ARTICLE

The Importance of Process and Substance*

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ABSTRACT

The Constitution of the Republic of South Africa, 1996 endeavours to reverse the legacy of apartheid. In the process, the judgments of the Constitutional Court have restored and extended many of the fundamentals of fairness and due process that had been trampled on by the apartheid state. This article highlights the important role that Justice Ngcobo's judgments have played (and continue to play) in our developing jurisprudence on procedural fairness. As it will be demonstrated, the Constitutional Court has begun to work out a home-grown account of due process that not only marks a stark break with our apartheid past, but which also highlights the contextual challenges and features of our new democratic order—and stresses the sometimes—difficult balancing exercise required by our courts in protecting rights while respecting separation of powers. This article, therefore, pays tribute to Justice Ngcobo's careful thinking around due process, and his insistence through various important judgments on recognising three cardinal features of fairness, which have now come to resonate in the Constitutional Court's jurisprudence.

Keywords: process and substance; procedural fairness; dispute resolution; public participation; reasonableness

Introduction

Justice Ngcobo accomplished much that is worthy of recognition during his period of service on the Bench. His contribution to revitalising and restructuring the judiciary is one example. It is well known that Justice Ngcobo had ambitious plans to transform the judiciary into a branch of government that is both institutionally and functionally

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independent of the Executive.[1] This was a cause close to his heart even before he was Chief Justice: as far back as 2003, he presented an address in which he cautioned that an Executive-dependent court administration system compromised the independence of the judiciary. He used his time as Chief Justice to drive through several reforms. Chief among these was the proclamation establishing the Office of the Chief Justice as a national department to provide support to the judiciary and ensure efficient court administration services.[2]

Justice Ngcobo is also widely lauded for his prolific work ethic, abundant energy and legal acumen. In this article, we have chosen, however, to consider his contribution to confirming the importance of process, a theme that emerges from his judgments as a Justice of the Constitutional Court. As some time has passed since Justice Ngcobo served on the Bench, we now have the benefit of seeing how his judgments on process have been treated and interpreted, and how they have influenced subsequent legal developments. These reveal the important role Justice Ngcobo's work has played in developing our present understanding of the procedural constraints on the exercise of public power, generally, and of procedural fairness in particular.

The many and varied subjects of Justice Ngcobo's judgments that we consider include access to courts and procedural fairness in administrative action,[3] public participation in the legislative process,[4] the participation of victims in a decision to pardon political prisoners,[5] and lawfulness of search-and-seizure warrants.[6] The judgments reveal Justice Ngcobo's bold approach to procedural fairness, the *audi alteram partem* rule (or *audi* principle) and natural justice.

South African administrative law lost its way under apartheid. Rampant parliamentary sovereignty in an undemocratic setting frequently held sway in giving effect to apartheid's grand design. With a few notable exceptions, the judiciary offered little resistance. The

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1 Hugh Corder and Jason Brickhill, 'The Constitutional Court' in Cora Hoexter and Morné Olivier, *The Judiciary in South Africa* (Juta 2014) 355 at 368.

2 Judge Ngcobo observed in a seminal address to a National Judges' Symposium in July 2003 that the Judiciary cannot be said be a genuinely independent and autonomous branch of government if it is 'substantially dependent upon the executive branch not only for its funding but also for many features of its day-to-day functions and operation': Sandile Ngcobo, 'Delivery of Justice: Agenda for Change' (2003) 120 SALJ 688 at 697, discussed in Corder and Brickhill (n 1) 103.

3 *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC).

4 *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (6) SA 477 (CC) ('*Matatiele*').

5 *Albutt v Centre for the Study of Violence and Reconciliation & Others* 2010 (3) SA 293 (CC) ('*Albutt*').

6 *Thint (Pty) Ltd v National Director of Public Prosecutions & Others, Zuma & Another v National Director of Public Prosecutions & Others* 2009 (1) SA 1 (CC) ('*Thint*').

basic notion of fairness—that there is a duty upon 'everyone who decides anything' to listen to both sides[7]—was forgotten. The Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution') attempts to reverse this legacy. In the process, the judgments of the Constitutional Court have restored and extended many of the fundamentals of fairness and due process that had been trampled on by the apartheid state.

In the discussion that follows we highlight the important role that Justice Ngcobo's judgments have played (and continue to play) in our developing jurisprudence on procedural fairness. As we shall see, the Constitutional Court has begun to work out a home-grown account of due process that not only marks a stark break with our apartheid past, but also highlights the contextual challenges and features of our new democratic order—and stresses the sometimes difficult balancing exercise required by our courts in protecting rights while respecting the separation of powers.

The Roots of Procedural Fairness

Section 33 of the Constitution enshrines the right to administrative action that, in addition to being lawful and reasonable, is procedurally fair.[8] The constitutional right to procedurally fair administrative action is given effect to in sections 3 and 4 of the Promotion of Administrative Justice Act ('PAJA').[9]

While the right has been afforded constitutional entrenchment, the principle of procedural fairness has long been part of our law. In its common-law guise, procedural fairness (or 'natural justice' as it was known) consisted of two main components. These are reflected in the common-law maxims *audi alteram partem* (hear the other side) and *nemo iudex in sua causa* (no one should be a judge in his or her own cause). For present purposes, we are concerned with the first of these two requirements—the *audi* principle. Corbett CJ in *Du Preez & Another v Truth and Reconciliation Commission* located the *audi* principle as part of a general duty to act fairly in certain circumstances:[10]

> The *audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly… The duty to act fairly, however, is concerned only with the manner in which the decisions are taken: it does not relate to whether the decision itself is fair or not.[11]

7 *Board of Education v Rice* [1911] AC 179 at 182.

8 Section 33 states that '[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair.'

9 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC) para 25.

