

**THE RULE OF LAW, THE PRINCIPLE OF LEGALITY AND THE  
RIGHT TO PROCEDURAL FAIRNESS: A CRITICAL ANALYSIS OF  
THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF  
SOUTH AFRICA**

**BY**

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## DECLARATION

I, Gift Kudzanai Manyika, hereby declare that:

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2. the written work is entirely my own except where other sources are acknowledged;
3. this paper has not been submitted as a requirement for academic for any other degree in this or any other similar form, at this or any other University.

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## CHAPTER ONE: INTRODUCTION

### 1.1 The principle of the rule of law

Section 1 of the Constitution of the Republic of South Africa, 1996 (the ‘Constitution’) states that:

‘[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness’.

As the Constitutional Court held in *United Democratic Movement v President of the Republic of South Africa*,<sup>1</sup> these values are important because they influence the interpretation of the other provisions of the Constitution as well as the ordinary rules of law, and set positive standards with which all law must comply in order to be valid. This means that any law or conduct which is inconsistent with these values can be declared invalid and struck down.<sup>2</sup>

Although all of the values set out in section 1 are equally important, over the past twenty years, the rule of law and, in particular, the principle of legality, has played a particularly significant role in the development of South Africa’s new constitutional system. This is because the Constitutional Court has consistently held that the exercise of all public power that falls outside the field of administrative action must at the very least comply with the principle of legality which is a part of the rule of law.

The rule of law has enjoyed great attention in recent years and has been termed ‘the most important political development of the second millennium’.<sup>3</sup> It has also been praised for promoting development<sup>4</sup> and has also been hailed as essential in bringing peace to

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<sup>1</sup> *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC).

<sup>2</sup> *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC) para 19.

<sup>3</sup> P Johnson ‘Laying Down the Law: Britain and American lead the way in establishing legal regimes based on universal principles’ (1999) *Wall Street Journal* 22.

<sup>4</sup> B Z Tamanaha *On the Rule of Law, History and Politics, Theory* (2004) 2.

transitional and post-conflict states.<sup>5</sup> Notwithstanding its growing influence at both a national and international level, the principle of the rule of law remains a somewhat elusive notion.<sup>6</sup> It is so contested a concept<sup>7</sup> that Tamanaha gives a caveat on its elusive nature when he says that:

‘disagreement exists about what the rule of law means amongst casual users of the phrase, among government officials and among theorists. The danger of this rampant uncertainty is that rule of law might devolve into an empty phrase, so lacking in meaning that it can be proclaimed with impunity by malevolent governments’.<sup>8</sup>

The modern concept of the rule of law may be traced back to the British constitutional law scholar, Albert Venn Dicey (1835–1922). In his great study entitled an *Introduction to the Study of the Law of the Constitution* (1895) Dicey argued that the rule of law encompasses three principles, namely the principle of the supremacy of the law, the principle of equality under the law and a general principle.

The principle of the supremacy of the law, he explains, refers to ‘the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power.’<sup>9</sup> This means that the ordinary law is supreme and that no one may be deprived of his or her rights through the arbitrary exercise of power.<sup>10</sup> A person may only be deprived of his or her rights in terms of established or pre-existing law.<sup>11</sup>

The principle of equality under the law, Dicey explains, means that no one, including public officials and member of the monarchy, are above the law. Instead, ‘every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’.<sup>12</sup> The important role that the ordinary courts play in upholding the rule of law is emphasised at this stage.<sup>13</sup>

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<sup>5</sup> E Brahm ‘Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies’ (2007) 9(4) *International Journal of Non-Profit Law* available at [http://www.icnl.org/research/journal/vol9iss4/special\\_2.htm](http://www.icnl.org/research/journal/vol9iss4/special_2.htm), accessed 30 May 2014.

<sup>6</sup> B Z Tamanaha *On the Rule of Law, History and Politics, Theory* (2004) 3.

<sup>7</sup> J Waldron ‘Is the rule of law an essentially contested concept (in Florida)?’ (2002) 21 *Law and Philosophy* 137.

<sup>8</sup> B Z Tamanaha *On the Rule of Law, History and Politics, Theory* (2004) 114.

<sup>9</sup> AV Dicey *Introduction to the study of the law of the Constitution* 10ed (1961) 202.

<sup>10</sup> J de Ville ‘The rule of law and judicial review: rereading Dicey’ (2006) *The Acta Juridica* 79

<sup>11</sup> B Z Tamanaha *On the Rule of Law, History and Politics, Theory* (2004) 63.

<sup>12</sup> A V Dicey *Introduction to the study of the law of the Constitution* 10ed (1961) 193.

<sup>13</sup> A V Dicey *Introduction to the study of the law of the Constitution* 10ed (1961) 202.

The general principle, Dicey explains, means that the fundamental rights of the individual are protected by the ordinary remedies of the common law provided by the ordinary courts, rather than by a Constitution.<sup>14</sup> The principle of the rule of law, therefore, should be rooted, not in written laws (including the Constitution), but rather in judicial decisions. This is because it is more difficult for authoritarian regimes to set aside the decisions of the courts than it is to set aside the written laws they have made themselves. Accordingly, the growth of legislation is not something to be welcomed, but rather regretted.<sup>15</sup>

Since Dicey first introduced the idea of the rule of law, several different versions have been developed. Among these are the minimalist version, the formalist version and the substantive version.

As its name suggests, the minimalist version simply provides that the state must act in accordance with a valid law regardless of its procedural and substantive qualities. In other words, the state may only exercise those powers that have been conferred upon it by the law. This version accordingly imposes no limits on the form and administration of laws. It also imposes no limits on the substance of laws.<sup>16</sup> Provided the government is acting in terms of a valid law it is complying with the rule of law, even if those laws are unfair and unjust. This version was promoted by the apartheid government.

The formalist version is a more sophisticated version of the rule of law. It adds to the minimalist version by imposing important procedural requirements on the state's authority to make and administer laws.<sup>17</sup> In particular, this version provides that the law must be general in nature; that it must be prospective and not retrospective; that it must be clear, open and relatively stable; and that the law must be enforced by independent courts following fair

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<sup>14</sup> A V Dicey *Introduction to the study of the law of the Constitution* 10ed (1961) 203. Bealac argues that this principle is not a general one. Instead, it is special and specific to English institutions only (see S Bealac *The Rule of Law in International Law Today* (2009) at 199 available at <https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/3093/International-Rule-Law-Final.pdf?sequence=1>, accessed on 14 September 2015).

<sup>15</sup> A V Dicey *Introduction to the study of the law of the Constitution* 10ed (1961) iv.

<sup>16</sup> A N Médécigo *Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico* (2015) 15. Médécigo calls this version the instrumental notion of the rule of law.

<sup>17</sup> A Street *Judicial review and the rule of law. Who is in Control?* (2013) 13.

procedures. Like the minimalist version, however, this version does not impose any limits on the substance of laws.<sup>18</sup>

The substantive version adds to both the principle of authority version and the principle of legality version by imposing substantive limits on the state's authority to make and administer laws.<sup>19</sup> In terms of this version, the rule of law is seen as an important mechanism for achieving a just society.<sup>20</sup> In terms of this version, therefore, the rule of law is associated with the promotion and protection of fundamental human rights.<sup>21</sup>

## 1.2 The basis of the principle of the rule of law in South Africa

As was pointed out above, the rule of law and the principle of legality have played a particularly significant role in the development of South Africa's new constitutional system. This is because the Constitutional Court has consistently held that the exercise of all public power that falls outside the field of administrative action must at the very least comply with the principle of legality. The rule that the principle of legality functions as a restriction on the exercise of public power may be traced back to the Constitutional Court's judgment in *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council*.<sup>22</sup>

The facts of the case are as follows. The Transitional Metropolitan Council and its four substructures (the Eastern Metropolitan Substructure, the Northern Metropolitan Substructure, the Western Metropolitan Substructure and the Southern Metropolitan Substructure) passed resolutions imposing a general rate of 6.45 cents in the rand on all land and rights of land under their jurisdiction for the 1996/1997 financial year. One of the consequences of adopting this general rate was that some ratepayers would be faced with a significant increase in the amount of rates they had to pay, while others would enjoy a decrease.

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<sup>18</sup> A N Medécigo *Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico* (2015) 11-17.

<sup>19</sup> A N Medécigo *Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico* (2015) 15. Medécigo calls this version the material or maximalist notion of the rule of law.

<sup>20</sup> A N Medécigo *Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico* (2015) 15. In this respect Medécigo states that substantive rule of law calls for intrinsic moral content in the laws.

<sup>21</sup> T Bingham *The Rule of Law* (2010) 66-67. Lord Bingham referred to the versions as 'thin' and 'thick' definitions.

<sup>22</sup> *Fedsure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC).

After these resolutions were passed, the appellants, who all faced a significant increase in the amount of rates they would have to pay, applied to the Johannesburg High Court for an order declaring the resolutions to be unconstitutional and invalid on the grounds that they were *ultra vires* and therefore infringed the constitutional right to just administrative action guaranteed in section 24(a) of the interim Constitution.<sup>23</sup> The Johannesburg High Court dismissed the application and the appellants then appealed unsuccessfully to the Supreme Court of Appeal and then to the Constitutional Court.

Given that the right to just administrative action applies only to those exercises of public power (and sometimes private power) that can be classified as administrative action, one of the key questions the Court had to answer was whether the resolutions in question could be classified as administrative action. The Court held that they could not. In arriving at its decision, the Court held that prior to the transition to democracy by-laws made by a municipal council were classified as administrative action. This is because municipal councils themselves were classified as subordinate law-making bodies.<sup>24</sup>

Following the enactment of the interim Constitution, however, this was no longer the case. In terms of the interim Constitution, by-laws had to be classified as legislative rather than administrative action. This is because local governments were not only recognised by the interim Constitution, but also derived at least some of their powers directly from the interim Constitution. In addition, municipalities were no longer subordinate law-making bodies but deliberative legislative bodies whose members were elected. The legislative decisions taken by them, therefore, were influenced by political considerations for which they were politically accountable to the electorate.<sup>25</sup>

Although municipal by-laws could not be reviewed for consistency with section 24(a) of the interim Constitution, the Constitutional Court held further, they could still be reviewed for consistency with the principle of legality which forms a part of the rule of law. The Court went further to state that the principle of legality provides, at the very least, that ‘the legislature and the executive in every sphere are constrained by the principle that they may

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<sup>23</sup> Constitution of the Republic of South Africa, Act 200 of 1993 (the ‘interim Constitution’).

<sup>24</sup> *Fedsure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) para 38.

<sup>25</sup> *Fedsure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) para 41.

exercise no power and perform no function beyond that conferred upon them by law.<sup>26</sup> In other words, the Court endorsed the principle of authority, namely that the exercise of all power should be sanctioned by law:

‘It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality’.<sup>27</sup>

An important consequence that flows from this finding, the Constitutional Court went on to hold, is that while administrative, legislative and executive actions are subject to the principle of authority, the source of this principle differs depending upon the nature of the action in question. In the case of administrative action, the principle of authority was enshrined in section 24(a) of the interim Constitution, now section 33 of the final Constitution. In the case of legislative and executive action, however, the principle of authority was enshrined in the principle of legality which was implicit in the interim Constitution itself.<sup>28</sup>

### **1.3 The application of the principle of the rule of law in South Africa**

From its humble beginnings in the *Fedure Life Insurance* case, the principle of legality has expanded exponentially over the past 15 years and today it consists of a wide range of grounds on which legislative, executive and judicial action may be challenged, encompassing the minimalist, the formalist and even the substantive versions of the rule of law.

Apart from its judgment in *Fedure Life Insurance*, for example, the Constitutional Court also applied the minimalist approach in *Minister of Education v Harris*<sup>29</sup> and held that the Minister could not impose legally binding obligations on independent schools unless there was a law authorising him to do so.

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<sup>26</sup> *Fedure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) para 58.

<sup>27</sup> *Fedure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) para 58.

<sup>28</sup> *Fedure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) para 59.

<sup>29</sup> *Minister of Education v Harris* 2001 (4) SA 1297 (CC).

A more formal conception of the rule of law was applied in *President of the RSA v Hugo*,<sup>30</sup> where the Constitutional Court held that the legislature may not enact a law that applies retrospectively or that targets a particular individual or group and in *Affordable Medicines Trust v Minister of Health*,<sup>31</sup> where the Court held that the legislature may not enact a law that is so vague and uncertain that those who are bound but do not know what is expected of them.

The decision to apply a substantive version of the rule of law appears to have originated in *New National Party v Government of the RSA*,<sup>32</sup> where the Constitutional Court held that the legislature may not enact a law that is arbitrary and irrational and was confirmed most famously in *Pharmaceutical Manufacturers: In re Ex parte Application of the President of the RSA*,<sup>33</sup> where the Court held that the executive may not exercise the powers that have been conferred upon it in a manner that is irrational.

Besides holding that the executive may not exercise the powers that have been conferred upon it in a manner that is irrational, the Constitutional Court has also applied the substantive versions of the rule of law to find that:

- (a) the executive may not exercise the powers that have been conferred upon it in bad faith or misconstrue its powers;<sup>34</sup>
- (b) the executive must exercise its powers to serve the legitimate purpose of those powers: it must not act arbitrarily, for no purpose or with an ulterior motive;<sup>35</sup>
- (c) when the executive exercises its powers it may not ignore relevant considerations,<sup>36</sup> and it must act with procedural rationality;<sup>37</sup> and
- (d) the executive must exercise its powers diligently and without undue delay.<sup>38</sup>

#### **1.4 The principle of the rule of law and the right to procedural fairness**

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<sup>30</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

<sup>31</sup> *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 108. See also *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 102.

<sup>32</sup> *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) and *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC).

<sup>33</sup> *Pharmaceutical Manufacturers: In re Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) and *Poverty Alleviation Network v President of the RSA* 2010 6 BCLR 520 (CC).

<sup>34</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

<sup>35</sup> *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng Provincial Government* 2012 (5) SA 24 (SCA).

<sup>36</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC).

<sup>37</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

<sup>38</sup> *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC).

As Hoexter points out a careful examination of the grounds of review encompassed by the rule of law overlap in many respect with the grounds of review encompassed by the right to just administrative action guaranteed in section 33 of the Constitution and that the Constitutional Court is simply using the principles of administrative law under another name.<sup>39</sup>

Although Hoexter is quite correct when she states that the grounds of review under the rule of law and the right to just administrative action overlap in many respects, it is important to note that there are certain important respects in which they do not overlap. One of the most important of these is the right to procedural fairness, particularly with respect to executive action.

When it comes to reviewing executive action on the grounds that it is procedurally unfair, the Constitutional Court has adopted different approaches. Initially the Court adopted a strict approach. In its majority judgment in *Masetlha v President of the Republic of South Africa* ('*Masetlha*')<sup>40</sup> and unanimous judgment in *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* ('*ARMSA*')<sup>41</sup> the Court held that executive action cannot be reviewed on the grounds that it is procedurally unfair. Or, to put it another way, in these cases the Court held that the right to procedural fairness should not be included as a separate and self-standing ground of review for executive action under the principle of legality.

Following its majority judgment in *Masetlha* and unanimous judgment in *ARMSA*, however, the Constitutional Court began to move towards a broader approach. This move started in *Albutt v Centre for the Study of Violence and Reconciliation* ('*Albutt*'),<sup>42</sup> where the Court held that executive action may be reviewed and set aside in those cases where the failure to follow a fair procedure was irrational and confirmed in *Democratic Alliance v President of*

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<sup>39</sup> C Hoexter 'The future of judicial review in South African administrative law' 2000 (117) *SALJ* 482 506. See also J Klaaren 'Redlight, Greenlight: *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council; Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*' (1999) 15 *SAJHR* 209 212.

<sup>40</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC).

<sup>41</sup> *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC).

<sup>42</sup> *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).

*the Republic of South Africa ('Democratic Alliance')*,<sup>43</sup> where the Court held that executive action may be reviewed and set aside in those cases where not only the decision, but also the process that preceded the decision was irrational.

More recently, the Constitutional Court has moved even close towards adopting a broad approach. In *Minister of Defence and Military Veterans v Motau ('Motau')*,<sup>44</sup> the Constitutional Court unanimously suggested, in an *obiter dictum*, that executive action could in fact be reviewed on the grounds that it is procedurally unfair. Or, to put it another way, the Court suggested, in an *obiter dictum*, that the right to procedural fairness should be included as a separate and self-standing ground of review for executive action under the principle of legality.

In light of these judgments, the purpose of this thesis is to critically examine the different approaches the Constitutional Court has adopted towards procedural fairness as a separate and self-standing ground of review for executive action under the principle of legality, and to consider the implications that these different approaches have for the doctrine of the separation of powers and, in particular, the separation of functions between the courts, on the one hand, and the executive and the legislature, on the other.

## **1.5 The research question**

As pointed out above, the purpose of this thesis is to critically examine the different approaches the Constitutional Court has adopted towards procedural fairness as a separate and self-standing ground of review for executive action under the rule of law, and the implications that these different approaches have for the doctrine of the separation of powers.

More particularly, the purpose of this thesis is to:

- (a) set out and discuss what is meant by the right to procedural fairness;
- (b) set out and discuss the different approaches the Constitutional Court has adopted towards procedural fairness as a separate and self-standing ground of review under the principle of legality;

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<sup>43</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC).

<sup>44</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC).

- (c) set out and discuss the implications of the different approaches that the Constitutional Court has adopted for the doctrine of the separation of powers and, in particular, the separation of functions between the courts, on the one hand, and the executive and the legislature, on the other.

## 1.6 The theoretical framework

The thesis is based on the theory of transformative constitutionalism. The Constitution is basically the source of this theory.<sup>45</sup> It is a legal instrument for progressive and transformative development of the law.<sup>46</sup> The Constitution contains normative values which seek to ‘transform our society into one in which there will be human dignity, freedom and equality’.<sup>47</sup> These values are contained in the Bill of rights which for all intents and purposes binds the legislature, the executive, the judiciary, all organs of state, and, where applicable, a natural or juristic person.<sup>48</sup>

Transformative constitutionalism accepts that ‘the achievement of political and socio-economic transformation requires a “collaborative enterprise” of all state players.’<sup>49</sup> As an instrument of transformation, the Constitution fosters a ‘culture of justification that all public power should be kept in balance by checking for compliance with human rights standards.’<sup>50</sup> This theory is relevant because it is adaptive and more accommodating of the different and changing social, economic, political and historical context of South Africa.<sup>51</sup>

## 1.7 The research methodology

This is a qualitative study. As such, it is based largely on a critical analysis of primary and secondary legal resources and materials in order to identify contradictions, inconsistencies, lacunae and trends in the relevant field. The primary and secondary materials that will be

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<sup>45</sup> K E Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAJHR* 146.

<sup>46</sup> R Solange ‘Transformative Constitutionalism in a Democratic Developmental State’ 2011 (22) 3 *Stellenbosch Law Review* 542 565.

<sup>47</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) para 8.

<sup>48</sup> Constitution: Section 8.

<sup>49</sup> R Solange ‘Transformative Constitutionalism in a Democratic Developmental State’ 2011 (22) 3 *Stellenbosch Law Review* 542 545.

<sup>50</sup> E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *SAJHR* 31 32 in R Solange ‘Transformative Constitutionalism in a Democratic Developmental State’ 2011(22) 3 *Stellenbosch Law Review* 542 545.

<sup>51</sup> S Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAHRJ* 146 at 188.

analysed in this study include statutes and law reports. In addition, they also include books, chapters in books, journal articles, reports and internet websites.

## **1.8 The limitations of the study**

Although the rule of law applies to legislative, executive and judicial action, this thesis focuses on procedural fairness as a separate and self-standing ground of review for executive action only. As Murcott has pointed out, it is not necessary to consider whether procedural fairness should also be a separate and self-standing ground of review for legislative and judicial actions. This is because the Constitution itself provides that Parliament, the provincial legislatures and the municipal councils must facilitate public involvement when they exercise their legislative and other powers<sup>52</sup> and because judicial proceedings already take place in public and in the presence of independent and impartial decision-makers.<sup>53</sup>

## **1.9 The structure of the study**

### *Chapter One: Introduction*

The aims and objectives of the study are set out in Chapter One. Apart from the aims and objects, the sources of the principle of the rule of law, the basis and application of the principle of the rule of law in South Africa and the relationship between the principle of the rule of law and the right to procedural fairness are also set out in Chapter One. Chapter One also includes the research question, the theoretical framework of the study, the research methodology, the limitations of the study and the structure of the study.

### *Chapter Two: The right to procedural fairness*

The history and sources of the right to procedural fairness is set out in Chapter Two. Apart from the history and sources, the value of the right to procedural fairness as well as the scope and ambit of the right to procedural fairness are set out in Chapter Two. Chapter Two also

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<sup>52</sup> Section 59 and 72.

<sup>53</sup> M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice in South Africa: An introduction* (2015) 167.

includes a discussion of the *audi alteram partem* principle and the *nemo iudex in sua causa* principle.

### *Chapter Three: The jurisprudence of the Constitutional Court*

The extent to which the Constitutional Court has recognised procedural fairness as a separate and self-standing ground of review for executive action under the principle of legality is set out and critically discussed in Chapter Three. This discussion takes place in the context of a careful examination of the judgments in *Masetlha*, *ARMSA*, *Albutt*, *Democratic Alliance* and *Motau*.

### *Chapter Four: The doctrine of the separation of powers*

The origins of the doctrine of separation of powers, the elements that make up the doctrine and the principle of checks and balances are set out and discussed in Chapter Four. Apart from the origin, the elements and the principle of checks and balances, the application of the doctrine in South Africa both pre- and post-1994 is also discussed in Chapter Four. This Chapter also includes a discussion of the power of judicial review as an element of the principle of checks and balances and the manner in which the Constitutional Court has attempted to exercise this power without overstepping the limits of its authority.

### *Chapter Five: Comment and Analysis*

The Chapter will then take a critical view on the way the Court has dealt with the adoption of procedural fairness as a part of legality. It is in this chapter that the position of the Court is measured against the principles of the separation of powers. Also in this chapter we shall determine the viability of the Court's position in light of the separation of powers. We will also give recommendations to the Court on whether to continue on the same course, divert, or whether there is an alternative.

