) (a) The Minister may, on the recommendation of the Board and after consultation with the Minister of Labour and any registered trade union or affected persons or their nominated representatives where there is no such trade union, direct in writing that the holder of the mining right in question take such corrective measures subject to such terms and conditions as the Minister may determine.

(b) The holder of the mining right must comply with the directive and confirm in writing that the corrective measures have been taken.

(c) If the directives contemplated in paragraph (a) are not complied with, the Minister may provide assistance to or apply to a court for judicial management of the mining operation.

Question 1(c) …/
Question 1 (c)... (Continued)

Miserable Minerals Ltd, a company that owns and operates the Catastrophic Coal Mine in Eastern Mpumalanga, having established that it fell within the ambit of s 52(1)(b) of the Act, notified the Board (the Minerals and Mining Development Board) as required by that section. The Board then followed the requirements of s 52(2) carrying out the investigation envisaged in s 52(2), having consulted with Miserable Minerals at the commencement of the investigation. Miserable Minerals is subsequently informed by the Board that the Board intends recommending to the Minister that Miserable Minerals close its Number 3 shaft at the Catastrophic mine, which is the mine’s most productive shaft. When Miserable Minerals asks if it can make representations concerning this recommendation, the Board’s response is that it has already heard Miserable Minerals at the commencement of the investigation and that the company will be heard by the Minister prior to the Minister’s making any decision pursuant to the Board’s recommendation. Miserable Minerals asks you whether it has the right to be heard by the Board in respect of the Board’s formulation of its recommendations following the investigation. Advise the company fully. (10)

[25 marks]

Question 2

Henry Naicker is a cricketer who plays for Juniors CC in a league in Ladysmith, KwaZulu-Natal, administered by the Northern Districts Cricket Association (NDCA). The NDCA receives a complaint from the captain of Colombo CC, a club that has just played against Juniors in the league, alleging Naicker was involved in unsporting behaviour, which is a contravention of the league’s rules. The match was played on 4 March. The NDCA executive committee meets on 7 March and decides to convene a disciplinary enquiry against Naicker. On 12 March, Naicker receives a fax message reading as follows:

Dear Mr Naicker

You are required to attend a disciplinary inquiry in respect of your behaviour in the match between Juniors and Colombo on Sunday 5 March 2011. You are required to attend a hearing at the NDCA offices on Tuesday 13 March at 17h00.

Yours faithfully

Etc.

Question 2.../
Question 2… continued

Naicker telephones the NDCA on Tuesday morning and complains that he has no idea what the letter is referring to, but the secretary tells him that he is unable to provide more details but that Naicker ‘better be there’ at 17h00.

Naicker arrives at 17h00 with his cousin, Sanjay Perumal, an attorney. Mohammed Jhazhbay, the Chairman of the NDCA, tells Naicker that he is not entitled to legal representation and that Perumal must leave. After some argument, Perumal leaves the hearing.

Jhazhbay, who is also a member and past chairman of Colombo CC, chairs the hearing. The only witness is Asif Moosa, the captain of Colombo CC. Moosa testifies that Naicker refused to leave the field when given out (when given out a player is required to leave the field) and abused the umpire when he was eventually persuaded to leave the field by his co-batsman. When Naicker attempts to ask Moosa a question, the chair instructs him that he is not allowed to ask any questions but that he must just provide his side of the story. Naicker’s version is that he queried whether a catch had been taken cleanly and, while the umpires were consulting each other on the fairness of the catch, members of Colombo CC had sworn at him, telling him that he should leave the field. Naicker had, in turn, sworn at the Colombo players before being given out by the umpire, but he stressed that he had not sworn at the umpire.

The disciplinary panel finds Naicker guilty and sentences him to a two-game suspension. This is the only information that is provided to Naicker at the hearing, and the panel indicates it will provide reasons in writing in due course. In terms of the NDCA rules, a player found guilty in terms of the rules may appeal to the KwaZulu-Natal Inland Council within two weeks of being informed of the decision.

On 19 March, Naicker receives a letter dated 15 March that reads as follows:

Dear Mr Naicker

This serves to inform you that you have been found guilty of contravening Rule 3(a) of the NDCA rules in that you showed dissent to an umpire. The reason for this is that the panel believed the testimony of Mr Moosa.

You are suspended for the following two league games.

Yours faithfully
Etc.  Question 2…/
Question 2… continued

You are required to answer the following questions in respect of the above facts, providing full authority.