10 1997 (3) SA 204 (SCA) ('*Du Preez*').

11 ibid at 231G–H.

Before the enactment of the Constitution and PAJA, procedural fairness was a principle not warmly embraced by the courts, regarded 'as something that would somehow lose its value if applied too often.'[12] This was derived from an ostensible concern that a requirement of procedural fairness would overburden the administration if applied liberally. This sentiment was expressed in *Laubscher v Native Commissioner, Piet Retief*,[13] where the Appellate Division, while acknowledging the importance of the *audi* principle, warned that 'its value would be lessened rather than increased if it were applied outside its proper limits.'[14]

Under the common law, procedural fairness originally extended only to *rights* that were adversely affected by administrative action, and not to legitimate interests. The position changed, however. In *Administrator, Transvaal, & Others v Traub & Others*,[15] in a decision handed down not long before the enactment of the Interim Constitution, Corbett CJ officially imported into South African law the doctrine of legitimate expectation.

The right to just administrative action is now constitutionally enshrined in section 33 of the Constitution and the right to procedural fairness in respect of both rights and legitimate expectations is specifically reflected in section 3 of PAJA.[16] As we shall see below, the challenge remains one of identifying when the right is triggered and, once triggered, what its content is.

Whereas before democracy the right was not enthusiastically protected by the courts—it being left to progressive judges to adopt and implement the right, where possible—the fact that the right has now received post-democratic constitutional protection does not answer questions about its application and scope. Justice Ngcobo's judgments highlight the complexities of deciding exactly when a right to be heard is implicated in a case, and then, once implicated, what its demands are upon the State. The judgments further illustrate how the peculiar and particular challenges faced by South Africa and its people today resonate as factors for our courts in giving effect to the constitutional promise of procedural fairness.

The promise itself is codified in PAJA, which in turn was drafted to give effect to the right of administrative justice in section 33 of the Constitution: today PAJA remains the main safeguard for procedural fairness. As we will illustrate, however, the *audi* principle (and a concern for the fairness of process) finds expression more widely (ie outside the administrative-law context).[17] One obvious example of this is the requirement to

12 Cora Hoexter, 'The Principle of Legality in South African Administrative Law' (2004) 4 Macquarie LJ 165. See also *S v Moroka* 1969 (2) SA 394 (A) at 398D–E.

13 1958 (1) SA 546 (A) ('*Laubscher*').

14 ibid at 549B–C.

15 1989 (4) SA 731 (A).

16 Section 3 of the PAJA provides that '[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.'

17 Section 195 of the Constitution provides for a public administration built on the principles of accountability impartiality, efficiency, transparency and responsiveness.

facilitate public participation in legislative processes. Another lies in the rule requiring access to courts before execution against property as part of ensuring a fair process for dispute resolution.

Both examples confirm Justice Ngcobo's focus on process as a means of ensuring constitutionally appropriate outcomes. We start with the latter example first; but in dealing with both we highlight how the South African context (our history, present challenges and future hopes) and our judiciary's concern for procedural and substantive fairness animate the judgments.

Fair Process for Dispute Resolution and the Rule of Law: *Zondi v MEC for Traditional and Local Government Affairs*

In *Zondi v MEC for Traditional and Local Government Affairs*[18] the Constitutional Court was required to consider the constitutionality of various sections of the KwaZulu-Natal Pound Ordinance 32 of 1947, an ordinance which made provision for the immediate seizure and impoundment of trespassing animals and their subsequent sale in execution, without judicial intervention and without notice to the livestock owner. Justice Ngcobo, writing for the majority, concluded that the Pound Ordinance was unconstitutional. One of the grounds on which he did so was that it unjustifiably limited the right of access to the courts by impermissibly authorising self-help.

In order to understand the constitutional objection to the Pound Ordinance, one must understand the iniquitous manner in which it operated. The Ordinance put in place a scheme which provided for the immediate impoundment of trespassing livestock. The landowner was not expressly required to give any notice to the livestock owner unless the livestock owner happened to be the owner of land immediately adjacent to that of the landowner and the livestock bore the registered brand of its owner.

Once the livestock had been seized, they could be taken to the nearest pound, where they could be released only upon the payment of a fee or on the payment of damages. Damages were assessed not by a court but by 'two disinterested persons', each of whom was required either to be a landowner or a 'voter'[19]—a deliberate qualification intended to exclude black people from assessing damage.[20] If the animals were not claimed, they could be sold to defray the impounding and transportation expenses. Any animal that remained unsold could be destroyed. Was this legislative scheme compatible with sections 33 and 34 of the Constitution?

18 2005 (3) SA 589 (CC) ('*Zondi*').

19 This was a voter as defined in s 1 of the Electoral Act, 1979.

20 The judgment expressly deals with this on a further ground relied on in the judgment: equality. It provides: 'The reference to the Electoral Act was deliberate and intended to ensure the exclusion of black people from assessing damages. This is manifest from the history of section 29(1). In terms of section 3(1) of the Electoral Act, only white persons had the right to vote. The alternative qualification for assessment of damages is land ownership.'

Section 34 of the Constitution guarantees the right of access to court, which entails that any constraint upon a person or property shall be exercised only after recourse to a court.[21] This is a manifestation of a more fundamental principle that underlies our democratic order: respect for the rule of law and the prohibition against self-help—foundational to a stable and organised society. If our society and its members are to resolve their disputes in a manner consistent with the rule of law, then that requires not only access to a court (or other mechanism) that allows for the orderly resolution of disputes. 'Orderly resolution of disputes'—to encourage society's commitment to resolution rather than its resorting to unilateral assertions of might or force—entails that the parties be treated fairly in the process. Fairness, then, is an integral component of the rule by law.[22]

Justice Ngcobo adverted to this motivation when he held that '[s]ection 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions.'[23] The learned Justice observed that the scheme denied the livestock owner the protection of the judicial process and the supervision of a court over the process of execution—and that 'from start to finish there [was] no judicial intervention'.[24] Furthermore, the landowner was permitted to bypass the courts and recover damages through an execution process carried on without any court intervention in a manner unjustifiably inconsistent with section 34 of the Constitution.