## CHAPTER TWO: THE RIGHT TO PROCEDURAL FAIRNESS

### 2.1 Introduction

As we have already seen, the grounds of review encompassed by the rule of law overlap in many respects with the grounds of review encompassed by the right to just administrative action, with some important exceptions. One of these exceptions is the right to procedural fairness. The purpose of this chapter is to set out and discuss the scope and ambit of the right to procedural fairness. Although the right to procedural fairness plays an important role in many different branches of the law, the branch in which it plays the most significant role is administrative law. The scope and ambit of the right to procedural fairness, therefore, will be set out and discussed from an administrative law perspective, taking into account the common law, the Constitution and the Promotion of Administrative Justice Act (the 'PAJA').<sup>54</sup>

### 2.2 The history and sources of procedural fairness

The three main sources of the right to procedural fairness are the common law, the Constitution and the PAJA. Although the Constitution and especially the PAJA are the primary sources of the right to procedural fairness to today, the common law still has an important role to play. The role that the common law plays in this branch of the law today was illustrated in the *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa*,<sup>55</sup> where the Constitutional Court held that administrative law:

'... is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was the main crucible for the development of these principles of constitutional law.<sup>71</sup> The Interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental

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<sup>54</sup> Promotion of Administrative Justice Act 3 of 2000.

<sup>55</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2002 (2) SA 674 (CC).

change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control'.<sup>56</sup>

As this rather lengthy quote indicates, the key role of the common law rules and principles governing the right to procedural fairness is to inform the content of the section 33 of the Constitution and especially the provisions of the PAJA and to contribute to their future development.<sup>57</sup> Other words, the rules of procedural fairness were derived from the rules of natural justice as demonstrated in the seventeenth and the eighteenth century English cases.<sup>58</sup>

For most of the twentieth century the common law rules and principles governing the right to procedural fairness adopted a very narrow approach. In terms of this narrow approach, the courts held that a decision was fair simply if it complied with the rules of natural justice.<sup>59</sup> These rules were encapsulated in two Latin maxims, namely *audi alteram partem* (hear the other side) and *nemo iudex in sua causa esse debet* principle (no one should be a judge in their own case).<sup>60</sup>

Besides restricting the right to procedural fairness to the rules of natural justice, during most of the twentieth century the courts also held that these rules applied only in those cases in which a decision could be classified as judicial or quasi-judicial in nature and not to those cases in which a decision could be classified as legislative or purely administrative in nature,

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<sup>56</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2002 (2) SA 674 (CC) para 45.

<sup>57</sup> R S French *Personnel Security Procedural Fairness Guidelines* (2010) available at <http://www.protectivesecurity.gov.au/personnelsecurity/Documents/Procedural%20fairness%20guidelines.pdf>, accessed on 20 April 2015. French states that 'although some have indicated that the term natural justice and procedural fairness can be used interchangeably, we shall prefer the term procedural fairness because the term natural justice is associated more with the decision making by the judges in the courts of law'.<sup>57</sup>

<sup>58</sup> R S French *Personnel Security Procedural Fairness Guidelines* (2010) 3 available at <http://www.protectivesecurity.gov.au/personnelsecurity/Documents/Procedural%20fairness%20guidelines.pdf>, accessed on 20 April 2015.

<sup>59</sup> M Groves 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285.

<sup>60</sup> J R de Ville *Judicial Review of Administrative Law in South Africa* (2003) 218.

in the absence of legislation to the contrary.<sup>61</sup> In addition, the courts held that a decision could only be classified as quasi-judicial if it prejudicially affected a person's rights. An important consequence of this approach is that a person who was merely an applicant and who did not have a right to claim what he or she was applying for was not protected by the *audi* principle.<sup>62</sup>

This narrow approach began to change in the late 1980s when the courts adopted a broader and more flexible approach to procedural fairness culminating in the judgment in *Administrator of the Transvaal v Traub*.<sup>63</sup> In this case, the Appellate Division (as it then was) rejected the classification of decisions as judicial or quasi-judicial, on the one hand, and legislative or purely administrative, on the other. The classification of a decision as quasi-judicial, the Court held, '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'.<sup>64</sup>

This new approach gained some momentum when the interim Constitution came into operation.<sup>65</sup> This is because section 24 of the interim Constitution provided, *inter alia*, that 'everyone shall have to the right to procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened'. While this provision still restricted the application of the right to procedural fairness to those cases in which a person's rights were prejudicially affected by a decision, it also confirmed the fact that the doctrine of legitimate expectations now formed a part of South African law.

These limitations on the scope and ambit of the right to procedural fairness were subsequently abandoned when the Constitution came into operation. This is because section 33 of the Constitution simply provides, *inter alia*, that everyone has the right to

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<sup>61</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) 391.

<sup>62</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) 391-92.

<sup>63</sup> *Administrator of the Transvaal v Traub* 1989 (4) SA 731 (A).

<sup>64</sup> *Administrator of the Transvaal v Traub* 1989 (4) SA 731 (A) 763H-I. Apart from rejecting the classification of decisions as the basis for deciding whether the rules of natural justice applied, the judgment in *Traub* also accepted that the doctrine of legitimate expectations formed a part of South African common law (see C Hoexter *Administrative Law in South Africa* 2ed (2012) 355).

<sup>65</sup> The interim Constitution came into operation on 27 April 1994. This was the date on which the first democratic election took place.

administrative action that is ‘lawful, reasonable and procedurally fair’.<sup>66</sup> Besides extending the right to procedural fairness beyond the rules of natural justice, both section 24 of the interim Constitution and section 33 of the Constitution have elevated the right to procedural fairness to the status of a fundamental human right. This means that the application of this right cannot be limited by the legislature unless such a limitation satisfies the requirements of section 36 of the Constitution.

In order to fulfil the obligations contained in section 33(3) of the Constitution, Parliament enacted the PAJA.<sup>67</sup> The Act explicitly provides that procedural fairness is one of the grounds on which administrative action may be reviewed.<sup>68</sup> This means that every exercise of power which falls into the definition of administrative action must now comply with the right to procedural fairness. Besides subjecting every administrative act to the right to procedural fairness, the PAJA also sets out the requirements of procedural fairness in some detail. In this respect it distinguishes between those cases in which administrative action affects an individual<sup>69</sup> and those cases in which it affects the general public.<sup>70</sup>

### **2.3 The value of procedural fairness**

The fact that the right to procedural fairness was included in both the interim Constitution and the Constitution highlights the important role this right plays in a democratic society. The important role that procedural fairness plays in a democratic society has been discussed by the Constitutional Court on a number of occasions.

In *Janse van Rensburg NO v Minister of Trade and Industry NO*,<sup>71</sup> for example, the Constitutional Court held that procedural fairness is important in a democracy because it is likely to improve the quality and wisdom of decision-making.

‘In modern states it has become more and more common to grant far-reaching powers to administrative functionaries. The safeguards provided by the rules of procedural fairness are thus all the more important. . .

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<sup>66</sup> Section 33(1) of the Constitution does not qualify that the right to be heard should be afforded where rights or legitimate expectations are affected.

<sup>67</sup> Section 33(3) of the Constitution provides that: ‘National legislation must be enacted to give effect to these rights’.

<sup>68</sup> PAJA: Section 6(2)(c).

<sup>69</sup> PAJA: Section 3.

<sup>70</sup> PAJA: Section 4.

<sup>71</sup> *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC).

Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner'.<sup>72</sup>

And in *Joseph v City of Johannesburg*,<sup>73</sup> the Constitutional Court, referring to Hoexter, held that procedural fairness is important in a democratic society not only because it is likely to improve the quality and wisdom of decision-making, but also because it demonstrates respect for the dignity of participants.

'The importance of procedural fairness is well described by Hoexter: "Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy".'<sup>74</sup>

Apart from the reasons referred to above, procedural fairness also plays an important role in our democracy because it promotes some of the values that underlie the Constitution, including accountability, responsiveness and openness. In addition, it also promotes the value of public participation.

Procedural fairness also has the ability to legitimise government actions as Baxter states that whenever the power of government seems to have grown tremendously and more radical, it is only fair procedure that will render them tolerable.<sup>75</sup>

Furthermore, procedural fairness is respected for its intrinsic value. Summers states that how good a legal system is may be judged by how good its process is outside the good that may arise from it.<sup>76</sup> Rawls adds on the same point stating that there is no criterion to distinguish

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<sup>72</sup> *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC).para 24.

<sup>73</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

<sup>74</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 41. In *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at para 131, Mokgoro J held that "[e]veryone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance".

<sup>75</sup> Baxter *Administrative law* 1984 at 540.

<sup>76</sup> R S Summers 'Evaluating and Improving Legal Processes: A Plea for Process Values' (1974) 60 *Cornell Law Review* 1 2.

whether the outcome is just except the procedure itself.<sup>77</sup> This means that there is value in the process itself outside the final result and this also needs to be protected.<sup>78</sup>

It is, however, also important to note that procedural fairness has the potential to impose an onerous administrative and financial burdens on the state and in extreme cases can even lead to ‘administrative paralysis’. The dangers inherent in the right to procedural fairness were highlighted by the Constitutional Court in its judgment in *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools; Eastern Transvaal*<sup>79</sup> where the Court said the following:

‘In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly’.<sup>80</sup>

As such, where the law demands the application of the right to be heard in the exercise of public functions and the decision maker does not take heed, it is within the power of the courts to rescind the decision or declare it invalid, void and unenforceable.<sup>81</sup> Decisions that lack procedural fairness are invalid no matter how good the merits of the case are.<sup>82</sup> We turn then to discuss what procedural fairness encompasses.

## 2.4 The scope and ambit of procedural fairness

The scope and ambit of the right to procedural fairness may be found in the principles and rules of the common law principles, the Constitutional and the PAJA. The common law rules

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<sup>77</sup> J Rawls *A Theory of Justice* (1972) 122.

<sup>78</sup> M Bernatt ‘The principle of procedural fairness and its implementation in administrative proceedings: Perspective of a country in democratic transition’ (2010) *Paper for the Workshop on Constitutional Principles and Democratic Transition* 4 available at <http://www.juridicas.unam.mx/wcc/ponencias/16/280.pdf>, accessed 24 July 2015.

<sup>79</sup> *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools; Eastern Transvaal* 1999 (2) SA 91 (CC).

<sup>80</sup> *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools; Eastern Transvaal* 1999 (2) SA 91 (CC) para 41.

<sup>81</sup> *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) 37C-F. See also *Harvey v Umhlatuze Municipality* 2011 (1) SA 601 (KZP) para 165.

<sup>82</sup> *Traub v Administrator, Transvaal* 1989 (1) SA 397 (W) para 403D-E. in this case Goldstone J stated that ‘if a person is wrongly denied a hearing in a case where he should have been given one, no matter how strong the case against him, the denial of the hearing is a fatal irregularity’

of natural justice, however, lie at the heart of the right to procedural fairness even under the Constitution and the PAJA. As we have already seen, the rules of natural justice are encapsulated in the *audi alteram partem* principle and the *nemo iudex in sua causa* principle. For the purposes of this thesis, however, we will concentrate on the *audi alteram partem* principle.

## 2.5 The *audi alteram partem* principle

### 2.5.1 Introduction

As De Ville points out, in its classic form the *audi alteram partem* principle simply provides that a person should be given the opportunity to be heard before a decision that adversely affects him or her is made.<sup>83</sup> A classic formulation of the principle was referred to with approval by the Appellate Division (as it then was) in its judgment in *Administrator Transvaal v Traub*,<sup>84</sup> where it held that:

‘The classic formulations of the principle states 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’.<sup>85</sup>

The quotes simply enforces that every man deserves to be heard before he is condemned.<sup>86</sup> The ‘fair hearing’ which lies at the heart of the *audi alteram partem* principle is made up of a number of core components or requirements. Among these are ‘adequate notice of the hearing’, ‘a reasonable opportunity to make representations’ and ‘notice of any right of review or internal appeal’.<sup>87</sup> All of these core requirements, plus several others, have been included in sections 3 and 4 of PAJA.

Before turning to consider sections 3 and 4 of PAJA, however, it is important to note that even though these core requirements are sometimes regarded as mandatory requirements,

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<sup>83</sup> JR de Ville *Judicial Review of Administrative Law in South Africa* (2003) 218.

<sup>84</sup> *Administrator Transvaal v Traub* 1989 (4) SA 731 (A).

<sup>85</sup> *Administrator Transvaal v Traub* 1989 (4) SA 731 (A) 732A. See also *Cabinet for the Territory of South West Africa v Chikane and Another* 1989 (1) SA 349 (A) 379G.

<sup>86</sup> *R v Gaskin* 1799 (8) TR 209 210.

<sup>87</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) 369-378.

they do not in fact have to be applied in every case.<sup>88</sup> This is because the *audi alteram partem* principle is a flexible concept.

### 2.5.2 A flexible concept

As was pointed out above, the *audi alteram partem* principle is a flexible concept.<sup>89</sup> Essentially, this means that when it comes to deciding whether a hearing was fair or not, the courts will always take the particular circumstances of the case into account. An important consequence of this approach is that the courts have refused to lay down fixed or rigid rules when it comes to determining the meaning and content of the core requirements that make up the principle. It is, therefore, not possible to say what ‘adequate notice’ or ‘a reasonable opportunity to make representations’ or ‘notice of a right of review or internal appeal’ means in the abstract. Instead, the meaning of these core requirements must be determined on a case-by-case basis.<sup>90</sup>

Apart from refusing to lay down fixed rules when it comes to determining the meaning of the core requirements that make up the *audi alteram partem* principle, the courts have also been careful not to equate administrative processes with courts of law. Administrative processes, therefore, do not have to comply with the strict procedures that are followed by courts of law. As Hoexter points out, an important consequence of this approach is that the technical rules of civil procedure and evidence do not need to be applied in administrative processes.<sup>91</sup> Instead, the courts have allowed administrative functionaries to determine their own procedures, provided those procedures are fair.<sup>92</sup>

Finally, it is important to note that the flexible nature of the *audi alteram partem* principle is recognised in section 3(2)(a) of PAJA, which provides that ‘[a] fair administrative procedure depends on the circumstances of each case’.

### 2.5.3 The requirements of a fair hearing

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<sup>88</sup> M Murcott ‘Procedural Fairness’ in G Quinot (ed) *Administrative Justice in South Africa: An introduction* (2015) 154.

<sup>89</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) at 364-365. Hoexter calls it a variable concept.

<sup>90</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) at 364-365.

<sup>91</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) at 366.

<sup>92</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) at 366.

The requirements for a fair hearing are set out in section 3 and section 4 of the PAJA. Section 3 sets out the requirements for a fair hearing in those cases in which the administrative action in question affects an individual and section 4 set out the requirements for a fair hearing in those cases in which the administrative action affects the public at large. For the purposes of this thesis, we will discuss largely on section 3 of PAJA.

#### **2.5.4 Section 3 of the PAJA**

Section 3 begins by setting out the circumstances in which a person is entitled to a fair hearing. Section 3(1) provides in this respect that ‘[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair’.

After setting out the circumstances in which a person is entitled to a fair hearing, section 3 then goes on to set out the requirement for a fair hearing. In this respect it distinguishes between those requirements for a fair hearing which appear to be mandatory and those which are discretionary.<sup>93</sup> The apparently mandatory requirements are set out in section 3(2)(b) and the discretionary requirements are set out in section 3(3).

Section 3(2)(b) provides in this respect as follows:

‘In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1):

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations;
- (iii) a clear statement of the administrative action;
- (iv) adequate notice of any right of review or internal appeal, where applicable; and
- (v) adequate notice of the right to request reasons in terms of section 5.’

Section 3(3) provides in this respect as follows:

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<sup>93</sup> In *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC), the Constitutional Court held that even though the requirements set out in section 3(2)(b) appear to be mandatory, they are not. This is because section 3(2)(b) must be read together with section 39(2)(a) which provides that a fair administrative procedure depends on the circumstances of each case .

‘In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her discretion, also give a person referred to in subsection (1) an opportunity to:

- (a) obtain assistance and, in serious or complex cases, legal representation;
- (b) present and dispute information and arguments; and
- (c) appear in person’.

Although the requirements set out in section 3(2)(b) appear to be mandatory, in *Joseph v City Council of Johannesburg*<sup>94</sup> the Constitutional Court held that this is not in fact the case.

Instead, the courts have a discretion when it comes to enforcing the requirements set out in section 3(2)(b). This is because, the Court held further, section 3(2)(b) must be read together with section 3(2)(a) which confirms that procedural fairness is a flexible concept which ‘depends on the circumstances of each case’.<sup>95</sup>

## **2.5.5 The circumstances in which a person is entitled to a fair hearing**

### *(a) Introduction*

A careful examination of section 3(1) of PAJA shows that a person is entitled to a fair hearing when administrative action has (i) materially or adversely affected (ii) his or her rights; or (iii) his or her legitimate expectations. Each of these requirements will be discussed in turn

### *(b) Materially and adversely affect*

This requirement appears to adopt a very strict approach towards the circumstances in which a person can claim the right to a fair hearing. This is because it seems to limit the circumstances in which a person may claim the right to a fair hearing to those cases in which the administrative action in question has had a ‘material’ impact on his or her rights or legitimate expectations. This narrow approach, however, has been rejected by the Constitutional Court in its judgment in *Joseph v City of Johannesburg*.<sup>96</sup>

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<sup>94</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

<sup>95</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) paras 57-59.

<sup>96</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

In this case the applicants lived in the same apartment building. The City cut off the supply of electricity to the apartment building after the owner failed to pay his account. The applicants then applied for an order declaring the City's decision to be invalid on the grounds that while it gave the owner a fair hearing it did not give them a fair hearing. In response the City argued that it did not have to give the applicants a fair hearing because it did not have a contract to supply electricity with them. It only had a contract with the owner.

One of the issues the Constitutional Court had to decide was whether the City's decision materially and adversely affected any of the applicant's rights. The Court held that it did. In arriving at this conclusion the Court held that administrative action will materially affect a person's rights or legitimate expectations if it simply has a 'significant and not trivial effect'. The key question, therefore, is whether the administrative action affects the person's rights or legitimate expectations.<sup>97</sup>

*(c) Materially and adversely affects a person's rights*

Apart from adopting a generous approach towards the 'materially and adversely affects' requirement in section 3(1) of the PAJA, the Constitutional Court also adopted a generous approach to the 'rights' requirement in its judgment in *Joseph v City of Johannesburg*.<sup>98</sup> As we have seen, the City argued that it did not have to give the applicants a fair hearing because it did not have a contract with them. It only had a contract with the owner. This meant, the City argued further, that the applicants had no rights that they could enforce against the City and, accordingly, no rights which the City could have materially and adversely affected when it made its decision to cut off the supply of electricity.

The Constitutional Court rejected this argument and found that the applicants did have a right which they could enforce against the City and that the City had materially and adversely affected this right when it cut off the supply of electricity. In arriving at this conclusion, the Court held that the word 'rights' in section 3(1) of PAJA does not only encompass common law rights that have vested in a person, but also 'legal entitlements that have their basis in the constitutional and statutory obligations of government'.<sup>99</sup> This is because the purpose of

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<sup>97</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 30.

<sup>98</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

<sup>99</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 43.

PAJA is not simply to protect private law rights, but rather to ‘promote an efficient administration and good governance’ and ‘to create a culture of accountability, openness and transparency in public administration’.<sup>100</sup>

After making these points, the Constitutional Court went on to find that the Constitution did confer a right on the applicants to receive electricity from the City as a part of the City’s obligation to provide basic services to its residents in terms of section 152 of the Constitution. The applicants, therefore, did have a constitutional right that they could enforce against the City and when the City cut-off the supply of electricity it materially and adversely affected this constitutional right.<sup>101</sup>

*(d) Materially and adversely affects a person’s legitimate expectations*

Besides those cases in which administrative action has materially and adversely affected a person’s rights, a person is also entitled to a fair hearing in those cases in which administrative action has materially and adversely affected his or her legitimate expectations. The inclusion of the concept of legitimate expectations in section 3(1) of PAJA has significantly broadened the circumstances in which a person may claim the right to a fair hearing.

As Murcott has pointed out, ‘[a] legitimate expectation is something less than a right. It entails the expectation of a fair procedure being followed or of a certain outcome being afforded the expectant party’. This expectation, she points out further, must have a reasonable basis and must have arisen out of an undertaking given by the administrator or out of a practice that has been followed by the administrator for a long period of time.<sup>102</sup>

The requirements for a legitimate expectation were set out by the High Court in its judgment in *National Director of Public Prosecutions v Phillips*.<sup>103</sup> In this case, the Court held that not every expectation is protected by the law. Instead, the law only protects those expectations

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<sup>100</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 43.

<sup>101</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 47.

<sup>102</sup> M Murcott ‘Procedural Fairness’ in G Quinot (ed) *Administrative Justice in South Africa: An introduction* (2015) 151.

<sup>103</sup> *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W).

that are legitimate. In order to be considered legitimate, the Court held further, an expectation must satisfy the following requirements:

- First, the representation giving rise to the expectation must be “clear, unambiguous and devoid of relevant qualification.
- Second, the representation giving rise the expectation ‘must have been induced by the decision-maker’.
- Third, the representation giving rise to the expectation must be “one which it was competent and lawful for the decision-maker to make.
- Last, the expectation must be reasonable.<sup>104</sup>

### **2.5.6 The requirements of a fair hearing**

#### *(a) Introduction*

Having set out the circumstances in which a person is entitled to a fair hearing, we may now turn to consider the requirements of a fair hearing. As we have already seen, section 3 of PAJA distinguishes between those requirements which are set out in section 3(2)(b) (the ‘minimum requirements’) and those which are set out in section 3(3) (the ‘discretionary requirements’).

#### *(b) The section 3(2)(b) minimum requirements*

As we have seen, section 3(2)(b) provides that a hearing will only be fair if the adversely affected person is given:

- adequate notice (s 3(2)(b)(i));
- a reasonable opportunity to make representations (s 3(2)(b)(ii));
- a clear statement of the administrative action (s 3(2)(b)(iii)); and
- notice of any right of review or internal appeal and of the right to request reasons (s 3(2)(b)(iv) and (v)).