(a) Is the decision of the NDCA disciplinary panel administrative action in terms of PAJA? Indicate the effect your answer will have on whether a court may review the panel's decision on the basis of any procedural irregularity. (5)

(b) Was the decision of the NDCA panel procedurally fair? Indicate ALL the factors that would be relevant to procedural fairness present in this set of facts and whether the NDCA has satisfied the law in respect of such factors. (20)

[25 marks]

Question 3

(a) Mrs Dudu Shange is 65 years old. She lives in the Loskop area in the foothills of the Drakensberg mountains. She is illiterate and very poor, supported sporadically by a son who works in Pietermaritzburg. She travels to Estcourt, the nearest reasonably-sized town about once every two years. She applied to the KwaZulu-Natal Department of Welfare for a pension in February 2010. She received a letter in April 2010 indicating that the application was unsuccessful. She approaches you, an Estcourt attorney, in February 2011 asking if she is able to review the decision. Will she be able to do so, despite 180 days having elapsed from the date on which she was informed of the refusal of the application? Explain fully. (Note: this question does not concern the merits of the case, but procedural considerations). (4)

(b) Bright Future Investments Ltd made certain investments on behalf of clients, following consultation with the South African Revenue Services (SARS) concerning whether the proceeds of the investments would be regarded by SARS as taxable or not. SARS gave Bright Future the assurance that the proceeds of the investments would be non taxable. Subsequently, SARS sought to recover tax on the proceeds of the investments, without having indicated to Bright Future that its attitude had changed from the assurance given earlier.

Bright Future comes to you for advice. The company specifically asks if it possible to seek a court order requiring SARS to comply with its initial assurance not to tax the proceeds of the investments in question. Advise fully. (17)
Question 3… continued

(c) An NGO called Stop the Hilton Landfill Site has lodged an appeal to the MEC of Agriculture and Environment in KwaZulu-Natal in terms of s 43 of the National Environmental Management Act 107 of 1998 against a decision in terms of the Act by the Department of Agriculture and Environment in the province to authorise the establishment of a landfill site in Hilton. The MEC is the official required to decide the appeal in terms of s 43. The NGO receives a document setting out the appeal decision, which upholds the original decision, signed by the MEC. The NGO then obtains information to the effect that the MEC handed the appeal over to an environmental lawyer asking him to make a recommendation on the appeal and, when the MEC received the lawyer’s recommendation, the MEC simply ordered one of the Departmental staff to ‘put the recommendation into an appropriate format’ and then signed this document. Advise the NGO as to whether this decision (the MEC’s appeal decision) can be reviewed. Explain fully.

(4) [25 marks]

Question 4

(a) You are approached by the Mtunzini Conservancy, which is alarmed that the KwaZulu-Natal Department of Public Works is planning to establish a resort in Mtunzini to be used by KZN cabinet ministers for holidays. Their concern arises from the fact that the plans for the resort envisage the filling in of an important wetland and that the plot on which the resort will be built is the only habitat of the Mtunzini Azure Butterfly. Scientific experts are of the opinion that the butterfly will become extinct if the resort is built on that land.

The resort requires authorisation in terms of s 24 of the National Environmental Management Act 107 of 1998 (NEMA), with the provincial Department of Agriculture and Environmental Affairs (DAEA) making the decision. This decision must be made on the basis of a report including an environmental impact assessment, indicating what the likely impacts of the development on the environment will be. The report contains documentation expressing concern as to the wetland destruction and the butterfly’s habitat, but these are given scant attention by the author of the report, an independent environmental consultancy known as EnviroSkills (Pty) Ltd.

Question 4…/
Question 4… (Continued)

The KZN DAEA issues a record of decision allowing the development. The record of decision contains no conditions relating to either the wetland or the butterfly’s habitat.

The Mtunzini Conservancy is in possession of a leaked letter from the KZN Premier to the Director-General of the KZN DAEA indicating that the development is of the ‘utmost priority’ to the Province and that ‘no obstacles must be placed in the way of this development. I trust that an appropriate decision will be reached in this regard’.

Note that NEMA provides for an appeal to the provincial MEC from the KZN DAEA’s decision in terms of s 43 of the Act.

(i) The Mtunzini Conservancy wants to launch an immediate review of the decision. Assuming there are valid grounds of review, may it do so? (Note: this question is concerned with the procedure to be followed – not the existence of grounds of review, which is covered in further questions). (5)

(ii) Is the DAEA’s decision reasonable and rational? Discuss fully with reference to all relevant cases. (10)

(iii) Does the letter from the Premier have any impact on the reviewability of the decision? Discuss fully. (4)

(b) The KwaZulu-Natal Provincial Department of Roads invites tenders for the construction of Armco barriers along provincial roads in the Ulundi-Melmoth area. Folwezi Fabrications submits a tender application, quoting R356 945 for the length of road for which the barriers are required. Folwezi is later told that the tender has been granted to Grant’s Construction and it finds out that Grant’s Construction’s quote was R2 211 000. When Folwezi asks why its bid was not successful, the reply from the tender committee is that the Declaration of Interest document (providing information relating to possible favouritism in the process) has not been dated. According to the Committee, successful completion of the Declaration of Interest document is a mandatory requirement of the tender submission procedure and the tender Committee does not have the discretion to consider a tender without a date on the Declaration of Interest. The Folwezi tender was consequently disqualified. (From the facts, it is evident that all other mandatory requirements of Folwezi’s application were present and that is able to carry out the terms of the tender). (6)

Will Folwezi be able to challenge this decision? Explain fully. [25 marks]