Justice Ngcobo's decision therefore recognised the central role of (court) process and the *audi* principle in resolving disputes and executing process. His judgment is a resolute demand that due process be observed when social schemes or the law's force are marshalled in an impactful manner against persons, particularly where those schemes perpetuate or arise from the racist practices of the past.

In *Zondi*'s case the detrimental impact arose from the scheme under the Pound Ordinance, and the Court insisted that when a material constraint upon a person or property is to be exercised by another in the execution process, that process is to be disciplined by the rules of due process. The *Zondi* principles have received attention from the Constitutional Court in other contexts. For example, in *Jaftha v Schoeman & Others, Van Rooyen v Stoltz & Others*[25] ('*Jaftha*') (decided in the same year as *Zondi*) and *Gundwana v Steko Development CC & Others*[26] the Constitutional Court held that residential properties could not be declared especially executable without an order of court and that, prior to making those orders, the High Court and the magistrates' courts respectively would need to be satisfied that to do so was just and equitable. Judicial

21 *Chief Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC).
22 Tom Bingham, *The Rule of Law*, Part 1, 'The Importance of the Rule of Law' (Penguin Books 2010) 1.
23 *Zondi* (n 18) para 61.
24 ibid para 74.
25 2005 (2) SA 140 (CC) ('*Jaftha*').
26 2011 (3) SA 608 (CC).

oversight over the execution process requires a magistrate or a judge to consider all the relevant circumstances of a case to determine whether there is good cause to order execution.

Jaftha is particularly illustrative of the Court's further thinking around the important role to be played by the principle of procedural fairness. In *Jaftha* the Constitutional Court declared section 66(1)(*a*) of the Magistrates' Courts Act 32 of 1944 unconstitutional. Section 66(1)(*a*) of the Act prescribes the process from the time a court gives judgment in favour of a creditor until the ultimate sale in execution of the debtor's immovable property. The sheriff calls at the home of the debtor and attaches movable property sufficient to settle the debt. If insufficient movables exist, the sheriff issues *a nulla bona* return, which reflects that there is insufficient movable property to settle the debt. On the strength of the fact that no movables are found, the clerk of the court is obliged to issue a warrant of execution against the immovable property. It is for him or her to decide whether, in the light of the sheriff's *nulla bona* return, insufficient movables exist to satisfy the judgment. Once he or she is satisfied of this fact, it follows that the debtor's immovable property will be sold in execution.

In *Jaftha* the appellants argued that the sale of immovable property in such circumstances violated the appellants' right of access to adequate housing. The appellants were poor: the second appellant, for instance, was a widow whose husband had bought their home with a State subsidy of R15 000, incurred debt of R190 for the purchase of vegetables, was thereafter unable to repay the amount, with the result that the bank claimed for that amount plus interest and had their home sold in execution for R1 000.[27] Against this background, the Court ruled that section 66(1)(*a*) of the Act is overbroad and constitutes a violation of section 26(1) of the Constitution to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure.[28]

Accordingly, the Constitutional Court held that words should be read into section 66(1)(*a*) to provide a judicial oversight mechanism. Such a mechanism would help to avoid the violation of section 26(1) during the execution process. In the Court's words:

> The most precise way to remedy the lack of judicial oversight over the process is to add the phrase a court, after consideration of all relevant circumstances, may order execution so that it applies to sales in execution over immovable property where insufficient movables have been found to satisfy the judgment or order. Section 66(1)(*a*) will then read as follows:
>
> Whenever a court gives judgment for the payment of money or makes an order for the payment of money in installments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any installment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown,

27 *Jaftha* (n 25) para 5.
28 ibid para 52.

> so orders, then a court, after consideration of all relevant circumstances, may order execution against the immovable property of the party against whom such judgment has been given or such order has been made.[29]

The Court stressed in this regard[30] that whether execution against immovable property is justified will depend on the circumstances of each particular case. However, it is clear that there will be circumstances in which it will not be justifiable to allow execution. In particular, there will be instances where execution will not be justifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor.

For this reason, the Constitutional Court required judicial oversight of all orders declaring immovable property executable in the magistrate's court—even where the property had been put up as security for debt. The countervailing argument was that the law already contains 'safeguards' in that it permits the debtor to approach the court to set the order aside. But the Court gave this argument short shrift, pointing out that this 'safeguard' is not sufficient to save the law from unconstitutionality, because in many cases the debtors will be legally unsophisticated people who are unaware of the protection. In addition, even if they were aware, indigent people would not have the wherewithal to make use of this opportunity.[31]

Accordingly, while the Court did not 'delineate all the circumstances in which a sale in execution would not be justifiable', it indicated that the approach must be flexible enough to

> accommodate varying circumstances in a way that takes cognizance of the plight of a debtor who stands to lose his security of tenure, but is also sensitive to the interests of creditors whose circumstances are such that recovery of the debt owed is the countervailing consideration, in a context where there is a need for poor communities to take financial responsibility for owning a home.[32]

These cases also provided the foundation for the Constitutional Court's recent decision in *University of Stellenbosch Legal Aid Clinic & Others v Minister of Justice and Correctional Services & Others,*[33] which held that emolument attachment orders may not be granted except by a court and only in circumstances where the court is reasonably satisfied that to do so is just and equitable. Prior to this, emolument attachment orders could be granted by the clerk or registrar of the court (as opposed to going to open court,

29 ibid para 64 [emphasis in the original].
30 ibid paras 42–43.
31 ibid paras 19 and 47.
32 ibid para 53.
33 *University of Stellenbosch Legal Aid Clinic & Others v Minister of Justice and Correctional Services & Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic & Others; Mavava Trading 279 (Pty) Ltd & Others v University of Stellenbosch Legal Aid Clinic & Others* 2016 (6) SA 596 (CC) ('*US Legal Aid Clinic*').

where a judge or magistrate would exercise a judicial discretion), a situation that gave rise to considerable unfairness.