The first of these requirements is based on the argument that a ‘man cannot meet charges for which he has no knowledge’. It is, therefore, essential to give an adversely affected person

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<sup>104</sup> *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W) para 28.

notice of an action that is impending against him or her.<sup>105</sup> As section 3(2)(b)(i) explicitly states, the notice must contain information about the nature and purpose of the administrative action being proposed. In addition, it has been argued that this information must be set out in enough detail to enable the adversely affected individual to exercise their rights.<sup>106</sup> In this respect it has also been held that the information must be so clear that the adversely affected individual is left with no questions as to the nature of the specific administrative action in question.<sup>107</sup>

Apart from providing the adversely affected person with sufficient information about the nature and purpose of the proposed administrative action, the administrator must also give him or her an adequate amount of time to prepare before the hearing takes place.<sup>108</sup> In practice, the amount of time that will be adequate depends on the circumstances of each case.<sup>109</sup> In order to determine whether the notice was adequate, the courts will also take into account the manner in which the notice was given<sup>110</sup> and how understandable the notice is.<sup>111</sup> As Hoexter points out there is also a crucial link between the ‘the amount of information disclosed to an affected person and the quality of his or her opportunity to make representations’.<sup>112</sup> The more valuable the information that is given is, the better the party will be better prepared to make their representations.

Besides giving the adversely affected individual adequate notice of the proposed administrative action, section 3(2)(b)(ii) provides that he or she must also be given ‘a reasonable opportunity to make representations’. This is the second requirement of procedural fairness. The obligation set out in section 3(2)(b)(ii) must be read together with section 3(3)(c) which provides that an administrator may, in his or her discretion, give an adversely affected individual an ‘opportunity to appear in person’. When read together, these two sections suggest that a hearing does not always need to be oral in order for it to be fair.<sup>113</sup> There is no right to an oral hearing so, what passes for procedural fairness does not always

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<sup>105</sup> *Kadalie v Hemsworth NO 1928 TPD 495 506.*

<sup>106</sup> I Currie & J Klaaren *The Promotion of Administrative Justice Act Bench book 2001* para 3.12 and 3.13

<sup>107</sup> *Klein v Dainfen College 2006 (3) SA 73 (T)* para 35.

<sup>108</sup> C Hoexter *Administrative Law in South Africa 2ed (2012)* 333.

<sup>109</sup> *Nkomo v Administrator, Natal 1991 12 ILJ (N) 48*hrs was held to be inadequate but in the *Police and Prisons Civil Rights Union v Minister of Correctional Services 2006 2 All SA 175* it was held to be sufficient.

<sup>110</sup> *Bashula v Permanent Secretary, Department of Welfare Eastern Cape 2000 (2) SA 849 (E)*. Here the nature of the proposed action meant that individual notice was sufficient and not a general one.

<sup>111</sup> *Cape Killerney Property Investments (Pty (Ltd) v Muhamba 2000 (2) SA 67 (C)*.

<sup>112</sup> C Hoexter *Administrative Law in South Africa 2ed (2012)* 334.

<sup>113</sup> C Hoexter *Administrative Law in South Africa 2ed (2012)* 334.

involve an oral hearing.<sup>114</sup> Instead of being oral, the representations can instead be submitted in a written form, provided they satisfy the requirements of a reasonable opportunity.<sup>115</sup> This is also true after considering that what is fair is contextual and can differ with circumstances.

It is important to note that the opportunity to make representations can be influenced by the following factors:

- How well the adversely affected individual is apprised of the facts, information and reasons that underlie the decision about to be taken. Information has to be material to the case.<sup>116</sup>
- The disclosure by the administrator of any information that is adverse or prejudicial to the adversely affected individual.<sup>117</sup> Such disclosure includes the disclosure of significant policy considerations.<sup>118</sup>
- Whether the adversely affected individual can invoke section 32(2) of the Constitution which entitles the applicant the right to full discovery of documentary evidence against themselves.<sup>119</sup>

Another aspect of the opportunity to make representations requirement that needs attention is whether the decision-maker is obliged to hear the adversely affected individual's representations personally. In *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism*,<sup>120</sup> the Court held that the obligation to hear representations from adversely affected individuals may be delegated to another person.

This case dealt with the construction of a nuclear reactor. The panel that was tasked to hear the applicant's submission was a panel of experts and it was found inconceivable that the Director-General should hear the representations considering their technical nature. The

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<sup>114</sup> *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided, Eastern Transvaal* 1999 (2) SA 91 (CC) para 39.

<sup>115</sup> I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* 2001 para 3.10 suggests fairness would not be met by expecting an uneducated person to give a written submission whilst they could have been heard orally.

<sup>116</sup> *Earthlife Africa (Cape Town) v Director General : Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C).

<sup>117</sup> *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C). In this case Griesel J found it unfair that the administrator did not disclose two reports prejudicial to the applicant.

<sup>118</sup> *Tseleng v Chairman, Unemployment Insurance Board* 1995(3) SA 162 (T).

<sup>119</sup> *NISEC v Western Cape Provincial Tender Board* 1997 (3) BCLR 367 (C).

<sup>120</sup> *Earthlife Africa (Cape Town) v Director General : Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C).

experts would assist the Director General to understand the submissions and ensure an informed decision on whether to erect the nuclear reactor and this would be in line with principles of a fair hearing.<sup>121</sup>

What is required in the end is that the decision-maker's conclusion be influenced by the submissions made by the applicant. This will promote fairness in the decision made even where the decision maker did not hear the applicant's case personally.

The third requirement of procedural fairness is set out in section 3(2)(b)(iv) which provides that an adversely affected individual must be given notice of any right of review or internal appeal, where applicable and the fourth ingredient in section 3(2)(b)(v) which provides that an adversely affected individual must be given notice of the right to request reasons in terms of section 5 of PAJA.

#### *(c) The section 3(3) discretionary requirements*

Apart from the minimum requirements set out in section 3(2)(b), section 3(3) of PAJA provides that an administrator may, in his or her discretion, also give an adversely affected person an opportunity to:<sup>122</sup>

- obtain assistance and, in serious or complex cases, legal representation;
- present and dispute information and arguments; and
- appear in person.

These provisions have been criticised on the grounds that they undermine the right of procedural fairness and especially the *audi alteram partem* principle since they move away from the idea of a hearing being an indispensable right in the Constitution. The discretionary nature of these obligations can also be abused by administrators and there can even be inferences of bias if the administrator wantonly refuses legal representation, or the opportunity to dispute information or to appear in person.

### **2.5.7 Departures from the minimum requirements**

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<sup>121</sup> *Earthlife Africa (Cape Town) v Director General : Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) para 72.

<sup>122</sup> PAJA: Section 3(3).

Although the requirements set out in section 3(2)(b) of PAJA are considered to be the minimum requirements for a fair hearing, section 3(4) of PAJA allows an administrator to depart from these minimum requirements in certain circumstances. Section 3(4)(a) provides in this respect that an administrator may depart from the minimum requirements when it is “reasonable and justifiable to do so”.

When it comes to deciding whether it is reasonable and justifiable to depart from the minimum requirements, the administrator does not have an entirely free hand. Instead, section 3(4)(b) provides that the administrator must take certain factors into account. These are as follows:<sup>123</sup>

- (a) the objects of the empowering provisions;
- (b) the nature and purpose of, and the need to take, the administrative action;
- (c) the likely effect of the administrative action;
- (d) the urgency of taking the administrative action or the urgency of the matter; and
- (e) the need to promote an efficient administration and good governance.

#### **2.5.8 Section 4 of PAJA**

Section 4 set out the requirements for a fair hearing in those cases in which the administrative action does not materially and adversely affect the rights of an individual, but rather the rights of the public at large. Like section 3, it begins by setting out the circumstances in which the public are entitled to a fair hearing. Section 4(1) provides in this respect that “where an administrative action materially and adversely affects the rights of the public”, the administrative action must be procedurally fair.

After setting out the circumstances in which the public are entitled to procedural fairness, section 4 then goes on to set out the requirement for a fair procedure. In this respect section 4(1) provides that in order to give effect to the right to procedurally fair administrative action, an administrator must hold a public inquiry or follow a notice and comment procedure or follow both procedures. Once the administrator has chosen one of these options, however, he

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<sup>123</sup> PAJA: Section 3(4)(b).

or she must follow the requirements of that procedure and may not choose a different procedure later on.<sup>124</sup>

In those cases in which an administrator decides to hold a public inquiry, section 4(2) provides (a) that the administrator must conduct the public inquiry or appoint a suitably qualified person or panel of persons to do so; and (b) the administrator, or person or panel referred to in paragraph (a) must:

- (i) determine the procedure for the public inquiry;
- (ii) conduct the inquiry in accordance with that procedure;
- (iii) compile a written report on the inquiry and give reasons for any administrative action taken or recommended; and
- (iv) as soon as possible thereafter publish a summary of the report and take steps to publicise the report.

These public inquiries are also regulated by the Regulations on Fair Administrative procedure.<sup>125</sup>

In those cases in which an administrator decides to follow a notice and comment procedure, section 4(3) provides that the administrator must:

- ‘(a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
- (b) consider any comments received;
- (c) decide whether or not to take the administrative action, with or without changes; and
- (d) comply with the procedures to be followed in correction with notice and comment procedures, as prescribed’.

The Regulations on Fair Administrative Procedure also prescribed on the notice and comment procedures,<sup>126</sup>

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<sup>124</sup> PAJA: Section 4.

<sup>125</sup> Regulations on Fair Administrative Procedures Published In *Government Notice* No. R. 1022 Of 31 July 2002 (*Government Gazette* No. 23674). The regulations provide for publication of the inquiry in any two official languages, advertisement of the inquiry either nationally and regionally, stating who has been appointed to hold the inquiry. Also the notice or publication of the inquiry should have enough information about the impending decisions, to enable the public to investigate and make meaningful representations. This requirement reflects the opportunity be heard and make representations in section 3 for individuals. The publication also allows the public an opportunity to prepare and the inquiry affords an opportunity to present their side.

Finally, section 4(4) provides that the administrator may depart from the requirements of sections 4(2) and 4(3) where it is reasonable and justifiable to do so. When it comes to deciding whether it is reasonable and justifiable to depart from the requirements of sections 4(2) and 4(3), the administrator must take certain factors into account. These factors are exactly the same as those that an administrator must take into account when deciding whether to depart from the minimum requirements set out in section 3(2)(b).

## **2.6 The *nemo iudex in sua causa* principle**

The *nemo iudex in sua causa* principle essentially provides that ‘no one should be judge in their own case’.<sup>127</sup> It has traditionally been regarded as one of the elements of natural justice which ‘seeks to ensure that the decision maker is impartial or is seen to be impartial in the case s/he is to decide’.<sup>128</sup> It is a rule that ensures that the decision maker is impartial and there is no bias when a decision is made thus it can be called the rule against bias.<sup>129</sup>

The human mind as a result of socio-economic and even political environments is prone to be vulnerable to prejudices and De Ville has stated that there is no legal rule that can prevent these pre-held convictions from surfacing time and again.<sup>130</sup> The assertion by De Ville that the human mind is susceptible to prejudice is the one that defines the importance of the rule against bias. The rule against bias simply ensures that those who come before the courts of law leave satisfied with the proceedings, fostering a sense of confidence in the legal system.

Further, the rationale for the rule against bias is that there is need to instil in the public a sense of confidence in administrative justice and the appearance of bias destroys such confidence.<sup>131</sup> Decision makers should be prevented from making decisions that are guided

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<sup>126</sup> Chapter 2 of the Regulations on Fair Administrative Procedures provides, inter alia, that the public should adequately be notified, through an official language, timeously; provide for the illiterate that they make their contribution etc.

<sup>127</sup> *De Lange v Smuts and others* 1998 (3) SA 785 (CC) para 131. Also see M Wiechers ‘Administrative Law’ in *The Law of South Africa Volume One* (1976) 50.

<sup>128</sup> J R de Ville *Judicial Review of Administrative Law in South Africa* (2003) 268.

<sup>129</sup> C Hoexter *Administrative Law in South Africa* 2ed (2012) at 451

<sup>130</sup> J R de Ville *Constitutional and Statutory Interpretation* (2000) at 3-8.

<sup>131</sup> *Metropolitan Properties Co (FCG) Ltd v Lannon* [1969] 1 QB 577 (CA) para 599F.

by their own interests, motives or considerations, they should not be influenced by any external force that has nothing to do with the decision that they are taking.<sup>132</sup>

In the English jurisdiction there are 3 different tests competing for dominance to establishing bias which are: whether there is real bias; a reasonable apprehension of bias or a real likelihood of bias.<sup>133</sup> Actual bias is difficult to satisfy because it manifests in the mind of the decision-maker.<sup>134</sup> Furthermore the reasonable apprehension of bias is preferred over the real likelihood of bias because it is captured in S 6(2)(a)(iii) which provides that that the court can review administrative action where the administrator ‘was biased or reasonably suspected of bias’. The accepted test therefore is the reasonable suspicion of bias.

Considering that the reasonable suspicion of bias test is couched in the PAJA it has also been endorsed in the courts. In the case of *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union*<sup>135</sup> it was stated that:

‘It is the right of the public to have their cases decided by persons who are free not only from fear but also from favour. In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality. To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root of the principle, deeply embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice. It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the *de minimis* principle) he is disqualified, no matter how small that interest may be. ... The law does not seek, in such a case to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter.’<sup>136</sup>

According to the case, one has to prove the appearance of bias rather than that bias actually existed. Some have called it reasonable apprehension of bias because of the controversy

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<sup>132</sup> C Hoexter *The New Constitutional and Administrative Law: Volume Two Administrative Law* (2002) 191.

<sup>133</sup> *City and Suburban Transport (Pty) Ltd v Local Board Transportation*, Johannesburg 1932 WLD 100.

<sup>134</sup> *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers’ Union and Others* 1992 (3) SA 673 (A) 688D-697.

<sup>135</sup> *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union* 1992 (3) SA 673 (A).

<sup>136</sup> *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union* 1992 (3) SA 673 (A).

surrounding what exactly is “reasonable suspicion”.<sup>137</sup> This distinction however is of little substantive significance.<sup>138</sup> What is important is that a variety of scenarios have been held to indicate a reasonable apprehension of bias and these include that: where the administrator may gain (financially or otherwise) from the outcome of the case;<sup>139</sup> or where a personal interest that a family member may benefit;<sup>140</sup> or where the administrator already has a pre-held expression of prejudice.<sup>141</sup> It can be noted that considerations of bias may overlap with the other grounds, for example abuse of discretion like pursuing ulterior motives or taking irrelevant considerations into account.<sup>142</sup> The test has the advantage that it removed from the court the burden of establishing the decision-maker’s state of mind.<sup>143</sup> This means it is no longer a subjective test but an objective one.

Caveat should be taken however to note that this test is for the minimum standard of bias. Suffice to say also that where actual bias is established the decision will consequently be set aside even where there was no reasonable suspicion of that bias.<sup>144</sup>

## 2.7 Conclusion

In summary we established in this chapter that procedural fairness adds a lot of value to the legal system especially in the area of public decision making. We have identified three main sources of procedural fairness as the common law, the Constitution and the PAJA. Since the thesis deals with questions of decision making by public officials, the PAJA was the main source that we discussed because it deals with procedural fairness under administrative law which also is a branch of public law.

Supplementing the PAJA with the common law principles and the Constitution we elaborated the content of procedural fairness. At the very basic, procedural fairness involves the principle of natural justice at common law which have been developed the Constitution into a right to procedural fairness. The PAJA outlines the components and requirements of the right

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<sup>137</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union* 1999 (2) SA 14 (CC) para 38.

<sup>138</sup> *Sager v Smith* 2001 (3) SA 1004 (SCA) para 15.

<sup>139</sup> See for example *Rose v Johannesburg Local Road Transportation Board* 1947 (4) SA 272 (W).

<sup>140</sup> See for example *Lienburg v Brakpan Liquor Licensing* 1944 WLD 52.

<sup>141</sup> See for example *Patel v Witbank Town Council* 1931 TPD 284.

<sup>142</sup> C Hoexter *The New Constitutional and Administrative Law: Volume Two Administrative Law* (2002) 191.

<sup>143</sup> E Muriénik ‘Administrative law’ 1992 *Annual Survey of South African Law* 730 731.

<sup>144</sup> L A Rose Innes *Judicial review of Administrative Tribunals in South Africa* (1963) 173ff.

to procedurally fair administrative actions. In doing so the PAJA appreciates that procedural fairness is a flexible concept which is applied with vast regard to the circumstances of each case.

From here we move to the next chapter where we shall discuss this concept of procedural fairness under the rule of law (legality). In the coming chapter we shall discuss a variety of cases in which the Constitutional Court has dealt with whether procedural fairness is a part of the principle of legality.

## CHAPTER THREE: THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT

### 3.1 Introduction

Having set out and discussed the scope and ambit of the right procedural fairness primarily from an administrative law perspective, we may now turn to consider the different approaches the Constitutional Court has adopted towards procedural fairness as a separate and self-standing ground of review for executive action under the rule of law.

As we saw in Chapter One, the Constitutional Court initially adopted a strict approach in its majority judgment in *Masetlha v President of the Republic of South Africa*<sup>145</sup> and unanimous judgment in *Association of Regional Magistrates of South Africa v President of the Republic of South Africa*.<sup>146</sup> In these cases the Court held that executive action cannot be reviewed on the grounds that it is procedurally unfair. Or, to put it another way, in these cases the Court held that the principle of legality should not be interpreted to include the right to procedural fairness as a separate and self-standing ground of review for executive action. For the sake of convenience, this approach may be referred to as the ‘no to procedural fairness’ approach.

Following its majority judgment in *Masetlha* and unanimous judgment in *ARMSA*, however, the Constitutional Court began to move towards a broader approach. This move started in *Albutt v Centre for the Study of Violence and Reconciliation*,<sup>147</sup> where the Court held that executive action may be reviewed and set aside in those cases where the failure to follow a fair procedure was irrational and confirmed in *Democratic Alliance v President of the Republic of South Africa*,<sup>148</sup> where the Court held that executive action may be reviewed and set aside in those cases where not only the decision, but also the process that preceded the decision was irrational. This approach may be referred to as the ‘yes to procedural rationality’ approach.

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<sup>145</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC).

<sup>146</sup> *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC).

<sup>147</sup> *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).

<sup>148</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC).

Most recently the move towards a broader approach almost came to fruition in *Minister of Defence and Military Veterans v Motau*.<sup>149</sup> Like its minority judgment in *Masetlha*, the Constitutional Court unanimously suggested, in an *obiter dictum*, that executive action could in fact be reviewed on the grounds that it is procedurally unfair. Or, to put it another way, the Court suggested, in an *obiter dictum*, that the principle of legality should be interpreted to include the right to procedural fairness as a separate and self-standing ground of review for executive action. This approach may be referred to as the ‘maybe yes to procedural fairness’ approach.

The purpose of this chapter is to set out and analyses these different approaches

## **3.2 The ‘no to procedural fairness’ approach**

### **3.2.1 Introduction**

As pointed out above, the Constitutional Court initially adopted a strict approach in its judgments in *Masetlha* and *ARMSA*. Both of these cases will be discussed in turn.

### **3.2.2 Masetlha v President of the Republic of South Africa: The majority judgment**

#### *(a) The facts*

The facts of this case are as follows. In 2004 Mr Billy Masetlha was appointed as the Director of the National Intelligence Agency (the ‘NIA’) by the President for a period of three years. In 2005 a prominent businessman by the name of Mr Saki Macozoma complained to the Minister of Intelligence that he had been placed under surveillance by members of the NIA. After receiving this complaint, the Minister asked Mr Masetlha for an explanation. The Minister, however, was dissatisfied with the explanation he received from Mr Masetlha and asked the Inspector-General of Intelligence to investigate the matter. Following his investigation, the Inspector-General came to the conclusion that the decision to place Mr Macozoma under surveillance was unlawful. In addition, he also found that Mr Masetlha had

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<sup>149</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC).

deliberately sought to mislead the investigating team and the Minister and recommended that a disciplinary hearing should be held.

After the Minister received the Inspector-General's report, Mr Masetlha was summoned to several meetings with the President and the Minister. At the last of these meeting, the Minister read out a letter advising Mr Masetlha that he had been suspended from his position as the Director-General. Approximately three weeks later, the President issued a Presidential Minute confirming the Minister's decision to suspend Mr Masetlha. In response, Mr Masetlha applied to the High Court for an order setting aside the President's decision to suspend him. Following this application, the President claimed that the relationship of trust between him and Mr Masetlha had irretrievably broken down and he then dismissed Mr Masetlha by amending his term of office so that it expired two days later.

After the President dismissed Mr Masetlha's by amending his term of office, Mr Mastlha applied to the High Court for an order declaring that the President had no power to unilaterally dismiss him and that he was still the Director-General. The High Court rejected this application and Mr Masetlha then appealed to the Constitutional Court. In the Constitutional Court he based his application on a number of different grounds. One of these was that the President's decision to dismiss him was an administrative decision and, consequently, that the President was required, in terms of section 3(2) of PAJA, to follow a fair procedure before he made his decision. Unfortunately, the President did not do this and his decision, therefore, was invalid.

*(b) The judgment*

A majority of the Constitutional Court rejected Mr Masetlha's argument. In arriving at this decision, the Court first had to determine whether the President's decision to dismiss Mr Masetlha was an administrative or an executive decision. Insofar as this issue was concerned, the Court found that the President's decision should be classified as an executive and not as an administrative one. The Court held further that this was because the power given to the President to appoint and dismiss the Director-General of the NIA was a special one aimed at

promoting the effective business of government and, especially, the effective pursuit of national security.<sup>150</sup>

Given that the President's decision to dismiss Mr Masetlha was an executive decision and not an administrative decision, the Constitutional Court also held, it would not be appropriate to subject it to the requirements of procedural fairness, which is a ground on which administrative action may be reviewed, but not a ground on which executive action could be reviewed. When it comes to deciding whether the exercise of public power should be subjected to the requirements of procedural fairness, the Court held further, the courts should be careful not to impose obligations on the government that will inhibit its ability to act in an effective manner.<sup>151</sup>

Even though executive actions do not need to be exercised in a procedurally fair manner, the Constitutional Court went on to hold that this does not mean that there are no constraints on executive action. Executive action still has to be exercised in a lawful and rational manner:

'This does not, however, mean that there are no constitutional constraints on the exercise of executive authority. The authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. Procedural fairness is not a requirement. The authority in section 85(2)(e) of the Constitution is conferred in order to provide room for the President to fulfil executive functions and should not be constrained any more than through the principle of legality and rationality'.<sup>152</sup>

After setting out these principles, the Constitutional Court turned to apply them to the facts. In this respect the Court failed to see any suggestion that indicated that the President acted arbitrarily or without sufficient reason. It stated that the breakdown in relationship between the President as head of the executive and Mr Masetlha as head of the Agency, constituted a rational basis for the decision to dismiss Mr Masetlha.<sup>153</sup>

### **3.2.3 ARMSA v President of the Republic of South Africa**

#### *(a) The facts*

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<sup>150</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 75 and 77.