Central, then, to these cases is the emphasis on the importance of observing process and procedures before a constraint or deprivation upon a person or property is to be exercised by another. Both sides must be heard by an impartial judge—the Constitutional Court thereby putting the common-law principles of *audi alteram partem* (hear the other side) and *nemo iudex in sua causa* (no one should be a judge in his or her own cause) to constitutional work in dealing with the challenges of life, work and society in South Africa. And recognising precisely and presciently these South African peculiarities, the Court wisely stressed the context-specific nature of the due process enquiry and its fundamental role in protecting (particularly vulnerable) individuals from the might of the State and those more powerful than them.

Returning to Justice Ngcobo's judgment in *Zondi*, while using section 34 of the Constitution to anchor the unconstitutionality of the Pound Ordinance, we see how significant emphasis was placed on the right to procedural fairness. A concern for procedural fairness is also reflected in the further complaint raised in *Zondi* that the Pound Ordinance did not make provision for notice to be given to the stockowner at all and did not require steps to be taken to trace the stockowner (where he or she is not known) when livestock was found trespassing and impounded. In his judgment Justice Ngcobo recognised that the right to notice before an adverse decision is made is a fundamental requirement of fairness. He concluded that, in the circumstances, procedural fairness required that the decision-maker take some steps to ascertain the identity of the person against whom the decision was to be made.

However, Justice Ngcobo also recognised that this requirement would depend on the circumstances of each case and that the overriding consideration would always be what fairness demands in the circumstances. In this regard he held:

> The question whether fairness requires the decision-maker to take some steps to ascertain the identity of the person against whom the decision is to be made must be determined with due regard to the circumstances of each case… The availability of information which, with the exercise of reasonable diligence, renders it possible to ascertain the identity of a person is a relevant consideration. So is the urgency required in making the decision.[34]

But a prior yet central question for the court, said Justice Ngcobo, is 'the consequences that an administrative decision might have on the individual.'[35]

34 ibid para 114.
35 ibid para 113.

Public Participation and Law-making: *Doctors for Life*[36] *and Matatiele*[37]

Perhaps most notably, Justice Ngcobo's approach to fair process and natural justice was demonstrated in the decisions of *Doctors for Life* and *Matatiele* and their progeny. *Doctors for Life* and *Matatiele* both concerned public participation in legislative (non-administrative) decisions.

Doctors for Life arose out of a complaint by Doctors for Life International that the National Council of Provinces ('NCOP'), in passing certain health Bills, failed to invite written submissions and conduct public hearings on these Bills. Justice Ngcobo concluded that the duty to facilitate public involvement in its legislative processes required the NCOP to do so. He recognised that public participation on a continuous basis provides vitality to the functioning of representative democracy and encourages citizens of the country to be actively involved in public affairs. Participation, he held, enhances the civic dignity of those who participate and promotes a spirit of democratic and pluralistic accommodation. It strengthens the legitimacy of legislation in the eyes of the people and, because of its open and public character, it acts as a counterweight to secret lobbying and influence peddling.[38] To Justice Ngcobo, the right in this legislative, democratic context is the right of public consultation – the right, as part of the democratic process, to 'be heard'.

Indeed, years after *Doctors for Life* and *Matatiele*, the Constitutional Court would reiterate the theme of being heard and stress its importance in the context of participatory democracy. In *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly*[39] the Constitutional Court was required to consider whether it was permissible for the National Assembly to regulate its business in a manner that denied its members the opportunity to introduce a legislative Bill in the Assembly. In concluding that it was not permissible to deny its members this entitlement, and recognising an individual member's competence to initiate or prepare legislation, the Constitutional Court held:

> Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen.[40]

That theme – of ensuring that the rights of all are heard—is accordingly a democratic one, one rooted in dignity, the dignity of others, of ensuring that everyone's voice is heard.

36 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) ('*Doctors for Life'*).
37 *Matatiele* (n 4).
38 *Doctors for Life* (n 36) para 115.
39 2012 (6) SA 588 (CC) ('*Oriana-Ambrosini*').
40 ibid para 43.

Returning, then, to *Doctors for Life*, we see how it is a theme that was carefully and powerfully articulated by Justice Ngcobo, with a focus on process not only as an end in itself (to enhance the dignity of the participants), but as a means to other, democracy-enriching ends. In that regard Justice Ngcobo held that the right to participate in the conduct of public affairs includes the right to direct participation through public debate and dialogue with elected representatives, referendums and assemblies; and that the right to participate in public affairs is accordingly closely linked to the rights to freedom of expression, association and assembly.[41] Ngcobo J went further to explain that the right to participate in the conduct of public affairs

> includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.[42]

Accordingly, the duty to respect process is triggered by both democratic goals and a concern for dignity. But what is the scope of that duty? Justice Ngcobo held that there are at least two aspects of the duty to facilitate public involvement:

> The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as 'a continuum that ranges from providing information and building awareness, to partnering in decision-making'. This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised.[43]

In this respect, the Constitutional Court has made clear that public participation must be facilitated at a stage where it can most meaningfully affect the decision to be made, not at a stage that is tangential to the point when significant decisions are made.[44]

While acknowledging the duty, Justice Ngcobo also recognised that legislators had a broad discretion to determine how best to fulfil that obligation. He stated:

> [T]he provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as it is reasonable to do so. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens

41 *Doctors for Life* (n 36) paras 106–111.
42 ibid para 105; and see paras 145–146.
43 ibid para 129.
44 ibid para 171.

> with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.[45]

Here, again, procedural fairness, and the nature and extent of the duty triggered, are contextual. And on this occasion Justice Ngcobo invoked the (well-worn) judicial tool of reasonableness as the Court's guiding light. Reasonableness is an objective standard that is dependent on fact and circumstance; context is all important in determining reasonableness. Whether a Legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The Court held that these would include:

> The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement.[46]

As we shall see, similar factors were articulated by the Constitutional Court in *Bato Star*[47] in describing when an administrative decision is itself reasonable. That should not, perhaps, be surprising, given that reasonableness is an objective, judge-driven standard. And, accordingly, it is furthermore not surprising that a similar margin of appreciation and sensitivity to context is also seen in the administrative-law field in the manner in which administrators must act procedurally fairly, but always with the Court's eye and its potential oversight and involvement being focused on the impact of the law (its 'intensity')—the more severe the impact, the more closely the Court will scrutinise the law and the more reasonable it will expect the Legislature to be in ensuring public involvement.

The second case, which followed soon after *Doctors for Life,* was *Matatiele*, a matter which concerned the validity of the Constitution Twelfth Amendment Act of 2005 and the Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005. These statutes effectively re-demarcated Matatiele Municipality by removing it from KwaZulu-Natal and placing it in the Eastern Cape. The Constitutional Court was required to consider the obligation of a provincial legislature to consult the people affected by the redrawing of provincial boundaries. Justice Ngcobo once again wrote the majority judgment. In it he recognised public participation as an important procedural precursor to legislative decision-making. Again, he unpacked the factors that a court would look

45 ibid para 145.
46 ibid para 128.
47 *Bato Star* (n 9) para 45.

at in deciding whether the duty of public participation was breached. And here, too, he did so through the reasonableness lens, writing:

> The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.[48]

In this paragraph, Justice Ngcobo identified the impact factor as a vital concern for the Court, recognising that where legislative decisions are likely to have a discrete and identifiable impact on certain persons or groups of persons, that ordinarily entitles those persons specifically to have a say. Unlike the NCOP Bills in *Doctors for Life*, the Court in *Matatiele* expressly identified that certain persons (the people of Matatiele) needed to be heard before a decision was made because their rights were affected by the decision. Giving content to this right, Justice Ngcobo explained that this obligation does not simply entail holding hearings. It must provide the opportunity to influence the decision of the law-maker. The Constitutional Court said this:

> While it is true that the people of the province have no right to veto a constitutional amendment that alters provincial boundaries, they are entitled to participate in its consideration in a manner which may influence the decisions of the legislature. The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.[49]

The Constitutional Court has thus made clear that where a law or a decision is to have an impact on people's rights directly and personally, then the due process obligation is triggered not only so that they might intrinsically feel respected, valued and dignified in being given a chance to have their say. The right becomes transitive—what the affected persons say assumes its own power; the power to influence. But in order for that process to function properly, for that power to influence substantively, the Court has stressed the duty on the law-makers not only to listen, but to do so in a way that is meaningful.

The Court has thus insisted that the *audi* principle finds application in both the administrative decision-making processes and the legislative decision-making processes. But, again, its application and content are context-specific—not only to ensure that a person's dignity is respected (by having her say), but also and particularly with a driving

48 *Matatiele* (n 4) para 82.

49 ibid para 97.

feature being the impact of the decision on the person concerned: the more the impact, the more the person must be given her say, the earlier the person must be given the opportunity to have a say, and the more meaningful the process must be, not only so that the person's say is had, but also so that the decision-maker's decision might be enhanced and improved by what is said.

Consider, for instance, the exposition given by Chaskalson CJ in *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others*[50] in which the Court had to decide whether the public had a right to a hearing prior to regulations being adopted by the Minister of Health. He held:

> Standards of fairness called for in respect of law-making by legislative administrative action are different to standards of fairness called for in cases involving adjudication or administrative decisions such as licensing enquiries and the like where individual interests are at stake and decisions affecting particular individuals have to be taken. An individual needs to know the concerns of the administrator and to be given an opportunity of answering those concerns. The decisions may depend on particular facts and may sometimes involve disputes of fact that have to be resolved. When it comes to the making of regulations the context is different. Regulations affect the general public and that means that diverse and often conflicting interests have to be taken into account in deciding what the laws will be. The decision of the law-maker on how to resolve these conflicting interests is ultimately a question of policy.[51]

In this passage, the Chief Justice recognised not only that the standards of fairness required for legislative, adjudicative and administrative decisions may differ, but also that deference may be owed, depending on the context, to the decision-maker as to how the disputes should be resolved. The passage is important for what it signifies—again—as probably the most important factor for a court to consider in deciding when a hearing will be called for, what the demands of public consultation will be, and how far the courts will defer to the decision-maker. It is impact, personalised.

In *New Clicks*, on the facts of that case that impact was too generalised in respect of the 'law-making by legislative administrative action'[52] to require public consultation, including the consideration that because 'diverse and often conflicting interests have to be taken into account in deciding what the laws will be.'[53] Yet, in *Matatiele* and *Doctors for Life*, Justice Ngcobo highlighted the fact that the impact of the proposed law on the affected communities was sufficiently severe, identifiable and personal to those communities that a hearing was required—and a meaningful hearing at that.

The cases discussed above illustrate the application of the *audi* principle in entirely different decision-making contexts: legislative (*Doctors for Life*; *Matatiele*), administrative (*Zondi*) and adjudicative (*Zondi*). Yet, in all these contexts, the *audi*

50 2006 (2) SA 311 (CC) ('*New Clicks*').
51 ibid para 153.
52 ibid para 153.
53 ibid para 154.

principle serves the same constitutional purposes, that is, of respecting the dignity and worth of those affected by the law or decision by allowing them a say in the process, and of substantively informing the outcome of the process (whether it is law-making or an administrative decision).