<sup>151</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 77

<sup>152</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 78

<sup>153</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 24-25

The facts of this case are as follows. In April 2010, the Independent Commission for the Remuneration of Public Office Bearers (the ‘Commission’) – acting in accordance with the provisions of the Independent Remuneration of Public Office-bearers Act<sup>154</sup> – proposed that public office-bearers, including Regional Magistrates and Regional Court Presidents, should receive an increase of 7% in their annual salaries for the 2010/2011 financial year. Before submitting this proposed recommendation to the President, however, the Commission sent a letter to the Chief Justice setting out its proposal and asking for his comments.

After receiving this letter, the Chief Justice asked the Commission to send its proposal to the Magistrates’ Commission, which it did. The Magistrates’ Commission then forwarded the letter to the Association of Regional Magistrates of South Africa (‘ARMSA’), which represented approximately 90% of Regional Magistrates. In response to the Commission’s proposal, ARMSA raised a number of concerns. Among these were a lack of consultation, the gap between the proposed increase and the annual cost of living and the gap between the remuneration of judges and magistrates and between judicial officers and other public officials.

Despite receiving these concerns, the Commission ultimately decided to adopt its proposed recommendation and in September 2010 it submitted a report to the President in which it recommended that the annual salaries of public office bearers, including Regional Magistrates and Regional Court Presidents, should be increased by 7% for the 2010/2011 financial year. In its report, the Commission indicated that it had consulted with the Minister of Finance, the Minister of Justice and the Chief Justice.

After he received the report, the President consulted with the Minister of Finance. During these consultations, the Minister indicated that he was opposed to the Commission’s recommendation because inflation was predicted to fall to 5.2% and the Commission’s recommendation would impose an undue burden on the national fiscus. The President agreed with the arguments made by the Minister and rejected the Commission’s recommendation. He then decided to increase the annual salaries of public office-bearers by only 5%. Shortly thereafter the President’s decision was forwarded to Parliament for approval and Parliament did so in November 2010. The decision was then published in the *Government Gazette*.

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<sup>154</sup> Independent Remuneration of Public Office-bearers Act 92 of 1997.

After the President's decision was published in the *Government Gazette*, ARMSA applied to the High Court for an order setting it aside. The High Court rejected this application and ARMSA then appealed to the Constitutional Court. In the Constitutional Court, ARMSA based its application on a number of grounds. One of these was that the President's decision was an administrative decision and, consequently, that the President was required, in terms of section 3(2) of PAJA, to follow a fair procedure and give ARMSA a reasonable opportunity to make representations before he made his decision. Unfortunately, the President did not do this and his decision, therefore, was invalid.

*(b) The judgment*

A unanimous Constitutional Court rejected this argument. In arriving at this decision, the Court first had to determine whether the President's decision to increase the annual salaries of public office-bearers by only 5% was an administrative or executive decision. Insofar as this issue was concerned, the Court found that the President's decision should be classified as an executive and not as an administrative one for a number of reasons.

One of these reasons was that the adequate remuneration of judicial officers is an important element of the independence of the judiciary. If judicial officers do not enjoy financial security, their ability to act independently may be put under strain. Given the sensitive nature of this issue, the Court held further, it could not be said that the President was merely 'carrying out the daily functions of the State' when he made his decision.<sup>155</sup>

Another reason why the President's decision was not an administrative decision, but rather an executive decision, the Constitutional Court went on to hold, is because it was subject to a number of checks and balances. Apart from receiving a recommendation from the Commission, the President also had to consult with the Minister of Finance and submit his decision to Parliament for approval. The decision also had to be published in the *Government Gazette*.<sup>156</sup>

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<sup>155</sup> *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC) para 43.

<sup>156</sup> *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC) para 44.

The fact that the President's decision was not an administrative decision, but rather an executive act, the Court concluded, meant that it was not governed by the principles of administrative justice as set out in PAJA, but rather by the principle of the rule of law and, in particular, the principle of legality. The Court summed up this finding as follows:

'In essence, when the President made the determination he was exercising a power which impacts on a matter that is of importance to the independence of the judiciary, in terms of a particular constitutional and legislative scheme, subject to clear statutory checks, balances and standards of review. In light of this Court's decision in *Masetlha*, that renders his conduct 'executive' rather than 'administrative' in nature. Given the significance of the President's decision, the careful manner in which Parliament has prescribed that it should be taken and the complexity of the ultimate determination, I conclude that the President's decision did not constitute administrative action and that PAJA does not apply. The applicant's argument on this issue must thus fail. . .

<sup>157</sup>

In its judgment in *Masetlha*, the Constitutional Court then held, it found that executive action may be reviewed only on certain narrow grounds that fall within the principle of legality. These grounds include lawfulness and rationality. Unlike administrative action, however, they do not include procedural fairness. This is because procedural fairness is not a requirement for the exercise of executive action. This means, the Court held further, that executive action cannot be challenged unless a hearing is specifically required by the enabling statute and in this case the Magistrates Act 90 of 1993 – which regulates the payment of salaries to magistrates – did not impose such a duty on the President.<sup>158</sup>

In light of these principles, the Constitutional Court went on to conclude, ARMSA's argument had to be rejected. In its own words the Court stated that:

'A further issue relates to ARMSA's contention that neither it nor its members were consulted either by the Commission or the President. The applicant argues that the decision was procedurally unfair. The challenge is without merit. With regard to the decision of the President, a procedural fairness challenge is not competent because the decision he took did not amount to administrative action. As it was pronounced in *Masetlha*, executive action may be reviewed on narrow grounds which fall within the ambit of the principle of legality. These grounds include lawfulness and rationality. Procedural fairness is not a requirement for the exercise of executive powers and therefore executive action cannot be challenged on the ground that the affected party was

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<sup>157</sup> *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC) para 45.

<sup>158</sup> *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC) para 59.

not given a hearing unless a hearing is specifically required by the enabling statute. Section 12 of the Magistrates Act does not require the President to hear Magistrates before determining their salaries'.<sup>159</sup>

### 3.2.4 Comment

The judgments in both *Masetlha* and *ARMSA* have been criticised by academic commentators on a number of different grounds. Among the most important of these criticisms are the following:

First, as Plasket points out, apart from the minimalist version of the rule of law (which would have legitimised the laws of Nazi Germany and apartheid South Africa), both the formalist version and the substantive version accept that the rule of law encompasses the right to procedural fairness.<sup>160</sup> In addition, he points out further, the Constitutional Court itself appears to have accepted that the rule of law does encompass the right to procedural fairness in its judgment in *De Lange v Smuts NO*<sup>161</sup> when it held that laws should be 'pre-announced, general, durable and reasonably precise rules administered by regular courts or similar independent tribunals according to fair procedures'.<sup>162</sup>

Second, as Raz has pointed out, both the formalist and substantive versions of the rule of law accept that it encompasses the right to procedural fairness because procedural fairness promotes a number of very important values in a democratic society.<sup>163</sup> One of these is that procedural fairness improves the quality and wisdom of decision making.<sup>164</sup> Another of these is that it also demonstrates respect for the dignity of the participants.<sup>165</sup> In addition, procedural fairness also promotes some of the values that underlie the Constitution such as accountability, responsiveness, openness and public participation.<sup>166</sup>

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<sup>159</sup> *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC) para 59.

<sup>160</sup> C Plasket 'Administrative Law' 2008 *Annual Survey* 41.

<sup>161</sup> *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

<sup>162</sup> *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 46.

<sup>163</sup> J Raz 'The Rule of Law and its Virtue' (1977) 93 *LQR* 195 201.

<sup>164</sup> *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC).

<sup>165</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

<sup>166</sup> M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice in South Africa: An introduction* (2015) 151.

Third, given how well established the *audi alteram partem* principle is in South African law and particularly how well established it is in the context of dismissals,<sup>167</sup> Hoexter points out that the judgment in *Masetlha* appears to be regressive.<sup>168</sup> This is because, first, it is difficult to understand how national security would be threatened by requiring the President to give Mr Masetlha a hearing and, second, because the Court defined the rule of law more narrowly than it was defined under the common law during the apartheid era.<sup>169</sup> Ngcobo J makes a similar point in his dissenting judgment in *Masetlha* when he said the following:

‘The new constitutional order incorporates common law constitutional principles and gives them greater substance. The rule of law is specifically declared to be one of the foundational values of the new constitutional order. The content of the rule of law principle under our new constitutional order cannot be less than what it was under the common law’.<sup>170</sup>

Finally, Kruger argued that the approach in *Masetlha* sets ‘a perilous precedent reducing the constraints on executive power, significantly and potentially eroding the supremacy of the constitution in that respect’.<sup>171</sup> In order to avoid such a precedent, she argues further, that ‘the only sensible way to read the decision in *Masetlha* is to regard the finding on procedural fairness and the rule of law, not as a general rule, but driven by the specific context of the case: that of the need to protect national security, which cannot be achieved if the President’s relationship of trust with the head of the NIA has broken down irreparably’<sup>172</sup>.

### 3.3 The ‘yes to procedural rationality’ approach

#### 3.3.1 Introduction

Following its judgments in *Masetlha* and *ARMSA*, however, the Constitutional Court began to move towards a broader approach. This move started in *Albutt v Centre for the Study of*

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<sup>167</sup> *Administrator, Transvaal v Zenzil* 1991 (1) SA 21 (A). A common law case that imposed procedural fairness in cases involving dismissals.

<sup>168</sup> C Hoexter ‘Clearing the Intersection? Administrative law and labour law in the constitutional court’ (2008) 1 *Constitutional Court Review* 209 at 231.

<sup>169</sup> C Hoexter ‘Clearing the Intersection? Administrative law and labour law in the constitutional court’ (2008) 1 *Constitutional Court Review* 209 at 231.

<sup>170</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 188.

<sup>171</sup> R Kruger ‘The South African Constitutional Court and the Rule of Law: The *Masetlha* judgment a cause for concern’ (2010) 13 *Potchefstroom Electronic Law Journal* 468 485.

<sup>172</sup> M Murcott ‘Procedural fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?’ (2013) 130(2) *SALJ* 271.

*Violence and Reconciliation*<sup>173</sup> and was confirmed in *Democratic Alliance v President of the RSA*.<sup>174</sup> Both of these cases will be discussed in turn.

### **3.3.2 Albutt v Centre for the Study of Violence and Reconciliation**

#### *(a) The facts*

The facts of this case are as follows. In November 2007 the President announced in Parliament that in order to complete the unfinished work of the Truth and Reconciliation Commission (the ‘TRC’) he intended to create a special dispensation in terms of which certain prisoners could apply for a presidential pardon in terms of section 84(2)(j) of the Constitution. The prisoners who could apply in terms of this special dispensation, he announced further, were those who had been convicted of a politically motivated offence committed before 16 June 1999 and who had chosen not to participate in the TRC proceedings for whatever reason

When he made this announcement, the President explained that those prisoners who qualified for a presidential pardon would have to submit an application to a specially created multi-party Pardon Reference Group (the ‘PRG’). The PRG, he explained further, would consider each application and make a recommendation to him. He would then personally consider each recommendation and make a decision based on the information placed before him.

When it came to deciding whether to grant a pardon or not, the President went on to explain, he would be guided by the ‘principles and values which underpin the Constitution, including the principles and objectives of national unity and national reconciliation; and, uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they related to the amnesty process’.<sup>175</sup>

Following the President’s announcement, the respondents (who were a coalition of non-governmental organisations) made numerous requests for the victims of the offences in respect of which pardons were sought to participate in the special dispensation process.

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<sup>173</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

<sup>174</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC).

<sup>175</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 53.

Unfortunately, these requests were rejected, first, by the PRG and then by the President. After the President rejected their requests, the respondents applied to the High Court for an order preventing the President from granting any such pardons without first giving the victims a hearing.

The respondents based their application on the grounds that the decision to grant a pardon in terms of section 84(2)(j) of the Constitution was an administrative decision and, consequently, that the President was obliged, in terms of section 3(2) of PAJA, to follow a fair procedure before he made such a decision. The High Court agreed with this argument and granted the order. The applicants then appealed to the Constitutional Court.

*(b) The judgment*

A unanimous Constitutional Court dismissed the appeal. In arriving at this conclusion, the Court held first that it was unnecessary to determine whether the President's decision should be classified as an administrative or executive decision. This is because it is a well-established principle of South African constitutional law that the exercise of all public power has to comply with the principle of legality. The principle of legality, the Court held further, provides that every exercise of public power, including the President's decision to grant a pardon, has to be both lawful and rational.<sup>176</sup>

In order to determine whether the President's decision to grant a pardon was rational, the Constitutional Court then held, it had to determine whether the means adopted by the President were rationally related to the ends. Or, to put it another way, it had to determine whether the decision to exclude the victims from participating in the special dispensation process was rationally related to the objectives the President announced in Parliament, namely national unity and national reconciliation.<sup>177</sup>

Apart from setting out these objectives, the Constitutional Court went on to hold, the President also announced in Parliament that they would be achieved by applying the principles, criteria and spirit that inspired and underpinned the process of the TRC, especially

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<sup>176</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49.

<sup>177</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 68.

as they related to the amnesty process. It was therefore, important to identify what the principles, criteria and spirit underlying the amnesty process actually were.<sup>178</sup>

In order to identify them, the Constitutional Court then held, there could be no doubt that the participation of the victims was crucial. This is because it did not only help victims to discover the truth of what happened to their loved ones, but also because it contributed to the twin objectives of nation building and national reconciliation by assuaging the victims' yearning for the truth and addressing their legitimate sense of resentment and grief.<sup>179</sup>

Given that the objectives of the amnesty process could only be achieved through the participation of the victims, the Constitutional Court held further that, it followed that the objectives of the special dispensation could also only be achieved through the participation of the victims. This meant, the Court concluded, that the participation of the victims was fundamental to the special dispensation and their exclusion was not rationally related to its objectives. The participation of the victims therefore was the only rational means of achieving national unity and reconciliation.

'In these circumstances, the requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation process. Indeed, the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, requires, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based'.<sup>180</sup>

### **3.3.3 Democratic Alliance v President of the Republic of South Africa**

#### *(a) The facts*

The facts of this case are as follows. In 2009 President Zuma appointed Mr Menzi Simelane as the National Director of Public Prosecutions (the "NDPP"). Prior to his appointment as the NDPP, Mr Simelane was the Director-General of the Department of Justice and Constitutional Development. While he was the Director-General, Mr Simelane was called as a witness to give evidence under oath at the Ginwala Commission of Inquiry. The Ginwala

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<sup>178</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 59.

<sup>179</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 59.

<sup>180</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 72.

Commission had been established by former President Mbeki in order to investigate the previous NDPP's fitness to hold office. The previous NDPP was Mr Vusi Pikoli.

In its final report, the Ginwala Commission severely criticised Mr Simelane and questioned the truthfulness of his evidence. Following these criticisms, the then Minister of Justice and Constitutional Development, Mr Enver Surty, asked the Public Service Commission to investigate Mr Simelane's conduct. Following its investigation, the Public Service Commission recommended that disciplinary steps should be taken against Mr Simelane. The new Minister, Mr Jeff Radebe, however, rejected the recommendation of the Public Service Commission and two days later President Zuma appointed Mr Simelane as the NDPP.

The Democratic Alliance (the "DA") then applied to the High Court for an order declaring the President Zuma's decision to appoint Mr Simelane to be unconstitutional and invalid. The DA based its application on the grounds that the President's decision to appoint Mr Simelane as the NDPP was irrational and, therefore, infringed the principle of the rule of law. President Zuma's decision to appoint Mr Simelane was irrational, the DA argued further, because the report of the Ginwala Commission showed that he was not a "fit and proper person" to be the NDPP as required by the National Prosecuting Authority Act.<sup>181</sup>

The High Court disagreed with this argument and refused to grant the order. The DA then appealed to the Supreme Court of Appeal. The Supreme Court of Appeal agreed with the DA and upheld the appeal. The President then appealed to the Constitutional Court.

*(b) The judgment*

A majority of the Constitutional Court dismissed the appeal. Like in the *Albutt* case, the Court held first that it was unnecessary to determine whether the President's decision should be classified as an administrative or executive decision. This is because it was a well-established principle of South African constitutional law that the exercise of all public power had to comply with the principle of legality. The principle of legality, the Court held further,

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<sup>181</sup> National Prosecuting Authority Act 32 of 1998.

provides that every exercise of public power, including the President's decision to appoint Mr Simelane has to be both lawful and rational.<sup>182</sup>

In order to determine whether the President's decision to appoint Mr Simelane was rational, the Constitutional Court then held, it had to consider a number of different issues. One of these was whether the test for rationality applies not only to the President's decision, but also to the process by which the President made his decision. This question, the Court held further, had in fact already been answered in *Albutt* when it found that the means were not rationality related to the purpose because the procedure by which the decision was taken did not provide an opportunity for victims or their family members to be heard. It followed, therefore, that both the process by which a decision was made and the decision itself had to be rational.<sup>183</sup>

Although Mr Simelane argued that the case at hand did not deal with the President's power to pardon offenders but rather with the President's power to make an appointment, the Constitutional Court held, there was no reason why the approach adopted in *Albutt* should apply only to pardons and not to appointments.<sup>184</sup> In fact, the Court held further, it would be illogical if the test for rationality applied to both the decision and the process by which the decision was made in the case of pardons, but only to the decision (and not to the process by which the decision was made) in the case of appointments.<sup>185</sup>

Given these points, the Constitutional Court concluded, there is no doubt that both the decision that was taken and the process by which that decision was taken must be rationally related to the purpose for which the power was given.

'The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred'.<sup>186</sup>

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<sup>182</sup>*Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) para 27.

<sup>183</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) para 34.

<sup>184</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) para 35.

<sup>185</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) para 35.

<sup>186</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) para 36.

After setting out and discussing other principles, the Constitutional Court turned to apply them to the facts. In this respect the Court found that the process which lead up to the President's decision to appoint Mr Simelane as the NDPP was not rationally related to the object, namely to appoint a 'fit and proper person'. The reason why the process was not rationally related to the object, the Court found further, is because the President had deliberately decided not to take into account certain relevant information, namely the Ginwala Commission Report.<sup>187</sup>

### **3.3.4 Minister of Home Affairs v Scalabrini Centre, Cape Town**

Apart from the two Constitutional Court judgments discussed above, it should be noted that the approach adopted in *Albutt*, was also followed by the Supreme Court of Appeal in *Minister of Home Affairs v Scalabrini Centre, Cape Town*.<sup>188</sup>

#### *(a) The facts*

Very briefly, the facts of this case are as follows. In May 2012 the Director-General of the Department of Home Affairs decided for a variety of reasons that the Refugee Reception Office in Cape Town would no longer receive and process applications for asylum in terms of the Refugees Act.<sup>189</sup> An important consequence of the Director-General's decision was that applications for asylum could no longer be made in Cape Town. Instead, they had to be made at other Refugee Reception Offices, all of which were situated in other provinces and especially along the northern borders of the country.

After the Director-General had made his decision, the Scalabrini Centre – a non-profit organisation that assisted displaced persons – applied to the High Court for an order setting it aside. The High Court granted the order and the Minister then appealed to the Supreme Court of Appeal. In the Supreme Court of Appeal, the respondent based its application on a number of different grounds. One of these was that the Director-General's decision was an administrative decision and, consequently, that he was required, in terms of section 3(2) of

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<sup>187</sup> *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) para 92

<sup>188</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA).

<sup>189</sup> 130 of 1998.

PAJA to follow a fair procedure and give the respondent a reasonable opportunity to make representations. Unfortunately, the Director-General did not do this and his decision, therefore, was invalid.

*(b) The judgment*

The Supreme Court of Appeal dismissed the appeal. In arriving at this decision, the Court first had to determine whether the Minister's decision to close the Refugee Reception Office was an administrative or executive decision. Insofar as this issue was concerned, the Court found that the Minister's decision should be classified as an executive decision because it was heavily influenced by policy considerations.

'I think it is clear from those and other cases that decisions heavily influenced by policy generally belong in the domain of the executive. It seems to me that if decisions of that kind are to be deferred to by the courts then that must necessarily be a strong guide to what falls outside "administrative action" and the review powers given to the courts by PAJA. The more a decision is to be driven by considerations of executive policy the further it moves from being reviewable under PAJA and vice versa. That seems to me to be consistent with *SARFU*, in which it was said that one of the considerations to be taken into account in determining what constitutes administrative action is "how closely it is related ... to policy matters, which are not administrative"<sup>190</sup>

'While that is not necessarily the only factor that is relevant to whether conduct is administrative action, I think it is sufficient for our decision in this case. The question whether a Refugee Reception Office is necessary for achieving the purpose of the Act is quintessentially one of policy. Where, and how many, offices should be established, will necessarily be determined by matters like administrative effectiveness and efficiency, budgetary constraints, availability of human and other resources, policies of the department, the broader political framework within which it must function, and the like. I do not think courts, not in possession of all that information, and not accountable to the electorate, are properly equipped or permitted to make those decisions'.<sup>191</sup>

The fact that the Minister's decision was not an administrative decision, but rather an executive decision, the Supreme Court of Appeal held, meant that it was not governed by the principles of administrative justice set out in PAJA, but rather by the principle of the rule of law and, in particular, the principle of legality. Insofar as the principle of legality was concerned, the Court pointed out, the Scalabrini Centre suggested that it imposed a general

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<sup>190</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) para 57.