Below we consider an entirely different context in which the principle arises—as a component of rationality. But here, too, we shall see how Justice Ngcobo has used the right to a hearing to achieve goals of both process and substance. Indeed, in the *Albutt* case, which we now discuss, Justice Ngcobo has directly linked process and merits, demanding that a fair process is required in order to achieve a rational outcome.

Procedural Fairness as a Requirement for Rationality: *Albutt*[54]

In *Albutt*, the Constitutional Court was required to decide whether failing to give victims or their families the opportunity to be heard was rationally connected to the governmental purpose of granting presidential pardons for applicants who claimed that they had been convicted of offences that were politically motivated. President Mbeki had announced a special dispensation in terms of section 84(2)(*j*) of the Constitution for granting presidential pardons to those convicted of politically motivated crimes, a dispensation aimed at dealing with the 'unfinished business' of the Truth and Reconciliation Commission. President Mbeki explained the rationale for the dispensation:

> … [a]s a way forward and in the interest[s] of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past.[55]

The aim of the project was therefore reconciliation and nation-building. President Mbeki, however, decided against the participation of the victims in the special dispensation process. This gave rise to the challenge in *Albutt*.

Justice Ngcobo, by this time Chief Justice, wrote the majority decision. He held that the participation of victims was fundamental to the amnesty process and that it would be irrational to pardon offenders without hearing from the victims. He held that the participation of both the victims and the perpetrators was crucial to the achievement of the twin objectives of rebuilding the nation and promoting reconciliation. Furthermore, such participation was key to fact-finding because, before the president could decide whether to grant the pardon, he would need to establish the facts in accordance with the criteria set out in the special dispensation process (ie whether the offence was in fact committed with a political motive). To establish the facts, the president would need to hear both the perpetrators and the victims of the crimes in respect of which a pardon was sought. The exclusion of the victims from the special dispensation process was

54 *Albutt* (n 5).

55 ibid para 4.

accordingly held not to be rationally related to the achievement of the objectives of the special dispensation process and entirely inconsistent with the principles and values that underlie the Constitution.

The decision in *Albutt* appears to have given Justice Ngcobo the opportunity to develop further his thinking in the earlier decision in *Masetlha*,[56] a case concerning the president's dismissal of the head of the National Intelligence Agency, Billy Masetlha. The question the Constitutional Court was required to consider was whether the president should have given Masetlha a hearing before dismissing him. The Constitutional Court concluded that the president, in dismissing Masetlha, had performed a special executive dismissal which did not attract labour rights or the right to fair administrative action (although the president was nonetheless constrained by the rule of law and the principle of legality in making the decision).

The majority in *Masetlha* held that this did not require the president to act in a procedurally fair manner. Justice Ngcobo held, in a dissenting judgment in *Masetlha*, that the requirement of rationality indeed demanded procedural fairness in the circumstances. *Albutt*, decided subsequently, is an endorsement of Justice Ngcobo's minority view in *Masetlha*, in that both judgments import procedural requirements into the standard of rationality.[57] Thereafter, in *Democratic Alliance v President of South Africa & Others*[58] and *Minister of Defence and Military Veterans v Motau & Others*,[59] the Constitutional Court continued to endorse a process-inclusive conception of rationality, affirming and applying *Albutt*.

In *Democratic Alliance*,[60] the Constitutional Court was required to decide whether the president's appointment of Menzi Simelane as the National Director of Public Prosecutions was rational. The Court, relying on *Albutt*,[61] held that what was required was not only rationality in the substance of the decision, but also rationality in the process leading up to the decision.[62] To the Court,

56 *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC).

57 We note that there is a lingering lack of consistency in the Court's treatment of the topic of procedural fairness in this context, which started early with *Albutt* and *Masetlha*. It remains a topic in need of clarity, if not only because of the decision in *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa & Others* [2013] ZACC 13; 2013 (7) BCLR 762 (CC). That case concerned the president's determination of a salary increase for magistrates. The Constitutional Court concluded that the conduct of the president (executive and not administrative action) did not need to be procedurally fair. See further Cora Hoexter, 'A Rainbow of One Colour' in Hanna Wilberg and Mark Elliot, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow, Hart Studies in Comparative Public Law Vol 8* (Hart Publishing 2015) 181–182. And see, too, the discussion immediately above of *Democratic Alliance* and *Motau*, which suggests that indeed the Court has accepted that the rationality enquiry does entail procedural fairness.

58 2013 (1) SA 248 (CC) ('*Democratic Alliance*').

59 2014 (5) SA 69 (CC) ('*Motau*').

60 See (n 58).

61 See (n 4) para 34, *per* Justice Yacoob.

62 *Albutt* (n 4) paras 31–35.

> [t]he 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. [63]

This approach to rationality was also followed in the decision of *Motau*, which concerned the Minister of Defence's decision to terminate certain persons' membership of the Armscor Board. The Constitutional Court, after concluding that the conduct was executive and not administrative, recognised that procedural fairness obligations may attach to such conduct. The Court declined to state expressly whether the principle of legality 'or some other principle' required the minister to act in a procedurally fair manner but was content to note that South African law has a long tradition of strongly entrenching the *audi* principle, and recognised that the principle attains particular force when prejudicial allegations are levelled against an individual.[64]

What we have thus seen take shape is a constitutionally rich account of rationality, which— under the principle of legality—imports fairness into the enquiry. The SCA stressed this in *e.tv*,[65] where it held that '[t]he duty to consult arises from the value of fairness underlying the principle of legality.'[66] This is also recognised in English law. The requirement of procedural fairness in South African (and UK) law is a flexible one,[67] and the touchstone is one of fairness: given the impact of the decision on the affected party, does fairness require consultation? This is made readily apparent by the recent authority of the UK Supreme Court in *R (on the application of Moseley) v Haringey London Borough Council* [2014] UKSC 56[68] ('*Moseley*'). There, the UK Supreme Court

63 ibid para 36.

64 *Motau* (n 59) para 83.

65 *e.tv (Pty) Ltd v Minister of Communications* (1039/2015) [2016] ZASCA 85 (31 May 2016).

66 ibid para 42.

67 Section 3(2)(*a*) of PAJA. See *MEC, Department of Agriculture, Conservation and Environment & Another v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC) at para 76; *Mkontwana v Nelson Mandela Metropolitan Municipality & Another* at para 65 and the cases relied on there: *Premier, Mpumalanga, & Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 39; *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) para 216; *Janse van Rensburg NO & Another v Minister of Trade and Industry & Another NNO* 2001 (1) SA 29 (CC) para 24; *Permanent Secretary, Department of Education and Welfare, Eastern Cape, & Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para 19; *Minister of Public Works & Others v Kyalami Ridge Environment Association & Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) para 101.

68 Until 1 April 2013, central government operated a Council Tax Benefit ('CTB') scheme in terms of which residents in local authority areas in England were granted relief from paying council tax on a means-tested basis, for which the local authorities were reimbursed in full. For the year 2013–2014, reimbursement to each local authority was fixed at 90% of the sum it had received in the previous year

held that a public authority's duty to consult before taking a decision could arise in a variety of ways, most commonly being generated by statute, but not infrequently being cast by the common-law duty to act fairly. According to the Court:

> [t]he search for the demands of fairness in this context is often illuminated by the doctrine of legitimate expectation ... But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.[69]

In that case the UK Supreme Court found that the scheme was not lawful. According to Lord Wilson, the requirements of a fair consultation are as summarised in the case of *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168:

> First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, ... that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.[70]

And as confirmation of its context-specific malleability, fairness may require that interested persons be consulted not only on the preferred option but also on discarded options.[71] In *Moseley*, the UK Supreme Court found, fairness demanded that the consultation document should briefly refer to alternative methods of absorbing the shortfall in government funding and to the reasons why the respondent, the Council,

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and each local authority was required to devise its own Council Tax Reduction Scheme ('CTRS') to provide relief from council tax to those whom it considered to be in financial need. It was a requirement that each local authority consult interested persons on its CTRS in draft form before deciding on a final scheme. The respondent, the Haringey London Borough Council, published a draft CTRS on 29 August 2012 under which it was proposed that the shortfall in central government funding would be met by a reduction in council tax relief of between 18% and 22% for all CTB claimants in Haringey (other than pensioners). The consultation document for Haringey residents explained the reduction in funding, and stated: 'That means that the introduction of a local [CTRS] in Haringey will directly affect the assistance provided to everyone below pensionable age that currently receives [CTB].' There was no reference to other options for meeting the shortfall, for example by raising council tax, reducing funding to council services or deploying capital reserves. The consultation document also included a questionnaire asking how the reduction in relief should be distributed as among CTB claimants. Following the consultation exercise, on 17 January 2013 the respondent decided to adopt a CTRS under which the level of council tax relief was reduced by 19.8% from 2012–2013 levels for all claimants other than pensioners and the disabled. The appellant was a resident of Haringey who until 1 April 2013 had been in receipt of full CTB, and thereafter had to pay 19.8% of full council tax. She successfully challenged the introduction of the scheme on the basis of the respondent's failure properly to consult.

69 ibid para 23.

70 *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 para 25 ('*Brent*').

71 *Moseley* (n 68) para 27.

had concluded that those alternative methods were unacceptable.[72] In fact, the purported consultation was premised on the assumption that the shortfall would be met by a reduction in council tax relief and no other option was presented.[73] Neither was it reasonably obvious to those consulted what other options there may have been and the reasons why such options had been discarded.

Consistent with the principle expressed in *Moseley* are the South African decisions which indicate that a change of policy does require consultation. Thus, it is well established that a departure from a policy, or a change of that policy, triggers the right to a hearing.[74] As the Constitutional Court held in *Premier, Province of Mpumalanga & Another v Executive Committee of the Association of Governing Bodies of State-Aided School: Eastern Transvaal*:[75]

> Citizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker.[76]

Furthermore, as *Moseley* helpfully illustrates, also for South African cases, the reason one insists on fairness is not just to honour fairness: it is to achieve another, democracy-enriching, purpose:

> Fairness is a protean concept, not susceptible of much generalised enlargement. But its *requirements in this context must be linked to the purposes of consultation*. In *R (Osborn) v Parole Board* [2013] UKSC 61, [2013] 3 WLR 1020, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless, the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement '*is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested*' (para 67). Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel' (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose*, reflective of the democratic principle at the heart of our society*. This third purpose is particularly relevant in a case like the present, in which the question was not 'Yes or no, should we close this particular care home, this particular school etc?' It was '*Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?*' (our emphasis).

72 ibid para 29.

73 ibid paras 17, 18 and 21.

74 *Tettey & Another v Minister of Home Affairs & Another* 1999 (3) SA 715 (DCLD); *Winckler v Minister of Correctional Services* 2001 (2) SA 747 (C); *Combrink & Another v Minister of Correctional Services & Another* 2001 (3) SA 338 (DCLD) 343; *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC). See also HWR Wade and CF Forsyth, *Administrative Law* (10 edn, Oxford University Press 2009) 457.

75 1999 (2) SA 91 (CC) para 41.

76 See (n 75) para 41.

Such thinking, in our respectful view, is consistent with the central principles identified by Justice Ngcobo in each of his leading judgments on due process; and, certainly, it could be put to good use in South African law as furthering the principle of fairness and resulting in better decisions at the same time.