<sup>191</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) para 58.

obligation on those who exercise public power to follow a fair procedure and give interested parties a reasonable opportunity to make representations.<sup>192</sup>

While this suggestion went too far, the Supreme Court of Appeal held, in light of the Constitutional Court's judgments in *Albutt* and *Democratic Alliance* there is no doubt that there are circumstances in which the failure to follow a fair procedure would be irrational and, therefore, unconstitutional. Procedural fairness, therefore, is a ground on which an executive decision may be reviewed, but only to the extent that the requirement of rationality demands it.<sup>193</sup>

After setting out these principles, the Supreme Court of Appeal turned to apply them to the facts. In this respect, it found that the Director-General should have followed a fair procedure before he made his decision to essentially close down the Refugee Reception Office in Cape Town. This was largely because he had promised interested and affected parties, like the Scalabrini Centre, that he would do so. Given this promise, the Director-General's failure to follow a fair procedure was irrational and, therefore, unconstitutional.

'That conclusion in this case does not have as a consequence that there is a general duty on decision makers to consult organisations or individuals having an interest in their decisions. Such a duty will arise only in circumstances where it would be irrational to take the decision without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision maker is aware. Here the irrationality arises because the Director-General, through his representatives, at the meeting on 7 May 2012, acknowledged the necessity for such consultation. That he did so is not surprising bearing in mind that the organisations represented at that meeting included not only the Scalabrini Centre, with its close links to the refugee community, but also the United Nations High Commissioner for Refugees, and organisations close to the challenges relating to alleged refugees'.<sup>194</sup>

### 3.3.5 Comment

Given the criticisms levelled against the judgments in *Masetlha* and *ARMSA*, it is not surprising that the judgments in *Albutt* and *Democratic Alliance* have been welcomed by most academic commentators. As Price points out, however, the judgments in *Albutt* and *Democratic Alliance* appear to be in tension with one another. One way in which this tension

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<sup>192</sup>*Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) para 67.

<sup>193</sup>*Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) paras 68 and 69.

<sup>194</sup>*Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) para 72.

may be resolved, he suggests, is to argue that *Masetlha* has been implicitly overruled. Another more satisfactory manner, he suggests further, is to draw a distinction between ‘procedural fairness’, on the one hand, and ‘procedural rationality’, on the other.<sup>195</sup>

While procedural fairness is not a separate and self-standing requirement of the principle of legality, procedural fairness is sometimes required as a part of the requirement of rationality, particularly in those cases where the decision maker has essentially promised to follow a fair procedure.<sup>196</sup> This approach is more satisfactory, Price argues, because it gives the President and other members of the executive a degree of flexibility. They do not always have to follow a fair procedure, but must do so if it would be irrational not to. He does go on to point out, however, that it will be very difficult in practice to distinguish between those cases in which a fair procedure must be followed in order to satisfy the requirement of rationality and those in which it does not have to be followed.<sup>197</sup>

### **3.4 The ‘maybe yes to procedural fairness’ approach**

#### **3.4.1 Introduction**

The move away from a strict approach towards a liberal approach almost came to fruition in *Minister of Defence and Military Veterans v Motau*<sup>198</sup> where the Constitutional Court suggested in an *obiter dicta* that executive action could in fact be reviewed on the grounds that it is procedurally unfair. This approach is also in keeping with the minority judgment in *Masetlha*.

#### **3.4.2 Minister of Defence and Military Veterans v Motau**

##### *(a) The facts*

The facts of this case are as follows. In August 2013, the Minister of Defence and Military Veterans dismissed the Chairperson (General Maomela Motau) and Deputy Chairperson (Ms Refiloe Makoena) from the Board of Directors of the Armaments Corporation of South

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<sup>195</sup> A Price ‘The evolution of the rule of law’ (2013) 130 *SALJ* 649 653.

<sup>196</sup> A Price ‘The evolution of the rule of law’ (2013) 130 *SALJ* 649 654.

<sup>197</sup> A Price ‘The evolution of the rule of law’ (2013) 130 *SALJ* 649 654.

<sup>198</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC).

Africa Ltd (“Armscor”). Armscor is a wholly state-owned company. It is regulated by the Armaments Corporation of South Africa Act (the “Armscor Act”).<sup>199</sup> It was established to serve as the Department of Defence’s armaments and technology procurement agency.

The Minister dismissed General Motau and Ms Makoena in terms of section 8(c) of the Armscor Act. This section provides that “[a] member of the Board must vacate office if his or her services are terminated by the Minister on good cause shown”. The Minister dismissed General Motau and Ms Makoena in terms of section 8(c) on a number of different grounds. Included among these were:

- (a) delays in the timeous progression of a number of procurement projects as a result of the Board’s decisions or inaction;
- (b) the failure to conclude a service level agreement between Armscor and the Department of Defence; and
- (c) complaints the Minister had received about Armscor from the defence industry indicating that the relationship between Armscor and the industry was poor.

After the Minister terminated General Motau and Ms Makoena’s membership of the Armscor Board, they both applied to the High Court for an order setting the Minister’s decision aside. The High Court granted the order and the Minister then appealed to the Constitutional Court. In the Constitutional Court General Motau and Ms Makoena based their application on the grounds that the Minister’s decision was an administrative decision and, consequently, that she was required to follow a fair procedure in terms of section 3(2) of PAJA and give them a reasonable opportunity to make representations before she made her decision. Unfortunately, she did not do so and her decision, therefore, was invalid.

*(b) The judgment*

A majority of the Constitutional Court dismissed the appeal. In arriving at this decision, the Court first had to determine whether the Minister’s decision to terminate General Motau and Ms Makoena’s membership of the Armscor Board was an administrative or executive decision. Insofar as this issue was concerned, the Court found that the Minister’s decision

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<sup>199</sup> Armscor Act 51 Of 2003.

should be classified as an executive and not as an administrative one for the following reasons:

- (a) First, the Minister's power to terminate a person's membership of the Armscor Board in terms of section 8(c) of the Armscor Act was a part of her power to formulate defence policy. As such it had a political dimension and, accordingly, was more executive than administrative in nature.<sup>200</sup>
- (b) Second, the powers conferred on the Minister by section 8(c) of the Armscor Act were not low-level bureaucratic powers that formed part of the daily functions of the state. Instead, they were high-level powers that formed part of her power to supervise high-ranking public-office bearers in the performance of their duties.<sup>201</sup>
- (c) Third, when it came to terminating a person's membership of the Armscor Board, section 8(c) of the Armscor Act conferred a wide discretion on the Minister. She simply had to show that she had good cause in order to justify the termination. She did not have to satisfy any other jurisdictional requirements. This broad discretion also indicated that her power was more executive than administrative in nature. The mere fact that her power was derived from legislation was not determinative.<sup>202</sup>

The fact that the Minister's decision was not an administrative decision, but rather an executive act, the Constitutional Court concluded, meant that it was not governed by the principles of administrative justice as set out in PAJA, but rather by the principle of the rule of law and, in particular, the principle of legality. The Court summed up this finding as follows:

'For these reasons, I am persuaded that the impugned decisions are not subject to review under PAJA. Because section 8(c) of the Armscor Act is an adjunct of the Minister's power to make defence policy, and thus more closely related to the formulation of policy than its application, the decision to terminate the services of Board members amounts to the performance of an executive function in terms of section 85(2)(c) of the Constitution, rather than the implementation of national legislation in terms of section 85(2)(a)'.<sup>203</sup>

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<sup>200</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 47-48.

<sup>201</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 49.

<sup>202</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 50.

<sup>203</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 51.

After finding that the Minister's decision to terminate General Motau and Ms Makoena's membership of the Armscor Board was governed by the principle of legality rather than PAJA, the Constitutional Court turned to consider, first, whether the Minister's decision was rational; and, second, whether the Minister was required to comply with the requirements of procedural fairness, as General Motau and Ms Makoena argued.

Insofar as the question of rationality was concerned, the Constitutional Court began by setting out the test for rationality, namely that the exercise of power must be rationally related to the purpose for which that power has been given. After setting out this test, the Court applied it to the facts. In this respect it found that there was a rational link between the termination of General Motau and Ms Makoena's membership of the Armscor Board (the "means") and the need to address the failures at Armscor (the "ends"). The Minister's decision, therefore, did satisfy the test for rationality.<sup>204</sup>

Insofar as the question of procedural fairness was concerned, the Constitutional Court began by observing that Armscor fell within the definition of a "state owned company" in terms of the Companies Act.<sup>205</sup> This meant that for all intents and purposes, Armscor had to be treated in the same way as any other public company unless the Minister had applied to exempt Armscor from the provisions of the Companies Act, which she had not.<sup>206</sup> In addition, it also meant that the Minister was considered to be the shareholder of Armscor. She had the power to appoint and dismiss the members of the Board.<sup>207</sup>

An important consequence of the fact that Armscor was governed not only by the Armscor Act, but also by the Companies Act, the Constitutional Court observed further, is that while the Armscor Act set out the substantive grounds which have to be satisfied before a person's membership of the Board can be terminated, the Companies Act set out the procedural requirements that have to be satisfied before a person's membership of the Board can be terminated.<sup>208</sup>

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<sup>204</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 69.

<sup>205</sup> Companies Act 71 of 2008.

<sup>206</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 74.

<sup>207</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 75.

<sup>208</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 74 and 76.

The procedural requirements that had to be satisfied, the Constitutional Court went on to observe, are set out in sections 71(1) and (2) of the Companies Act. Section 71(1) states in this respect that:

‘Despite anything to the contrary in a company’s Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2)’.

And section 71(2) states that:

‘Before the shareholders of a company may consider a resolution contemplated in subsection (1):

- (a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and
- (b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.’

Given that the Minister was shareholder for the purposes of section 71(1) and (2), the Constitutional Court held, it followed that she was required to comply with the procedural requirements in the section.<sup>209</sup> Unfortunately, the Court then concluded, when she exercised her powers in terms of section 8(c) of the Armscor Act and terminated the membership of General Motau and Ms Makoena the Minister did not comply with the procedural requirements set out in sections 71(1) and (3) of the Companies Act. Her decision, therefore, was unlawful and invalid.<sup>210</sup>

Despite the fact that the Constitutional Court had already found that the Minister’s decision was unlawful and invalid because she failed to follow the procedures set out in the Companies Act, the Court turned to consider whether the principle of legality also imposed an obligation on her to follow a fair procedure before she terminated General Motau and Ms Makoena’s membership of the Board.

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<sup>209</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 75 and 79.

<sup>210</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 80.

In this respect, the Constitutional Court began by pointing out that its earlier decision in *Masetlha* had been interpreted to “exclude the requirement of procedural fairness in the review of executive action as a stand-alone requirement under the principle of legality”. This was wrong, the Court pointed out further. The judgment in *Masetlha* does not stand for such an unequivocal proposition. Instead, the judgment in *Masetlha* was limited to the specific circumstances of that case.

‘Were it not for the operation of the Companies Act, would there be an obligation on the Minister to dismiss directors in a procedurally fair manner? This Court’s decision in *Masetlha*, which was extensively relied on by the Minister in her submissions, has been interpreted to exclude the requirement of procedural fairness in the review of executive action as a stand-alone requirement under the principle of legality. *Masetlha* does not stand for this unequivocal proposition, however. The decision was limited to the specific context of that case and the power under consideration: the distinguishing feature which rendered the observance of procedural fairness inapposite in that case was “the special legal relationship that obtains between the President as head of the National Executive, on the one hand, and the Director-General of an intelligence agency, on the other”. The sensitive nature of this special relationship, lying as it did in the heartland of “the effective pursuit of national security”, meant that Mr Masetlha, the spymaster-in-chief, could continue to occupy his position only as long as he enjoyed the trust of the President, his principal. Moreover, the power to appoint and dismiss in *Masetlha* was “conferred specially upon the President for the effective business of government and . . . for the effective pursuit of national security”.’

In any event, the Constitutional Court then pointed out, in *Albutt* it has accepted that ‘procedural fairness obligations may attach independently of a statutory obligation in virtue of the principle of legality’.<sup>211</sup>

Although it was not strictly necessary to decide this issue, the Constitutional Court concluded, it was important to note that ‘our law has a long tradition – which was established by this Court in *Mohammed* – of strongly entrenching *audi alteram partem* (‘hear the other side’), which attains particular force when prejudicial allegations are levelled against an individual. And it is for this reason that dismissal from service has been recognised as a decision that attracts the requirements of procedural fairness’.<sup>212</sup>

### **3.4.3 Masetlha v President of the Republic of South Africa: The minority judgment**

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<sup>211</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para82.

<sup>212</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para83.

Unlike the majority judgment in *Masetlha*, the minority judgment held that the President's decision to dismiss Mr Masetlha could be reviewed on the grounds that it was procedurally unfair. In arriving at this decision, the minority judgment held that the principle of legality does not only provide that every exercise of public power must be both lawful and rational, in addition it also provides that every exercise of public power must also be "fair", including the President's decision to dismiss Mr Masetlha:

'It is a fundamental principle of fairness that those who exercise public power must act fairly. In my view, the rule of law imposes a duty on those who exercise executive powers not only to refrain from acting arbitrarily, but also to act fairly when they make decisions that adversely affect an individual.'<sup>213</sup>

The reason why every exercise of public power must be fair, the minority judgment held further, is because the Constitution is not just a formal document. Instead, it is a living document that embodies a normative and objective value system one of which is fairness. Like lawfulness and rationality, therefore, the duty to act fairly should govern every exercise of public power, including once again the President's decision to dismiss Mr Masetlha.<sup>214</sup>

In addition, the minority judgment went on to hold, the rationality requirement has both a substantive and a procedural requirement.<sup>215</sup> The substantive requirement provides that the decision should be rationally related to the purpose for which the power was given, while the procedural requirements provides that the process by which the decision was made should also be rationally connected to the purpose for which the power was given.<sup>216</sup> The procedural requirement imposes a duty to act fairly. If the procedural requirement was not included 'executive decisions which [had] been arrived at by a procedure which was clearly unfair [would be immune] from review.'<sup>217</sup>

After setting out these principles, the minority judgment turned to apply them to the facts and found that the President had failed to follow a fair procedure before deciding to dismiss Mr Masetlha. This is because he did not give him a reasonable opportunity to make representations. The President's decision, therefore, infringed the principle of legality and was unconstitutional and invalid.

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<sup>213</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 180.

<sup>214</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 183.

<sup>215</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 184.

<sup>216</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 184.

<sup>217</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 184.

### 3.4.4 Comment

The following comments may be made with respect to the judgment in *Motau*.

First, instead of simply overruling the judgment in *Masetlha*, the Court in *Motau* chose to read it in a very narrow manner. It did this by focussing on the national security aspect of the case. I don't think that this is an accurate reading of *Masetlha* and it certainly is not an accurate reading of ARMSA. In both those cases, the Court adopted a general and not a specific rule about executive action. In both cases the Court held that executive action as a whole cannot be reviewed on the grounds of procedural fairness. It did not hold that only executive action which deals with national security cannot be reviewed on the grounds of national security.

Second, this inaccurate and narrow reading of the *Masetlha* cases indicates that the Court might not be willing to overrule the judgments in *Masetlha* and *ARMSA* directly. Instead, what it might do is confine them to the facts of their cases and then hold that in all other cases executive action may be reviewed on the grounds that it is procedurally unfair. We will have to wait and see how this jurisprudence develops.

Third, while the move towards accepting procedural fairness certainly addresses the criticisms levelled against *Masetlha*, it also raises difficult separation of powers questions. This is because it adds another ground on which the courts may now review executive decisions in politically sensitive cases. In addition, it is not always clear what sorts of obligations procedural fairness may impose on the President and other members of the executive. This will inevitably draw the courts into more and more confrontations with the President and the other members of the executive.

### 3.5 Conclusion

The move towards a broader approach almost came to fruition in *Minister of Defence and Military Veterans v Motau*.<sup>218</sup> In this case the Constitutional Court suggested, without

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<sup>218</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC).

actually deciding that executive action could in fact be reviewed on the grounds that it is procedurally unfair. This chapter has shown a progression in the jurisprudence of the Constitutional Court towards the adoption of procedural fairness as a separate and self-standing ground of review for executive action under the rule of law. At first stage the Constitutional Court was unwilling to accept procedural fairness as a separate and self-standing ground of review for executive action under the rule of law stating that it should be reserved only for administrative action.<sup>219</sup> There was also a second stage that represents a version of the broader approach which accepted ‘procedural rationality’, but the most important of these is the last approach which represents the ‘acceptance of procedural fairness’ as a self-standing requirement. In the next chapter we will turn to investigate the implications of the Constitutional Court’s approach in terms of the doctrine of the separation of powers.

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<sup>219</sup> *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) para 77.

## CHAPTER FOUR: THE DOCTRINE OF THE SEPARATION OF POWERS

### 4.1 Introduction

As we saw in Chapter Three, the Constitutional Court's judgment in *Motau* addresses many of the criticisms levelled against its judgment in *Masetlha*. At the same time, however, it also raises difficult separation of powers questions. This is because it adds another ground on which the courts may now review executive decisions in politically sensitive cases. In addition, it is not always clear what sorts of obligations procedural fairness imposes on the President and other members of the executive. This will inevitably draw the courts into more and more confrontations with the President and the other members of the executive. The purpose of this chapter is to explore the difficult separation of powers questions that the inclusion of procedural fairness as a separate and self-standing ground of review for executive decisions under the rule of law may give rise to.

### 4.2 The origin of the doctrine of the separation of powers

The origin of the doctrine of separation of powers doctrine may be traced back to the English philosopher, John Locke (1632-1704), who argued that the power of the state should be divided into legislative, executive and foreign relations functions.<sup>220</sup> The modern version of the doctrine, however, is usually associated with the French philosopher, Charles Montesquieu (1689-1755), who argued that the power of the state should be divided into legislative, executive and judicial functions and then allocated to different or separate branches of the state, namely the legislature, the executive and the judiciary.<sup>221</sup>

The doctrine of the separation of powers is based on the idea that the abuse of power, and especially the abuse of power by the state, is more likely to occur when power is concentrated in the hands of a single individual or body or organ of state. In other words, to prevent the abuse of power and enhance the freedom of the individual, the doctrine therefore argues, it should be divided into different categories and allocated to different individuals or bodies or

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<sup>220</sup> ECS Wade and A Bradley *Constitutional and Administrative Law* (1991) 51.

<sup>221</sup> MJC Vile *Constitutionalism and the Separation of Powers* (1967) as quoted in V Yash 'The Independence of the Judiciary: A Third World Perspective' (1992) 11(6) *Third World Legal Studies* 127, available at: <http://scholar.valpo.edu/twls/vol11/iss1/6>, accessed on 4 March 2013.

organs of state, each of which may be held accountable for the manner in which they exercise their powers.<sup>222</sup>

In his book, *L'Esprit de Lois*, Montesquieu explains the rationale behind the doctrine of the separation of powers in the following terms: '[a]ll would be in vain if the same person, or the same body of officials, be it the nobility or the people, were to exercise these three powers: that of making laws, that of executing the public resolutions, and that of judging crimes or disputes of individuals'.<sup>223</sup> A bit later in the same work, he explains the rationale in the following similar terms: 'when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty'.<sup>224</sup>

Apart from imposing restrictions on the manner in which the state may exercise its power, the doctrine of the separation of powers is also regarded as a source of that power.<sup>225</sup>

Labuschagne, for example, argues that the separation of powers is both a constraint and a source of government authority:

'One of the oldest dicta on restricted authority (the doctrine of the separation of powers) entails that the freedom of the citizens of a state can be ensured only by a division of centralised institutionalised power, because the centralisation of power can potentially lead to abuse. This division of authority is achieved by a structural and functional separation of government's authority into legislative, executive and judicial branches'.<sup>226</sup>

### **4.3 The elements of the doctrine of the separation of powers**

The doctrine of the separation of powers has evolved in the years that have passed since Locke and Montesquieu introduced it and today it is usually divided into four principles, namely: the principle of *trias politica*; the principle of the separation of functions; the principle of the separation of personnel; and the principle of checks and balances.<sup>227</sup>

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<sup>222</sup> IM Rautenbach and EFJ Malherbe *Constitutional Law* (1996) 68.

<sup>223</sup> C Montesquieu *L'Esprit des Lois* (1748) 116.

<sup>224</sup> S Ngcobo 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' (2011) *Stellenbosch Law Review* 1 at 37.

<sup>225</sup> P Labuschagne 'The doctrine of the separation of powers and its application in South Africa (2004) 23(3) *Poleitia* 84 85.

<sup>226</sup> P Labuschagne 'The doctrine of the separation of powers and its application in South Africa (2004) 23(3) *Poleitia* 84 85.

<sup>227</sup> J D van der Vyver 'The Separation of powers' 1993 *SAPL* 177 at 178. See also M J Ville *Constitutionalism and separation of powers* 2ed (1967) 13 and P Labuschagne 'The doctrine of the separation of powers and its application in South Africa' (2004) 23(3) *Poleitia* 84 86.

- The principle of *trias politica* simply provides that the state should be formally divided into three branches, namely: the legislature, the executive and the judiciary.<sup>228</sup>
- The principle of the separation of functions provides that each of the three branches of the state may exercise only those powers and functions that have been conferred upon it and may not exercise any other powers.<sup>229</sup>
- The principle of the separation of personnel provides that each of the three branches of the state must be composed of separate and distinct groups of people and that there may be no overlapping membership.<sup>230</sup>
- The principle of checks and balances provides that one branch can be held accountable by the other branches to check the exercise of power by that branch. In certain circumstances, this allows one branch to ‘veto’ the actions taken by another branch. This principle was introduced by the drafters of the United States Constitution.<sup>231</sup>

Although the first three principles form an important part of the modern doctrine of the separation of powers is based, it is generally accepted that no constitutional system applies all of them strictly. This is because it is not possible to apply these principles strictly while also applying the principle of checks and balances, which ‘anticipates the necessary or unavoidable intrusion of one branch on the terrain of another’.<sup>232</sup>

#### 4.4 The principle of checks and balances

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<sup>228</sup> J D van der Vyver ‘The Separation of powers’ 1993 *SAPL* 177 at 178. See also M J Ville *Constitutionalism and separation of powers* 2ed (1967) 13 and P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 86.

<sup>229</sup> J D van der Vyver ‘The Separation of powers’ 1993 *SAPL* 177 at 178. See also M J Ville *Constitutionalism and separation of powers* 2ed (1967) 13 and P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 86.

<sup>230</sup> J D van der Vyver ‘The Separation of powers’ 1993 *SAPL* 177 at 178. See also M J Ville *Constitutionalism and separation of powers* 2ed (1967) 13 and P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 86.

<sup>231</sup> J D van der Vyver ‘The Separation of powers’ 1993 *SAPL* 177 at 178. See also M J Ville *Constitutionalism and separation of powers* 2ed (1967) 13 and P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 86.

<sup>232</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA, 1996* (4) SA 744 (CC) (hereafter the ‘*First Certification Judgment*’).

The origins of the fourth principle are usually traced back to the Constitution of Massachusetts which was adopted in 1780 and which was written largely by John Adams (1735-1826).<sup>233</sup> Apart from drafting the Massachusetts Constitution he also helped draft the Declaration of Independence and was the second president of the United States.

One of the key questions that Adams and the other drafters faced was how best to ensure that the state does not abuse the power that has been conferred upon it. The answer he came up with was the idea of an independent judiciary staffed with impartial judges to serve as a crucial check on the political branches of government.<sup>234</sup>

Article XXIX of the Massachusetts Constitution provides in this respect that:

‘It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their office as long as they behave themselves well; and that they should have honourable salaries ascertained and established by standing laws’.

Article XXX went on to provide that:

‘In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.’

One of the consequences that flowed from Adams’s idea of an independent judiciary staffed with impartial judges is that the judiciary lost its inferior status (Montesquieu did not think the judiciary was as important as the other two branches), and the overarching principle of checks and balances was created.<sup>235</sup>

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<sup>233</sup> L Kohn *The burgeoning constitutional requirement of rationality and separation of powers has rationality review gone too far?* Unpublished LLM Thesis, University of Cape Town (2013) 7.

<sup>234</sup> M H Marshall ‘The separation of powers: An American perspective’ (2006) 22 *SAJHR* 10 at 11.

<sup>235</sup> P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 85.

Although both the legislature and the executive act as a check against the abuse of power by the other branches of government, it is the judiciary that plays the most important role in this respect and that gives the principle of checks and balances its greatest value. The judiciary acts as a check on the abuse of power most commonly through the power of judicial review of legislative and executive action.

The power of judicial review is the power allocated to the courts to test laws and conduct against the provisions of the Constitution and to declare them to be unconstitutional and invalid if they conflict with the provisions of the Constitution and that conflict cannot be justified in an open and democratic society. It is an essential feature of a constitutional democracy.

In order to function as an effective check on the abuse of power by the other branches of government, however, the judiciary has to be, and has to be seen to be, independent and staffed by impartial judges. Judicial independence, therefore, forms an important part of the principle of checks and balances, in particular, and of the doctrine of the separation of powers, in general.

## **4.5 The doctrine of the separation of powers in South Africa**

### **4.5.1 The separation of powers prior to 1994**

Prior to 1993 the doctrine of the separation of powers was applied in the context of a system of parliamentary sovereignty. As Dicey has pointed out, a system of parliamentary sovereignty is one in which parliament has ‘the right to make or unmake any law whatever, and further that no person or body is recognised by the law . . . as having a right to override or set aside the legislation of parliament’.<sup>236</sup>

As this statement by Dicey indicates, one of the consequences that flows from a system of parliamentary supremacy for the doctrine of the separation of powers is that the judiciary cannot review or restrict the powers of parliament.<sup>237</sup> This is because there are no legal

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<sup>236</sup> AV Dicey *Introduction to the study of the law of the constitution* 10 ed (1959) 70.

<sup>237</sup> P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 86.

grounds on which parliamentary sovereign authority may be limited or restricted.<sup>238</sup> Parliament, and following the introduction of the party system, the executive were all powerful.<sup>239</sup> This, of course, severely undermined the principle of checks and balances.<sup>240</sup>

Given the points set out above, it is not surprising that the 1909 Union Constitution did not provide for a substantive separation of powers and that the 1961 Republican Constitution expressly excluded substantive judicial review thereby striking a hard blow on the separation of powers.<sup>241</sup> This Constitution affirmed the supremacy of Parliament and expressly stated, no court could declare an Act of Parliament to be invalid unless it related to language rights.<sup>242</sup> The courts, therefore, could only review Acts of Parliament in terms of the procedure that was followed to enact them and not in terms of their substantive content.

In colonial and apartheid South Africa, therefore, the doctrine of the separation of powers was restricted largely to the principle of *trias politica* and the principle of the separation of personnel between the legislative and executive branches, on the one hand, and the judicial branch, on the other.<sup>243</sup> Given that the courts could only review Acts of Parliament rule in terms of the procedure that was followed to enact them and not in terms of their substantive content, the judiciary could only place temporary obstacles in the way of the legislature. If Parliament disagreed with the approach adopted by the courts it could simply amend the Constitution or defeat the interpretation of the courts.<sup>244</sup> In *Collins v Minister of the Interior*,<sup>245</sup> the Appellate Division summed up the powers of the courts when it stated that ‘[i]f the provisions of a law are clear, we, as a court, are not concerned with the propriety of the legislation or policy of the Legislature, our duty is to minister and interpret it as we find it’.<sup>246</sup>

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<sup>238</sup> G E Devinish *A Commentary on the South African Constitution* (1998) 8.

<sup>239</sup> P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 89.

<sup>240</sup> P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 86.

<sup>241</sup> P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 88.

<sup>242</sup> Republic of South Africa Constitution Act 32 of 1961: Section 59.

<sup>243</sup> P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 89.

<sup>244</sup> P Labuschagne ‘The doctrine of the separation of powers and its application in South Africa’ (2004) 23(3) *Poleitia* 84 89.

<sup>245</sup> *Collins v Minister of the Interior* 1957 1 SA 552 (A).

<sup>246</sup> *Collins v Minister of the Interior* 1957 1 SA 552 (A) at 567 E.

## 4.5.2 The doctrine of the separation of powers after 1994

### (a) Introduction

Although neither the interim Constitution nor the Constitution expressly refers to the doctrine of the separation of powers, Constitutional Principle VI provided that there had to be ‘a separation of powers between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness’ and the Constitutional Court has confirmed on a number of occasions that this doctrine does indeed form a part of South Africa’s constitutional system.<sup>247</sup>

In *SA Association of Personal Injury Lawyers v Heath*,<sup>248</sup> for example, the Constitutional Court held that the existence of the doctrine of the separation of powers in South Africa may be derived from the wording and the structure of the Constitution:

‘In the first certification judgment this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers. In the *Western Cape* case<sup>249</sup> it enforced that separation by setting aside a proclamation of the President on the grounds that the provision of the Local Government Transition Act<sup>250</sup>, under which the President had acted in promulgating the Proclamation, was inconsistent with the separation of powers required by the Constitution, and accordingly invalid. It has also commented on the constitutional separation of powers in other decisions. There can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the Constitution requires in this regard, are invalid’.<sup>251</sup>

And in *Justice Alliance of South Africa v President of the RSA*,<sup>252</sup> the Court reaffirmed that the existence of the doctrine of the separation of powers may be derived from the structure of the Constitution:

‘The principle of the separation of powers emanates from the wording and structure of the Constitution. The Constitution delineates between the legislature, the executive and the judiciary. This Court recognised a fundamental principle of the new constitutional text as being “a separation of powers between the Legislature,

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<sup>247</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) paras 106-113; *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 22; *Glenister v President of the RSA* 2009 (1) SA 287 (CC) paras 28-30; and *Justice Alliance of South Africa v President of the RSA* 2011 (5) SA 388 (CC) para 32.

<sup>248</sup> *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

<sup>249</sup> *Executive Council of the Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC).

<sup>250</sup> Local Government Transition Act 209 of 1993.

<sup>251</sup> *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 22.

<sup>252</sup> *Justice Alliance of South Africa v President of the RSA* 2011 (5) SA 388 (CC).

Executive and Judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness”<sup>253</sup>.

Apart from finding that the doctrine of the separation of powers forms a part of South Africa’s constitutional system, the Constitutional Court has also held that the principle of checks and balances forms a part of the South African doctrine of the separation of powers. An important consequence of this approach, the Court has held further, is that the separation of powers in South Africa can never be absolute and that one branch will inevitably intrude on the functional independence of another.<sup>254</sup>

In the *First Certification Judgment*,<sup>255</sup> for example, the Constitutional Court held that:

‘There is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.<sup>256</sup> . . . The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation’.<sup>257</sup>

And in *De Lange v Smuts NO*,<sup>258</sup> the Constitutional Court repeated these points and then went on to hold that:

‘. . . over time our Courts will develop a distinctly South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest’.<sup>259</sup>

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<sup>253</sup> *Justice Alliance of South Africa v President of the RSA* 2011 (5) SA 388 (CC) para 32.

<sup>254</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 108. See also *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries* 2013 (10) BCLR 1159 (CC) para 13.

<sup>255</sup> *First Certification Judgment* 1996 (4) SA 744 (CC).

<sup>256</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 108.

<sup>257</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 109.

<sup>258</sup> *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

<sup>259</sup> *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 60.

The fact that the Constitutional Court has accepted that the separation of powers in South Africa can never be absolute indicates that it has adopted a functionalist rather than a formalist approach towards the doctrine of the separation of powers. Before turning to consider what this means for the Court's relationship with the other two branches of government, it will be helpful to briefly discuss each of these approaches in turn.

*(b) The formalistic approach*

The first theory resembles the structural separation of powers as advanced by Montesquieu. This theory is founded on the notion that the legislature, the executive and the judiciary are inherently distinguishable and completely separate.<sup>260</sup> The theory can also be called the pure theory (Montesquian theory) of the separation of powers.<sup>261</sup>

The theoretical separation of powers was in force in South Africa during the times of the apartheid government. Prior to the Constitution there was only a formal or structural separation of powers. This separation was limited only to the classification and distinction of government organs into the executive, parliament and the judiciary. Any interference (substantial or institutional) with the other organs was prohibited. If there was conflict between any of the organs of state, the pre-held classification of competencies are the ones that identified whether the task at hand was judicial, executive or legislative and the inquiry exhausted here.<sup>262</sup> Once the class was identified then the task was handed over or allocated to the appropriate Institution with no interference from any other organ of state.

This theory has been criticised on a number of different grounds. Among these are the following:

First, Cachalia criticised this approach or form of separation of powers stating that it can no longer curb the agent demand of the modern democratic government and a state that has become more administrative.<sup>263</sup> Carolan in his book *The New Separation of Powers: A Theory of the Modern State* expounds clearly on the short comings of the formalistic

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<sup>260</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 25.

<sup>261</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 11.

<sup>262</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 286.

<sup>263</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 286.

approach. He states in this book that this pure Montesquian model has not been wholly reproduced in any institutional design of any modern state.<sup>264</sup>

Carolana continues with the critic and states that this pure theory of the separation of powers is 'practically impossible and an undesirable mode of government.'<sup>265</sup> It would be difficult, the argument continues, to subject public bodies to such an 'austere' independence of the organs that there is no interaction since corporation and coordination are essential for any government to function cohesively.<sup>266</sup> An understanding of the arguments of the critics boil down to the idea that overlap between the branches is inevitable.

A further criticism of the approach is that it is too indeterminate.<sup>267</sup> It involves a lot of definition and distinction of what is executive and how it is different from legislative and Judiciary, a task which he argues, the court will struggle to do.<sup>268</sup> Although the formalistic theory is easy to explain it is too abstract and difficult to apply because of its indeterminacy which makes it difficult to establish what it enjoins in a particular individual case.<sup>269</sup>

Carolana reaches the conclusion that the formalist theory is in fact so indeterminate that it is ultimately devoid of any practical efficacy.<sup>270</sup>

Before visiting the second approach it is essential that I point to the fact that the shortcomings of the formalistic approach and the criticisms thereof do not mean that the approach is totally irrelevant and of no value. This is because the Montesquian tripartite theoretical division of government is still influential and useful as a guiding principle of the distribution of power between the branches.<sup>271</sup> Where the critics seem to place their arguments most is on the mechanics of the operation of the doctrine, that the formalist approach does not assist on how the separation of power should practically be applied.<sup>272</sup> The short-falls of the formalist

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<sup>264</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000).

<sup>265</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 18.

<sup>266</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 19.

<sup>267</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 22.

<sup>268</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 26. Carolan states that the weakness of the approach is based on the fanciful imagination that the system will be able to define the indefinable notion of institutional balance.

<sup>269</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 22.

<sup>270</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 22 and 27. Carolan reaches the conclusion that the tripartite theory although it provides a guideline it does not guide on how to achieve it in practice.

<sup>271</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 21.

<sup>272</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 27.

approach is the reason why South Africa is now in the post-formalist period of the separation of powers.

Besides the exception that the theory is relevant, the formalist approach remains too theoretical, prompting one critic to state that: ‘a political philosopher can produce a utopian vision of the ideal world, uncluttered by the limitations inherent in human endeavour. A Utopian Constitutional ideal on the one hand is a waste of time.’<sup>273</sup> It can be concluded therefore that spending too much time on this theory is a waste of time.

The second theory helps to an extent that it fills the lacuna that the formalist approach leaves by providing for far more workable formulation of the separation of powers that can be applied in practice.

### *(c) The functionalist approach*

The second theory of the separation of powers is the functionalist theory which recognises a system of checks and balances allowing for an intrusion of one branch of state into the competencies or domain of the other.<sup>274</sup> Although the Constitutional Court in the *Certification Judgment* accepted that there is functional independence of the branches of government, it pointed further and importantly that there is no absolute separation of power.<sup>275</sup> The theory lies on the important notion of inter-institutional balance of power, acknowledging that it is impractical to have neatly divided pockets of power in government.<sup>276</sup> This approach seeks to ensure that no one body assumes too much power and it follows post 1994 approach to the separation of powers.<sup>277</sup>

If there is a foreign Constitution that put this theory well; it is the Constitution of Hemisphere that states that:

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<sup>273</sup> N Barber ‘Prelude to the Separation of Powers’ (2001) 60 *CLJ* 59 62-63.

<sup>274</sup> F Cachalia ‘Separation of Powers, Active Liberty and the Allocation of Public Resources: the E-Tolling Case.’ (2015) 132(2) *SALJ* 285 286.

<sup>275</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 108.

<sup>276</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 25.

<sup>277</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 108.

‘[t]he Legislative, Executive and Judiciary powers ought to be kept as separate from and independent of each other as the nature of free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of unity.’<sup>278</sup>

According to Berendth separation of power is not merely a formal organisation of state power. To this author, the separation of powers seeks to protect the rights of individuals that is given by the Constitution. He continues to argue that the separation of powers seeks to prevent the accumulation of power in one branch of government. In this breath the author argues that Constitutional Courts gives teeth to the separation of powers to try and achieve these objectives and this is what is called the functionalist approach to the separation of powers.<sup>279</sup> Interaction between the different organs is therefore inevitable.

The functionalist approach can be traced as far back as 1995 in the case of *Executive Council Western Cape Legislature v President of the Republic of South Africa*<sup>280</sup> where the provincial government was challenging the decision by the legislature to assign plenary legislative powers to the national executive. Here the court argued the most basic assumptions of the separation of powers and stated that the executive would not be allowed to exercise plenary legislative powers. However Parliament could delegate to the Executive subordinate law-making powers.<sup>281</sup> The decision showed that there are limits to what powers Parliament could delegate to the national executive and their core function of absolute law- making was one power that could not delegate. The case showed that the courts are willing to interfere with the decisions of the other organs of state therefore separation was not absolute but functional.

The above case illustrates that the fundamental principle of the separation of powers that allows intervention between branches of government. The supremacy clause allows for intrusion and intervention since the court can test every exercise of public power by public officials and organs of state for constitutional consistency. Intervention is therefore inevitable.

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<sup>278</sup> Constitution of New Hampshire (1784): Article 17.

<sup>279</sup> E Barendt ‘Separation of powers and constitutional government’ (1995) *Public Law* 599 at 601

<sup>280</sup> *Executive Council Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 887 (CC).

<sup>281</sup> Plenary law-making powers are powers that are the core functions of the legislature. Parliament cannot delegate these powers.

The provision that any law or conduct inconsistent with the Constitution is invalid therefore encourages checks and balances consequently interference.<sup>282</sup> The courts on interpreting the Constitution can set aside a decision or declare an Act of Parliament inconsistent with the Constitution thereby checking the power of government.<sup>283</sup> As stated in the *Western Cape* case that is discussed above, the Court showed its willingness to balance power between the executive and parliament when it stated that parliament could not assign plenary legislative powers.<sup>284</sup> By making such a judgment the court interfered with the powers of the legislative branch by citing the extent of their powers.

In the *First Certification Judgment* the Court found that, although there is functional independence in South Africa, there is no absolute separation.<sup>285</sup> It went further to state that there is always partial separation.<sup>286</sup> This is why the court held in the *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* case that the separation of powers in the Constitution is distinctively a South African design.<sup>287</sup> This design is functionalist in nature since there is no universal model for the separation of powers.<sup>288</sup> It does not mean however that the functionalist approach is perfect and can solve all problems.

The functionalist theory also has its own criticisms. It is criticised for its reliance on the fanciful imagination that functionalism can define the notion of institutional balance.<sup>289</sup> It is so difficult to come up with what ‘balance’ entails in the sense of how much power should be given to each organ and how much intrusion should be allowed in order not to usurp the powers of the other organs. To this end, the theory also faces the same problem of indeterminacy. Carolan argues that using such an approach the courts have become more reactionary than prescriptive in discharging their roles as there is no set standard of balancing powers. The consequences of the absence of a ‘comprehensive curial guidelines’ is that cases are heard on an ad hoc basis and each case is treated as if it is the first of its kind.<sup>290</sup>

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<sup>282</sup> Constitution: Section 2.

<sup>283</sup> Section 165(5) of the Constitution states that the judgments of the courts bind all persons and organs of state to whom they apply.

<sup>284</sup> *Executive Council Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 887 (CC).

<sup>285</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 106-8

<sup>286</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 109.

<sup>287</sup> *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (2010) JOL 25115 (CC) para 91.

<sup>288</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 108.

<sup>289</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 26.

<sup>290</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 26.

It seems in the final analysis that both theories are affected by indeterminacy since it is difficult to define most of the aspects of the doctrine which leaves the court ‘to supplement by their own intuitive choice of independent criteria’.<sup>291</sup> The Court following the Constitutional text prefers the functionalist approach since ‘checks and balances’ allow for intrusion. We therefore move on to discuss the checks and balances and the principle of how the Court should engage in its review duties.

## **4.6 The principle of checks and balances and judicial self-restraint**

### **4.6.1 Introduction**

Apart from finding that the principle of checks and balances forms a part of the South African doctrine of the separation of powers, the Constitutional Court has found that the power of judicial review and the independence of the courts form a key part of the South African principle of checks and balances.

Once again, in *South African Association of Personal Injury Lawyers v Heath*.<sup>292</sup>

‘[t]he separation required by the Constitution between the legislature and the executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various parts of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined’.<sup>293</sup>

And in *Justice Alliance of SA v President of the RSA* the Court held that:<sup>294</sup>

‘Judicial independence is crucial to the courts for the fulfilment of their constitutional role. It is ‘foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law’. What is vital to judicial independence is that “the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive”’.<sup>295</sup>

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<sup>291</sup> E Carolan *The New Separation of Powers: A Theory of the Modern State* (2000) 26.

<sup>292</sup> *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

<sup>293</sup> *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 26.

<sup>294</sup> *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC).

<sup>295</sup> *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) para 36.

Although the power of judicial review and the independence of the courts have been accepted as a part of South Africa's system of checks and balances, the power of judicial review has been criticised by some commentators who argue that it is contrary to democratic principles. It is not within the scope of this thesis to discuss what democracy is, but our working definition will loosely be that democracy is a system where the government of the day is elected (with the legislature directly elected and the executive indirectly elected) into power by a system of regular elections that are free.<sup>296</sup>

Consequent to such election the government is the representative of the general populace to whom they are accountable to even if they can be voted out of power in the next election. Elections give the legislature and the executive their democratic legitimacy and the decisions and actions that they perform are generally accepted on this basis.<sup>297</sup> South Africa has a system of representative democracy and the political organs find their legitimacy in their representative nature of the majority of the population of South Africa.

Opposition to judicial review is therefore based on the fact that in a democracy, the leaders of the day should be elected by the people. The judiciary is not elected and therefore is deficient of this democratic legitimacy. The lack of democratic legitimacy in the institution of the judiciary leads to a dilemma which Dennis Davis summarises as follows:

'[c]onstitutional review is conducted by unelected judges who are empowered to overturn the will of a democratically elected and accountable legislature in terms of a process of interpreting abstract constitutional provisions. In short, the question arises as to how to account for and justify the curtailment of the operation of a democratic political system by an unaccountable institution'.<sup>298</sup>

Taking the above quote into account, the precise submission is that by allowing for judicial review the Constitution allows for the subversion of democracy.<sup>299</sup> The political will of the people as represented by the legislature and the executive can in this instance be subverted by an unelected group of people in the person of Constitutional Court Judges through judicial review. This clash between the will of the people and the duties of the judiciary is the one

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<sup>296</sup> Section 1(d) of the Constitution states that '[t]he Republic of South Africa is one, sovereign, democratic state founded on', inter alia, 'universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'

<sup>297</sup> K Mclean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 111.

<sup>298</sup> D Davis 'Democracy - its influence upon the process of constitutional interpretation' (1994) 10 *SAJHR* 104.

<sup>299</sup> C G van der Merwe, C Gerhardus, and JE du Plessis *Introduction to the law of South Africa* (2004) at 230

that leads to the counter-majoritarian dilemma.<sup>300</sup> On one hand the courts have the duty to dispense with their constitutional mandate and on the other hand they have to respect the political branches of state since they represent the will of the majority.

As Freedman has pointed out, the manner in which the courts in constitutional democracies have responded to these criticisms may be divided into two categories: first, the non-justiciable approach; and, second, the judicial self-restraint approach.<sup>301</sup>

#### **4.6.2 The non-justiciable approach**

In some jurisdictions, such as the United States, the courts have adopted what is referred to as a ‘non-justiciable approach’ or ‘political questions doctrine’. In terms of this approach the courts have held that certain disputes, especially those that are politically sensitive, should be resolved by the political branches, rather than by the judicial branch. This is because the separation of powers provides that political decisions should be made by the elected political authorities and not by the courts.

The origins of the non-justiciable approach may be traced back to Chief Justice Marshall’s judgment in the seminal case of *Marbury v. Madison*,<sup>302</sup> where he said the following:

“[t]he province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court”.<sup>303</sup>

In terms of this approach it is important to be able to distinguish between those disputes which may be classified as “political” (or non-justiciable) and those which may not be classified as “political” (or justiciable). This issue has been considered by the United States Supreme Court on a number of occasions. The leading judgment in this respect, however, is *Baker v Carr* 396 US 186 (1962).

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<sup>300</sup> C G van der Merwe, C Gerhardus, and JE du Plessis *Introduction to the law of South Africa* (2004) at 230

<sup>301</sup> W Freedman *Understanding the Constitution* (2013) 72-73.

<sup>302</sup> *Marbury v. Madison* 1803 (5) U.S 1 Cr para 137 170

<sup>303</sup> *Marbury v. Madison* 1803 (5) U.S 1 Cr para 165-166

In *Baker v Carr* 369 US 186 (1962), the Supreme Court explained that a matter will be a political question if: (a) the constitution itself has allocated the issue to another branch of government; (b) there are no legal principles in terms of which the dispute may be resolved; (c) the issue cannot be resolved without first making a political decision; (d) a court cannot resolve the dispute without showing a lack of respect for the political branches; and (e) conflicting decisions from the different branches of government would cause embarrassment.

In recent times the Supreme Court has held that the procedures followed by Congress when it impeaches a judge or when it impeaches the president are political questions (see *Nixon v United States* 506 US 224 (1973)). In addition, the Supreme Court has also held that the president's authority over foreign affairs and, in particular his power to terminate treaties, or to commit troops to battle, are political questions (see *Goldwater v Carter* 444 US 996 (1979)).

#### **4.6.3 The judicial self-restraint approach**

In other jurisdictions, such as South Africa, the courts have not developed a political question doctrine. This is usually because the constitution itself makes it clear that every exercise of public power is subject to judicial review. Section 2 of the South African Constitution, for example, provides that “[t]he Constitution is the supreme law of the Republic; land and conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

The mere fact that the Constitutional Court is willing to deal with ‘political questions’, however, does not mean that it is willing to overstep the limits of its designated authority and take over the powers and functions that have been allocated to the political branches of government. It simply means that the Constitutional Court has developed different approaches to determining the limits of its power over the political branches of government and thus managing its relationship with them.

The approach adopted by the Constitutional Court may be referred to as the ‘judicial self-restraint approach’. In terms of this approach the Constitutional Court uses a number of different strategies to determine how far it is willing to intrude into the functions that have been reserved for the political branches. As a general rule, the more political a particular

issue is, the less willing the Court is to intrude; or, to put it another way, the more political an issue is, the more restrained the Court will be.

Navot describes the judicial self-restraint approach as follows:

‘As mentioned, Israeli law did not adopt the American approach of the non-justiciability of political questions. The foremost spokesman for the Israeli “self-restraint” approach was Supreme Court former President Aharon Barak. According to Barak, any act is liable to be “caught” by the legal norm, and there is no act for which there is no applicable legal norm. There is no “legal vacuum”, in which acts are performed without the law taking a position on them. The law spans all actions. Barak’s view is that the nature of the act – political or other – is irrelevant. Every act, whether political or a matter of determining policy, is contained within the world of law, and is subject to a legal norm.

According to the Israeli approach, the political nature of an act does not negate its legal nature, but the legal character of the executing body will affect the nature of the rules applied by the court. In the words of Justice Barak: ‘The judiciary assesses the legal aspects of politics, not its wisdom. Accordingly, when a judge assesses the legality of a political determination, he is not concerned, neither positively nor negatively – with the merits of the determination. He does not make himself part of it. He does not assess its internal logic, but only examines its legality according to legal standards. In doing so he fulfils his classic role’.

It bears mention that Justice Barak disagrees with Justice Brennan’s comments in *Baker v Carr*. Hence, regarding the first example, i.e that the determination of the question is largely in the realm of the political authority, Justice Barak argues for a distinction between (a) the legal question of the jurisdiction of the political authority and whether the jurisdiction was lawfully exercised, and (b) the question of whether the political authority chose the appropriate solution from among a number of lawful solutions.

“Determination of the first question (a) is generally the role of the court, within the context of its power and duty to determine the nature of the statute. When a particular statute empowers a governmental authority, it thereby empowers the court to interpret it, determine its scope, and to decide whether its power was lawfully exercised. Hence submission of a particular act to governmental authority does not mean that the issue of the lawfulness of that act was also submitted to the governmental authority”.<sup>304</sup>

Amongst the different strategies that the Constitutional Court has adopted are the following: (a) exploiting doctrinal gaps; (b) adopting different standards of review; and (c) designing different remedies. Each of these will be briefly discussed in turn.

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<sup>304</sup> S Navot ‘Political Questions in the Court: Is Judicial Self-Restraint a Better Alternative than a Non Justiciable Approach?’ paper presented at *VII World Congress of the International Association of Constitutional Law: Rethinking the Boundaries of Constitutional Law* (2007) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1367596](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367596), accessed on 6 February 2016.

- (a) Insofar as the first strategy is concerned, Roux argues that at this stage in South Africa's constitutional development it is not always clear which sections of the Constitution applies to a particular problem. In addition, it is not always clear what some of terms set out in the Constitution mean, for example, the phrase "rule of law" in section 1 or the phrase "multi-party democracy". These doctrinal gaps, he argues further, provide the Constitutional Court with a great deal of flexibility and the Court has used this flexibility to manage its relationship with the political branches.<sup>305</sup>
- (b) Insofar as the second strategy is concerned, Roux argues that when it comes to testing the constitutional validity of a decision taken by the other branches of government, the Constitutional Court has adopted a wide range of standards. Some of these favour the government (for example the test for rationality), while others do not (for example the test for reasonableness). When the issue is a politically sensitive one, he argues further, the Court will usually adopt a test that favours the government.<sup>306</sup>
- (c) Insofar as the third strategy is concerned, Roux argued that when the Constitutional Court has come to the conclusion that a decision taken by the other branches of government is constitutionally invalid, it often adopts a remedy aimed at avoiding conflict between itself and the other branches, for example it might refer an invalid Act back to Parliament to correct, or it might issue an order which simply declares that the government has acted in an unconstitutional manner without actually instructing the government to take any specific steps, or it might issue an order instructing the government to take specific steps, but without actually supervising the manner in which the government has complied with its order.<sup>307</sup>

The decision in a particular case, Roux argues further, often depends on the particular strategy the Constitutional Court has adopted and the Court's decision to adopt a particular

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<sup>305</sup> T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' paper presented at the *African Network of Constitutional Law: Fostering Constitutionalism in Africa Conference* 18-20 April 2007 12-28.

<sup>306</sup> T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' paper presented at the *African Network of Constitutional Law: Fostering Constitutionalism in Africa Conference* 18-20 April 2007 12-28.

<sup>307</sup> T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' paper presented at the *African Network of Constitutional Law: Fostering Constitutionalism in Africa Conference* 18-20 April 2007 12-28.

strategy is not based purely on legal principles and rules. Instead, it is sometimes based on pragmatic considerations, especially in those cases that have a strong political dimension and, therefore, may be classified as politically sensitive cases.

#### 4.7 Comment

In light of the discussion set out above, the following comments may be made:

First, that the judgment in *Masetlha* is an example of judicial self-restraint. Like the decision to adopt rationality rather than reasonableness as the standard of review in terms of the principle of legality, it may be argued that the decision to exclude executive action from the requirements of procedural fairness was a strategy adopted by the Court in order to ensure that it did not overstep the limits of its authority.

Second, an important consequence of analysing the *Masetlha* judgment in this way is that it may be argued that the judgment was not based purely on the application of legal principles and rules, but rather on pragmatic considerations. Given the politically sensitive nature of executive decisions, and especially those made by the President, it is not surprising that separation of powers concerns and the need to show appropriate deference to the executive weighed very heavily with the Constitutional Court in these cases.<sup>308</sup>

Third, the fact that the approach adopted in *Masetlha* was so obviously based on pragmatic considerations, rather than on the application of legal principles gave rise to a great deal of criticism from academic and other commentators. The strong negative reaction from the academic community arose out of the fact that the legal principles governing procedural fairness and their application to dismissals were very well settled in South Africa before this case. In addition, the decision to exclude executive action from the requirements of procedural fairness was set out in very wide terms (it was not limited to the facts of the case) and poorly motivated.

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<sup>308</sup> For a more detailed discussion of the difference between pragmatic and principled decisions see T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106.

Fourth, the almost universal negative reaction to the judgment was problematic for the Constitutional Court. This is because while the Court does have to take pragmatic considerations into account when it manages its relations with the political branches especially in politically sensitive cases, it cannot be seen to be basing its decision purely on pragmatic considerations. It has to base, or at least appear to base, its decision on legal principles. If it simply bases its decision on pragmatic and not legal considerations, then it will start to lose its legitimacy as a legal and not a political body.

Fifth, the criticisms levelled by academic and other commentators against the *Masetlha* judgment suggest an alternative approach. One in which the Constitutional Court can deal with these sorts of cases in a principled manner, but without overstepping its authority. This alternative approach provides that the Court should accept that executive action is subject to the requirements of procedural fairness, but given that procedural fairness is a flexible concept, the actual obligations that are imposed on the President and other members of the executive when they make executive decisions should be kept to an absolute minimum.

Finally, it is submitted that the judgment in *Motau* indicates the Constitutional Court itself is coming around to this way of thinking. It seems that the Court itself has realised that the strategy it adopted in *Masetlha* has not been particularly effective and that it needs to find a new approach. An important consequence of this is that in future judgments we will most probably see a move towards adopting procedural fairness (although the Court might call it procedural rationality in order to avoid directly overruling *Masetlha*), but that the actual obligation imposed on the executive will be kept to a minimum.

#### **4.8 Conclusion**

In this chapter we have seen that the separation of powers has proved phenomenal in South Africa's constitutional era. It is supported by its historical necessity as indicated by the consequences of stifling it during Apartheid. Of the basic principles of separation of powers we have established that the system of checks and balances is the most important. Under this system of checks and balances we noted the importance of judicial review generally and constitutional review specifically. There are criticisms for the court's role of judicial review usually coming in the form of the counter-majoritarian difficulty. It has been established that the Constitutional Court has mechanisms in place to deal with these challenges one of these

being judicial self-restraint. We noted that whilst dealing with cases that involved procedural fairness under the rule of law the Court has tried to use this mechanism of restraint in order to maintain the separation of powers. The next Chapter, therefore, will analyse the approach of the Constitutional Court in relation to whether procedural fairness is a part of legality. This analysis will be done in relation to the principles contained in the doctrine of the separation of powers to establish whether the Court is still acting within the principles of the rule of law.

## CHAPTER 5: COMMENT AND ANALYSIS

### 5.1 Introduction

As we have seen the principle of legality is a source of review power and an antecedent of the rule of law. Under this review power the courts have the power to review any exercise of public power, including the exercise of executive power. As a source of review power it encompasses most of the grounds of review found under administrative law, with the exception of procedural fairness. We established what procedural fairness is and we noted that it encompasses the principles of natural justice, namely the right to be heard and the rule against bias.

We went further in the previous chapters to look at the cases that tried to answer the question of whether there is hope for procedural fairness under the principle of legality. It was discovered that the Constitutional Court has taken three approaches to this question. First, there is the ‘no to procedural fairness’ approach which rejected procedural fairness. Second, there is the ‘yes to procedural rationality approach’ which stated that procedural fairness is only acceptable if it assists in establishing the rationality of a decision. Third, there is the ‘maybe yes to procedural fairness approach’ which is willing to adopt full blown procedural fairness under the doctrine of legality.

Having found that the different approaches of the Constitutional Court were influenced by the principles that emanate from the doctrine of the separation of powers we went further to discuss it. We found that in South Africa there is a formal separation of powers where none of the three branches of government should disrupt or invade the powers of the others. This separation, however, is not absolute. This is because at a functional level the courts are given the power to review the powers of the other branches of government.

However, when it comes to reviewing the more political powers of government (specifically the executive) there is a tensions which arises. This is because the Constitutional Court is an unelected body in a democratic state. The Constitutional Court, therefore, has devised ways in which to review decisions of a political nature without disrupting the separation of powers. One of these ways is the strategy of judicial self-restraint where the Court sets out its own boundaries in order not to overstep its authority.

This chapter seeks to analyse the Constitutional Court's approach to procedural fairness under legality to establish whether it is in line with the rule of law and whether it respects the separation of powers. We shall look at the extent to which the Constitutional Court has stated that executive functions should comply with procedural fairness. We shall look at whether the Court's approach is in keeping with the separation of powers. We shall also examine the arguments for procedural fairness and those against procedural fairness bearing in mind concerns about the separation of powers.

## **5.2 What is the extent to which executive action should comply with procedural fairness?**

As we have stated, the Constitutional Court has adopted three approaches in an attempt to respond to the above question on the extent to which executive action should comply with procedural fairness.

Just a brief recap we found that in the first approach, as represented by the cases of *Masetlha* and the *ARMSA*, the Constitutional Court took a strict approach that it would not adopt procedural fairness as a requirement when executive power is being exercised. Their main argument was that, because procedural fairness is essential to administrative law it did not find a place under the principle of legality.<sup>309</sup> Suffice to note that the Court stated that procedural fairness is not one of the constraints under the principle of legality in both cases without giving concrete reasons why. We have already pointed out that the Court's 'special relationship' is dubious since it is difficult to see how national security is affected by a hearing.<sup>310</sup>

In the second stage, as represented by the *Albutt* and the *DA* case, the Constitutional Court warmed up a bit and followed a more liberal approach. At this stage the Court accepted that in certain circumstances procedural fairness could be accepted as a requirement of legality. The acceptance was conditional and the condition was that procedural fairness would be accepted if it would aid in meeting a stated government purpose. It meant that if procedural

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<sup>309</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 76 and *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC) para 59.

<sup>310</sup> C Hoexter 'Clearing the Intersection? Administrative law and labour law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209.

fairness was the only means to affect the rationality of an executive action then the obligations of procedure would be imposed.<sup>311</sup>

The third stage which represents the last approach took the acceptance of procedural fairness to a different level, as represented in the judgment of *Motau* and the minority judgment of *Masetlha*. In *Motau* the Constitutional Court imposed requirements of a fair procedure on the executive although there was statute to that effect. The Court went further to state that even if there had not been legislation that demanded procedural fairness, there still was nothing that could prevent it from imposing it.<sup>312</sup> The same sentiment towards this approach was also endorsed by the minority of *Masetlha*.<sup>313</sup>

Ngcobo J in the minority of the *Masetlha* case found that the President was supposed to give Mr Masetlha a hearing and his failure to do so meant that his actions were contrary to the rule of law and therefore unconstitutional. On this he found that legality demands more than rationality but something more which he called the fundamental principle of fairness which places a duty to act fairly on the exercise of all public power. In summary he found that to dissociate procedural fairness from legality (the rule of law) would ‘result in executive decisions which have been arrived at by a procedure which was clearly unfair being immune from review.’<sup>314</sup>

There is no other jurisprudence than that of the *Motau* and the *Masetlha* minority that has shown a willingness by the Constitutional Court to accept procedural constraints on executive power. This is the ‘maybe yes’ to procedural fairness.

### **5.3 Analysing the Constitutional Court’s approach in light of the separation of powers**

#### **5.3.1 Introduction**

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<sup>311</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 59. In the *Albutt* case the Constitutional Court accepted that the victims should be heard simply because a hearing would further the government purpose which was national unity and national reconciliation. In *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) para 39 the Court accepted that the failure to take relevant information into consideration meant that not only the process by which the decision was made, but also the decision itself was irrational.

<sup>312</sup> *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 117.

<sup>313</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 180- 83. For Ngcobo J the exercise of all power is subject to the Constitution which is the supreme law and has its constraints on the exercise of power which included the rule of law.

<sup>314</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 184

There are a number of separation of powers concerns that are imputed to the imposition of procedural fairness on the executive. The first one is that procedural obligations are very onerous and they may demand too much from the executive. Such onerous obligations are feared to have the effect of affecting the separation of powers. This is because procedural fairness may hinder the effective running of government business as stated in the case of *Masetlha* that the powers of the President were given to him for the efficient running of government business.

These arguments arise because of the more political nature of executive decisions. Under administrative law it has been held that procedural requirements will not be applicable in cases that are not administrative in nature.<sup>315</sup> This excludes executive actions because of their political nature. De Ville states that the application of procedural fairness is directly linked to its content stating as if on a spectrum ‘[t]he closer a decision approximates the judicial process, the stricter the application of the requirements of procedural fairness. On the other end of the spectrum lie issues that are of a high policy nature. The closer one gets to this end of the spectrum, the more minimal the requirements of procedural fairness’.<sup>316</sup> This assertion entails that the more political or policy related an issue is the less procedural obligations that should be imposed.

### **5.3.2 The ‘yes to procedural rationality’ approach**

This approach seems to stand out since it is far away from the extremes of either accepting or not accepting procedural fairness under legality. Considering De Ville’s argument above that the more political a decision is the less procedural obligations the law should impose, the *Albutt* and *Democratic Alliance* cases seem to be on point. Whilst the Constitutional Court did not want to overrule the ‘no to procedural fairness approach’, it showed a wider form of deference to the executive thereby maintaining the separation of powers. The Court adopted a less strict strategy of accepting the lesser requirement of rationality rather than reasonableness or full procedure. As such the approach respected the separation of powers.

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<sup>315</sup> *De Beer NO v North Central Local Council and South Central Local Council* 2002 (1) SA 429 (CC) paras 10-15.

<sup>316</sup> J R de Ville *Judicial Review of Administrative Law in South Africa* (2003) at 221.

A perfect example of taking the separation of powers into consideration was in the *Albutt* case. There was a fear in the case that imposing full procedural fairness would affect the efficient running of government business which in this case was the pardoning of offenders of politically motivated crimes. For the Constitutional Court to impose the obligations associated with the right to a fair procedure on the executive would be to impose a mammoth task on the executive. The argument goes that it would have been difficult for the President to adhere to every applicant's requirement of notice and oral presentations and representation. This kind of requirement to impose on the exercise of every executive functions would be unjustifiable since the state's capacity to hear every case would depend on a variety of factors like money, personnel and time.

### **5.3.3 Arguments against the acceptance of procedural fairness and its separation of powers concerns.**

There are some arguments that support the 'no to procedural fairness' approach. Some of these arguments are included in the commentary of *Masetlha* in Chapter Three and will be highlighted here once more.

Some of the arguments hinge around the separation of powers and one such argument is that to impose procedural obligations is undesirable as doing so would be to fetter the political discretion of the decision maker or hinder the effective running of government business.<sup>317</sup> That procedural fairness fetters political discretion is seen in the *Masetlha* case where the Constitutional Court stated that because of the special relationship that existed between the President and the Head of the National Intelligence Agency procedural fairness would shackle political power. This in the end would result in the courts unduly meddling into politics. A De Ville has stated obligations of procedural fairness need to be lessened as we get closer to policy decisions and decisions of a political nature.<sup>318</sup>

Another separation of powers argument is that the exclusion of executive powers from the PAJA and therefore from administrative law constraints like procedural fairness was in order to respect the separation of powers. Respect for the separation of powers would be through

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<sup>317</sup> M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice in South Africa: An introduction* (2015) 167.

<sup>318</sup> J R de Ville *Judicial Review of Administrative Law in South Africa* (2003) at 221

insulating the more political organs, accordingly political issues of state, from judicial review, thereby insulating the courts from interfering in political issues. As such imposing administrative law obligations on the exercise of executive power would be untenable.<sup>319</sup> The hesitation to adopt procedural fairness just like that of unreasonableness under legality maintains the distinction between administrative and non-administrative issues. To demand procedural fairness will encourage the idea that there are two administrative justice systems running parallel to each other.

As stated earlier, a further argument is that procedural fairness can impose onerous obligations on the executive like the notice of the hearing, the notice to defend, written oral submissions from all sides and even the possibility of appeal. These cumbersome obligations will mostly be in relation to the uncertainty of procedural fairness requirements.<sup>320</sup> The bulky procedural obligations have been held to have the effect of disrupting the efficient running of government business.<sup>321</sup>

The burdensome nature of obligations of a fair procedure is worsened by the fact that it is unclear how much of a hearing is required for the decisions.<sup>322</sup> In some decisions, only a written submission can be enough, in some there may be required the full hearing with oral hearing and submissions from all the parties and this could clog and choke the efficient running of state business.<sup>323</sup>

Also it has been submitted by some that the inclusion of procedural fairness may encourage judicial litigation rather than departmental hearings. This means that instead of the decisions being heard by public officials in their departmental disciplinary bodies, there may be preference by victims in favour of judicial litigation. Price states in this respect that judges are better placed to hear questions of procedural justice than public officials.<sup>324</sup> Bearing in mind the judicial position of the courts it seems that they are better equipped to achieve or accomplish procedural fairness than the executive is. This ability is in regards to time,

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<sup>319</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 77

<sup>320</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 205

<sup>321</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 206

<sup>322</sup> Whether mere written submissions or full blown oral hearing like in the Courts.

<sup>323</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 28-29.

<sup>324</sup> A Price 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network and Albutt*' (2010) 127 *SALJ* 580 at 590

investigating officials and their ability to be impartial. Imposing procedural fairness therefore may encourage the usurpation of executive powers by the judiciary.

There are also some theoretical arguments that have been put forth setting forth why the Constitutional Court should maintain a *Masetlha* like approach to the question of the separation of powers. The first argument is that procedural fairness introduces an element of uncertainty to the legality platform so it should not be adopted. Murcott observes that it is still unclear what the precise content of fairness is in those cases in which the Court has accepted the application of fairness principles under legality.<sup>325</sup> So even if procedural fairness is adopted there is no certainty to what its content would be. It should be appreciated that such uncertainty is against principles of the rule of law.<sup>326</sup>

Demanding procedural fairness for the exercise of executive actions has also been held to have the effect of blurring even further the already blurry distinction between administrative law and the rule of law. In fact some authors already refer to legality as ‘administrative law being called by another name’.<sup>327</sup> The absence of the requirement of procedural fairness had the effect of marking a distinction between legality review and review under administrative law. In this breath the acceptance of procedural fairness under legality will make distinction with administrative law even dimmer. This distinction or exclusion of executive powers from the PAJA is a way of holding the separation of power in esteem.

### **5.3.4 Submissions for the acceptance of procedural fairness under legality**

The founding argument for those authors who support the acceptance of procedural fairness under legality is that it does not disrupt the separation of powers. The argument goes that procedural fairness on the spectrum of the rule of law is part of the formal version of the rule of law. This version of the rule of law does not venture into the substantive quality, wrongness or rightness of law but that the law should adhere to some set formal standards. As

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<sup>325</sup> M Murcott ‘Procedural Fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* Possible?’ (2013) 130 *SALJ* 260 269.

<sup>326</sup> Formal forms of the rule of law that the law should not be vague.

<sup>327</sup> C Hoexter ‘The future of judicial review in South African administrative law’ (2000) 117 *SALJ* 482 at 506. See also J Klaaren ‘Redlight, Greenlight: *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council; Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*’ (1999) 15 *SAJHR* 209 212.

such it is astonishing that one could argue that demanding such a formal requirement could affect or distort the separation of powers doctrine.

More still, some authors disagree with the argument that procedural fairness imposes onerous burdens on the executive. They argue in this respect that procedural fairness does not necessarily impose onerous burdens because it is a very flexible concept.<sup>328</sup> It is difficult to see why such a flexible concept could burden the executive. We noted in chapter two that the concept of a hearing may vary from a simple written presentations to a full blown hearing with oral submissions. There is no justifiable reason, therefore, to say that under no circumstance will procedural fairness be imposed on executive action. This argument entails that even the simplest forms of presentations like a written submission are unacceptable under legality. PAJA itself states that for administrative actions, what is fair will depend on circumstances.<sup>329</sup> The argument that dismisses procedural fairness in totality, therefore, does not take into consideration the flexibility of procedural fairness.

Another argument for the adoption of procedural fairness concerns the Constitutional Court ready acceptance of rationality as a requirement under legality. Having looked at the trend that the Court is adopting in relation to legality, it can be seen that rationality is a well-established requirement for the rule of law.<sup>330</sup> Rationality encompasses procedural and substantive aspects of legality, while procedural fairness is only a form of procedural legality. This means, therefore, that rationality imposes on the public officials more onerous demands than procedural fairness. Rationality is closer to substantive requirements like reasonableness which have the capacity to disrupt the separation of powers. It is difficult to understand, therefore, why the more substantive requirement of rationality is accepted as a constraint for executive while the merely formal requirement of procedural fairness is not.

In addition, Hoexter states that it can be argued that rationality will always demand procedural fairness and that the application of procedural fairness will depend on circumstances. Hoexter finds it difficult to conceive of a situation where the rationality of a

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<sup>328</sup> See J Raz 'The Rule of Law and its Virtue' (1977) 93 *LQR* 195 201 and C Hoexter 'The principle of legality in South African administrative law' (2004) 4 *Macquarie Law Journal* 165.

<sup>329</sup> PAJA: section 3(2)(a).

<sup>330</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 90. Here it was called the minimum threshold requirement for the exercise of all public power.

decision would not be enhanced by hearing both sides.<sup>331</sup> Her argument, therefore, is that whenever rationality is in question, hearing both sides has the effect of affecting the rationality of decisions in all cases. Our argument is that if rationality is an established principle under legality then at least procedural fairness should also be established as a part of the principle of rationality. The argument that procedural fairness can never find space under legality then becomes redundant.

There are also some commentators who have submitted theoretical arguments for the support of procedural fairness in the exercise of public power. They argue that procedural fairness has always been used as a mechanism to control the exercise of power. After all it is a part of the rule of law. For example, Hoexter states that it cannot be justifiable to dismiss anyone without a hearing.<sup>332</sup> She is backed by Rawls who states that in some instances there is no other way or criteria to distinguish a just outcome except the procedure that has been used.<sup>333</sup> All is buttressed by Raz who acknowledges that ‘the principle of fairness is inherent in the obligations of the rule of law’ thus it is a component of the rule of law.<sup>334</sup>

Forsyth and Wade also state that no matter how wide the powers a public functionary are the administrator is still expected to act in a manner that is procedurally fair. They state further that ‘[a]s governmental powers grow more drastic, it is only by procedural fairness that they are rendered tolerable’.<sup>335</sup> The argument goes even further that even where substantive laws are unfair or even unjust they are tolerable to the extent that they are procedurally fair.<sup>336</sup> Jackson J in the same breadth concluded that ‘procedural fairness and regularity are of indispensable essence to liberty. Severe substantive laws can be endured if they are fairly and impartially applied’.<sup>337</sup>

Although there is general agreement that the imposition of procedural requirements has the effect of impeding or being an obstacle to the smooth running of government it has been

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<sup>331</sup> C Hoexter *Administrative Law* 2ed (2012) at 420

<sup>332</sup> C Hoexter ‘Clearing the intersection? Administrative law and labour law in the Constitutional Court’ (2008) 1 *Constitutional Court Review* 209 231.

<sup>333</sup> J Rawls *A Theory for Justice* (1994) 122

<sup>334</sup> J Raz ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195 201. See also C Hoexter ‘The principle of legality in South African administrative law’ (2004) 4 *Macquarie Law Journal* 165.

<sup>335</sup> W Wade and C Forsyth *Administrative Law* 9ed (2004) 439.

<sup>336</sup> W Wade and C Forsyth *Administrative Law* 9ed 2004 439.

<sup>337</sup> *Shaughnessy v United States* 354 206 (1953).

upheld for its ability to give decisions of a better quality.<sup>338</sup> Kelly explains justice as the correct decision as being seen from the point of view of those affected by the decision.<sup>339</sup> He found that in the early ages the Greek and the Romans found it best to hear the other side because the chances of making a mistake were higher. This was because, generally, human beings enjoy hearing the accusation rather than the defence so hearing both sides would assist judges in being unbiased.<sup>340</sup> We can note here that the hearing rule is even protruding into judicial impartiality and as such it can have the same effect if applied in executive actions. This means that the executive functionary will not be impartial towards the information at his disposal which excludes that of the affected party if there is no hearing.

Furthermore Raz puts the observance of principles of natural justice as important principles to the rule of law he says that '[o]pen and fair hearing, absence of bias and the like are obviously essential for the correct application of the law and thus ... to its ability to guide action'.<sup>341</sup> Raz defends the application of procedural fairness under legality because at least the court has the opportunity to decide what content of fairness is required in each given case thus he is against the all or nothing approach.<sup>342</sup>

#### **5.4 Is the Constitutional Court's Approach consistent with the separation of powers?**

In considering consistence with the separation of powers we shall examine the constitutionality of the first and second stage. On the third approach we notice that the Constitutional Court has pointed that it is willing to accept full-blown procedural fairness but has not yet accepted it. As such we have already looked at the arguments for and against such an approach. Under this heading therefore we will dwell more on analysing the first two approaches.

The first approach that has been adopted in the *Masetlha* and *ARMSA* has been criticised for putting the law back 20 years. This is according to Hoexter who when she was commenting on the majority decision of *Masetlha* said that the decision that procedural fairness cannot be imposed on the executive seems retrogressive.<sup>343</sup> Hoexter's position anchors on two fronts:

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<sup>338</sup> W Wade and C Forsyth *Administrative Law* 9ed (2004) 440.

<sup>339</sup> J M Kelly 'Audi Alteram Partem' 1964 *Natural law Forum* 103.

<sup>340</sup> J M Kelly 'Audi Alteram Partem' 1964 *Natural law Forum* 103 104.

<sup>341</sup> J Raz 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195 201.

<sup>342</sup> J Raz 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195 184.

<sup>343</sup> C Hoexter 'Clearing the intersection? Administrative law and labour law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209 231.

First, being that it is inconceivable to think how affording Mr Masetlha a hearing would have jeopardised state security. Second, that in *Zenzile* the court required that there should be a hearing. It boggled her mind why in a constitutional dispensation built on principles of accountability, the Constitutional Court would find a hearing to be a non-event.<sup>344</sup> It means that according to this approach the content of procedural fairness is even less than it was in the old regime.<sup>345</sup>

The shallow reasoning of the *Masetlha* case has led some commentators to say that the decision of *Masetlha* legality is ‘clearly wrong’.<sup>346</sup> Some have been more lenient and said that at least the Court should have taken *Masetlha* to be an exception rather than the rule.<sup>347</sup> The argument goes that adopting *Masetlha* is an outright erosion of the right to be heard. At least the Court could have stated that *Masetlha* was exceptional considering the context specific nature of protecting national security.<sup>348</sup>

Kruger warns that *Masetlha* should not be read as precedent or as the general rule. She states that ‘if not read in context and with care’ it could ‘set a perilous precedent reducing the constraints on the exercise of executive power, significantly and potentially eroding the supremacy of the Constitution in that respect’.<sup>349</sup> Reducing the rather important constraints that judicial review for executive functions survives additionally has the effect of undermining the separation of powers which caters for checks and balances.

Perhaps the second approach illustrated better the unconstitutionality of the first approach and its impermissibility as an approach to be taken seriously. Besides the first approach being too strict the Constitutional Court softened in its second approach. In the *Albutt* case, for example, the Court adopted the approach that the decision of the President to pardon convicts of politically motivated crimes needed to be rational. The Court found that for the President to be able to meet the goals for which the dispensation was being carried, he needed to hear

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<sup>344</sup> C Hoexter ‘Clearing the intersection? Administrative law and labour law in the Constitutional Court’ (2008) 1 *Constitutional Court Review* 209 231.

<sup>345</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para188.

<sup>346</sup> C Plasket ‘Administrative Law’ 2008 *Annual Survey* 41.

<sup>347</sup> C Hoexter ‘Clearing the intersection? Administrative law and labour law in the Constitutional Court’ (2008) 1 *Constitutional Court Review* 209 233.

<sup>348</sup> M Murcott ‘Procedural Fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?’ (2013) 130 *SALJ* 260 269.

<sup>349</sup> R Krüger ‘The South African Constitutional Court and the rule of law: The *Masetlha* judgment, a cause for concern?’ 2010 (13) *Potchefstroom Electronic Law Journal* 468 485.

the families of the victims. In the end the Court imposed an obligation of procedural fairness on the President because it would make the decision rational. Procedural fairness at this stage is not taken to be a requirement not simply because it enhanced rationality, but also because it is the only way to meet the government purpose. For example, in the *Albutt* case it was the only way to meet the purpose of national unity and peace building.

*Albutt* and the *Democratic Alliance* cases, therefore, stand in tension with *Masetlha* and *ARMSA* whose judgments dismiss even the possibility of demanding procedural fairness for executive action. The first approach was so radical even though Hoexter says that it is difficult to think of cases whose rationality would not be enhanced by hearing the other side.<sup>350</sup> Hoexter's sentiment, therefore, is that the radical stance of the Constitutional Court in the first approach is not reasonable as it was an outright expulsion of the right to be heard when executive action is involved. Although *Albutt* did not overrule *Masetlha*,<sup>351</sup> *Masetlha* remains a cause for concern.<sup>352</sup>

In summary, we note that it is clear that the first approach was clearly out of touch with principles of the separation of powers. With the second approach the Constitutional Court had a little more respect for the separation of powers. However, it is very disappointing that the judgment of the Court illustrated wasted opportunity to clear up issues. So far the Court is considering the separation of powers and it is encouraging.

## **5.5 Which approach is better for SA's system of the separation of powers?**

The approach that best suits South Africa is the one that best suits South Africa's system of the separation of powers which in itself is a difficult question to answer. The difficulty is enhanced by the fact that the Constitutional Court itself has not developed a coherent theory for the separation of powers. The Court has dealt with the separation of powers mainly on a case by case basis.

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<sup>350</sup> C Hoexter 'The rule of law and the principle of legality' in S Hoctor and M Carnelley (eds) *Law, Order and Liberty* (2011) 61.

<sup>351</sup> M Murcott 'Procedural Fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?' (2013) 130 *SALJ* 260 271.

<sup>352</sup> R Krüger 'The South African Constitutional Court and the rule of law: The *Masetlha* judgment, a cause for concern?' 2010 (13) *Potchefstroom Electronic Law Journal* 468 485.

South Africa's system of the separation of powers is a hybrid system. It allows intrusion of the judicial powers into the powers of the executive through the principle of judicial review. Because there is no fixed rigid doctrine of the separation of powers<sup>353</sup> it is not defensible to act as if separation of powers does not allow overlap of powers at all. As such Cachalia's argument is relevant, that the South Africa form of separation of powers is not primarily concerned with the rigid fragmentation of government power but the exercise of an appropriate degree of judicial control.<sup>354</sup> The unique formulation of the doctrine therefore allows for separation of powers to be dealt with in a context sensitive manner that caters for the flexibility of procedural fairness.<sup>355</sup> Ngcobo states that there is need to sustain public confidence in the judiciary, so we need to understand the cooperation rather than competition nature of the separation of powers.<sup>356</sup> In the end to out rightly exclude procedural fairness for the fear of upsetting separation of powers seems jurisprudentially untenable because each case has to be delay with uniquely to see how the doctrine can be applied.

With our version of the rule of law, the question is not of whether the courts should intervene or not for fear of upsetting the separation of powers but how the courts will manoeuvre the question of separation of powers in each case. To this end there should be reviewability for procedural fairness in which questions of the separation of powers will be discussed depending on the circumstances of the case.

Having established this background it seems there is a lot of support for the position that executive powers should be constrained by obligations of procedural fairness. On the backdrop of apartheid power was removed from the political branches and vested in the judiciary, chapter nine institutions and civil society.<sup>357</sup> Procedural fairness minimises arbitrariness and thus has the consequence to promote the rule of law.<sup>358</sup>

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<sup>353</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 287.

<sup>354</sup> *First Certification Judgment* 1996 (4) SA 744 (CC) para 288.

<sup>355</sup> M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice in South Africa: An introduction* (2015) 154.

<sup>356</sup> S Ngcobo's 'Sustaining Public confidence in the Judiciary: An essential condition for realising the judicial role' (2011) *UCT Review* 3-5.

<sup>357</sup> N Ramatlhodi 'The big read: ANC's fatal concessions' *The Times* (2011-09-01) available at <http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions>, accessed 12 November 2015.

<sup>358</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 190.

Procedural fairness is a firm requirement that should not be taken lightly.<sup>359</sup> Ngcobo J says that all the other reasons for not adopting procedural obligations for the exercise of executive actions so far are not enough, for example the trust relationship given in *Masetlha*. He argues that the case by case application approach is even better as it respects the supremacy of the Constitution and, consequently, the importance of the rule of law.<sup>360</sup>

Countering the argument that procedural requirements may be too imposing on the executive. Klare states that there is need to consider that the Constitution was written as a response to the political history of South Africa.<sup>361</sup> Here the non-arbitrariness argument of Ngcobo J who states that fundamental fairness is linked to the non-arbitrary exercise of power is important.<sup>362</sup> The argument goes that the rule of law is linked to the other foundational values of accountability, openness and responsibility whereby adherence to these seems impossible without participation in decision making.<sup>363</sup> Murcott takes the argument further and argues that the new constitutional dispensation envisages participatory democracy in which ‘the right to speak and be listened to is part of the right to be a citizen in the full sense of the word . . . and the right to have a voice on public affairs is constitutive of dignity’.<sup>364</sup>

In summary, the separation of powers doctrine of South Africa involves both formal and substantive requirements. Considering the importance of judicial review for procedural fairness it should be rejected that procedural fairness has no place in legality. However, it cannot be denied that the requirement is onerous. As such the Constitutional Court should adopt a case by case approach, which tallies with the way that the Court has adopted the separation of powers doctrine that it applies on a case by case basis. We found also that judicial review is the rule of law in action. At the same time we found that the rule of law ‘enforces minimum standards of fairness both substantive and procedural’.<sup>365</sup> The *Masetlha* stance is a perilous stance with the danger of eroding the supremacy of the Constitution.

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<sup>359</sup> R Krüger ‘The South African Constitutional Court and the rule of law: The *Masetlha* judgment, a cause for concern?’ 2010 (13) *Potchefstroom Electronic Law Journal* 468 474.

<sup>360</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 195.

<sup>361</sup> K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14(1) *SAJHR* 46 88.

<sup>362</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 184.

<sup>363</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 179.

<sup>364</sup> *Minister of Health v New Clicks (Pty)Ltd* 2006 (2) SA 311 (CC) para 625-627.

<sup>365</sup> A Street *Judicial review and the rule of Law: Who is in Control* (2013) 14

Even some of the theoretical arguments apply in South Africa where Ngcobo J stated that ‘[a] hearing can convert a case that was considered to be shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explained’.<sup>366</sup> The argument goes that had *Masetlha* been given a hearing the misunderstanding that made the special relationship upset might have been cleared.<sup>367</sup>

## 5.6 Recommendations

Considering the Constitutional Court has no real and established approach yet, we will make some recommendations that can assist the Court in the future.

The most important recommendation is that the Constitutional Court in cases where they want to apply principles of procedure fairness should not avoid the PAJA. *Albutt* was a clear case and example of where the Court avoided the PAJA.<sup>368</sup> Murcott argues that finding out whether pardoning powers were administrative or not would have had an influence on the applicability of procedural fairness or the standard of procedural fairness demanded.<sup>369</sup>

Although the Constitutional Court now appears to be willing to accept procedural fairness for the exercise of executive power, nothing has been said about the nature of the hearing that will be required. Murcott argues that the PAJA would have helped ease everything.<sup>370</sup> This is with the consideration that nothing was said by the Court on the nature or content of hearing that had to be followed under the rule of law.<sup>371</sup>

The submission, therefore, is that at least there is certainty in the PAJA so the courts should be hesitant to avoid it. Murcott states that sound judicial reasoning is that the legality should

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<sup>366</sup> *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) para 112.

<sup>367</sup> C Hoexter ‘Clearing the intersection? Administrative law and labour law in the Constitutional Court’ (2008) 1 *Constitutional Court Review* 209 232.

<sup>368</sup> M Murcott ‘Procedural Fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?’ (2013) 130 *SALJ* 260 267.

<sup>369</sup> M Murcott ‘Procedural Fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?’ (2013) 130 *SALJ* 260 268.

<sup>370</sup> M Murcott ‘Procedural Fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?’ (2013) 130 *SALJ* 260 268.

<sup>371</sup> M Murcott ‘Procedural Fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?’ (2013) 130 *SALJ* 260 268.

be a backstop after considering the PAJA.<sup>372</sup> She states that the tendency of the Constitutional Court is not avoidance of the PAJA but failure to apply the PAJA which in the end belittles the importance of the PAJA.<sup>373</sup> By refusing to apply the PAJA the Court failed to decide whether it is desirable, necessary or possible to apply the rights that the PAJA protects.<sup>374</sup>

The recommendation, therefore, is that the Constitutional Court should at least first inquire into the applicability of the PAJA and leave the PAJA to set a guideline on what procedural fairness demands. Mthiyane JA states in this regard that '[a] litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation'.<sup>375</sup>

Further, we recommend and upheld the 'yes to procedural rationality' approach whilst holding that the 'no to procedural fairness' approach should be discarded. This is because, besides the respect that the 'yes to procedural rationality' gives to the executive, it has the capacity to be developed taking into account the interests of the parties in each case. The two other approaches are too extreme; they lead to a generalisation, an all or nothing approach which stamps out individuality and situational differences.<sup>376</sup> The 'yes to procedural rationality' approach respects the dignity of the people that are affected by the executive and it resembles what Mashaw called the Dignitary Theory.<sup>377</sup>

This dignitary approach, Mashaw states, offers constitutional consistency because it echoes rights (substantive procedures) where the rights that are in the Constitution are affected by the

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<sup>372</sup> M Murcott 'Procedural Fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?' (2013) 130 *SALJ* 260 270.

<sup>373</sup> M Murcott 'Procedural Fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?' (2013) 130 *SALJ* 260 269.

<sup>374</sup> M Murcott 'Procedural Fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?' (2013) 130 *SALJ* 260 269.

<sup>375</sup> *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC). See also *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at paras 99 to 101

<sup>376</sup> J L Mashaw 'Administrative due process: the quest for a dignitary theory' (1981) 61 *Boston University Law Review* 885 897.

<sup>377</sup> The theory states that where measures that affect interests are taken then there needs to be a hearing,

decision.<sup>378</sup> For example in the *Albutt* the individuals' right to be heard was iterated, and provided for with the respect of cause to the powers conferred on the executive

As a result of the dignitary theory, Mashaw suggests an approach which states that that the 'effects of process on participants, not just the rationality of substantive results, must be considered in judging the legitimacy of public decision making'.<sup>379</sup> He goes on to state that intuitively, process is important to us regardless of what the outcome is.<sup>380</sup> This means that as far as fairness is concerned there is a need to distinguish between result oriented arguments and process based ones.<sup>381</sup> Thibaut and Walker in their experimental work found that people have a tendency to involve themselves in decision making processes to gauge the fairness of the processes thus trying to protect substantive concerns through the afforded opportunity given for personal strategy.<sup>382</sup>

In a sense, therefore, people do not associate losing with being treated unfairly but unfairness will be associated with not being taken seriously as an individual.<sup>383</sup> In a sense the Court in *Paul v. Davis*<sup>384</sup> made the same point when it stated the following: 'I have always thought that one of this Court's most important roles is to [protect] the legitimate expectations of every person to innate human dignity and sense of worth.' The issue according to the theory 'is . . . whether the challenged process sustains or diminishes individual dignity'.<sup>385</sup>

This recommendation entails, therefore, that procedural rationality is the way to go since it protects both the process values and the substantive values that a fair procedure seeks to advance. So in the end even though the Constitutional Court may not want to disregard *Masetlha* or follow *Motau*, to accept full procedural rationality is sustainable. Considering it

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<sup>378</sup> J L Mashaw 'Administrative due process: the quest for a dignitary theory' (1981) 61 *Boston University Law Review* 885 at 897.

<sup>379</sup> J L Mashaw 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 *Boston University Law Review* 885 at 886.

<sup>380</sup> J L Mashaw 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 *Boston University Law Review* 885 at 887.

<sup>381</sup> J L Mashaw 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 *Boston University Law Review* 885 at 887.

<sup>382</sup> J Thibaut & L Walker *Procedural Justice* (1975) 117 to 224

<sup>383</sup> J L Mashaw 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 *Boston University Law Review* 885 889.

<sup>384</sup> *Paul v Davis* 1976 (424) US 693 para 734-35

<sup>385</sup> J L Mashaw 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 *Boston University Law Review* 885 885.

is minimum threshold for the exercise of all public power more requirements could be added to it therefore keep the executive in check.

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