Getting the Balance Wrong: *Thint*

Before moving to our central thesis in this article—and of attempting to draw together the link between process and substance—we pause to stress that the due process enquiry, while objective and contextual, does not always produce obvious or easy answers. It allows for reasonable disagreement and judicial differences. Ironically, perhaps, that disagreement is on display in Justice Ngcobo's dissent in *Thint*,[77] a dissent which confirms the importance of getting context right, and appreciating its objective force on the scope available to judges to interfere with State decision-making.

In *Thint*, various search-and-seizure warrants had, in terms of section 29 of the National Prosecuting Authority Act,[78] been issued by a judge. The case concerned the validity of the terms of the warrants and the lawfulness of the manner of their execution. Justice Ngcobo was a lone dissenter from the majority judgment written by Langa CJ, which concluded that the warrants had lawfully been granted. Justice Ngcobo concluded that the warrants had not lawfully been granted as the State had not established a 'need' for the issue of the search-and-seizure warrants (a jurisdictional requirement in terms of the statute which required the State to show that its resort to the search-and-seizure procedure was reasonable in all the circumstances and that less drastic measures were not available to it).[79] In reaching this conclusion, Justice Ngcobo was alone on the Bench in his interpretation of the 'need' requirement. He reasoned that, in order to satisfy the 'need' test, resort to informal methods of obtaining the documents and records was required. He held that this required the State to request the person who was in possession of the documents voluntarily to surrender them. In his words, the State should 'ordinarily resort to the informal method of requesting a person to surrender documents or the less drastic procedure contained in section 28(6) unless these methods are unlikely to succeed.'[80]

It was a surprising dissent from one who had been at pains to emphasise in his judgments that natural justice is always context-specific. While it appears that Justice Ngcobo here held that the rights of individuals should weigh far heavier than the interests of the State and of society in fighting crime, the notion that there was an obligation on the State first to request the suspect voluntarily to surrender the documents was naive and

77 See (n 6).
78 Act 32 of 1998.
79 *Thint* (n 6) paras 268 onwards.
80 ibid para 285.

would, more often than not, defeat the very purpose of a search warrant.[81] It would also, no doubt, encourage the type of preliminary litigation that has unfortunately come to symbolise the approach adopted by President Zuma in his various travails before the courts, and which has recently come to be criticised by the Judiciary.[82]

Thus, while a focus on the potential impact of a measure on the individual is an important feature of the due process enquiry, the dissent ignored two other related features of the enquiry: the first is the deference that is owed to the law-enforcement officials involved in the difficult task of policing organised crime, and the space that ought to be afforded them in choosing the appropriate procedure under the statute; and the second is the context, which in that case was law enforcement and the detection of crime. After all, it was Justice Ngcobo who had correctly highlighted in *Doctors for Life* that a 'court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content.'[83] While that nod to deference was made in the case of a duty to allow public involvement in the process of law-making, it seems to us that the principle ought to have been equally applicable to show the Court's respect for the means chosen by the law-enforcement officials to implement the warrants in their fight against crime.[84]

That is so for a further reason that was overlooked by Justice Ngcobo, being the public interest. As the Constitutional Court would later come to stress, in a case decided after Justice Ngcobo's retirement, the public interest is an important consideration in criminal cases and discussions about fairness. The following words by the Constitutional Court in *Savoi* allow a retrospective insight into how Justice Ngcobo went wrong in *Thint*:[85]

> The public interest may also have to come into the equation when considering what is fair. In *King* the Supreme Court of Appeal held:

81 For criticism of Justice Ngcobo's approach in *Thint* see Pierre de Vos, 'A Tale of Two Judgments' *Constitutionally Speaking* (1 August 2008) <http://constitutionallyspeaking.co.za/a-tale-of-two-judgments/> accessed 13 November 2017, where de Vos states: 'To me Ngcobo's judgment tips the scales too far in favour of the accused. If one is going to be too trusting of accused individuals many of them will make use of this trust to destroy or hide evidence and few unscrupulous fraudsters will ever be convicted. How many people facing 15 years in jail will willingly hand over evidence to the state that could have them convicted? How many would rather try and hide or destroy that evidence?'

82 See, for example, *National Director of Public Prosecutions v King* [2010] ZASCA 9; 2010 (2) SACR 116 (SCA) para 5; *Van der Merwe v National Director for Public Prosecutions* [2010] ZASCA 129; 2011 (1) SACR 94 (SCA) para 32; *Democratic Alliance & Others v Acting National Director of Public Prosecutions & Others* 2012 (3) SA 486 (SCA) para 49; *Minister of Safety and Security v Tembop Recovery* [2016] ZASCA 52 (1 April 2016); 2016 JDR 0599 (SCA) para 19.

83 *Doctors for Life* (n 36) para 128.

84 On the Court's duty of deference, see also *Logbro Properties CC v Bedderson NO & Others* 2003 (2) SA 460 (SCA) 471B–D; *Bato Star* (n 9) para 46; and *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited & Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 44.

85 *Savoi & Others v National Director of Public Prosecutions & Another* 2014 (5) SA 317 (CC) ('*Savoi*') para 68.

> There is no such thing as perfect justice... Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the state. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation – a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay'. One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution.

Fairness and the Debate on Process versus Substance: Reasonableness Review and the Spectre of Corruption

Section 33(1) requires administrative action that is lawful, reasonable and procedurally fair. Thus far we have considered procedural fairness. Traditionally, this duty to act 'fairly' is concerned only with the manner in which the decisions are taken (ie process): it does not relate to the substance of the decision (ie whether the decision itself is 'fair' or not). Hence, in *Bel Porto School Governing Body*,[86] Chaskalson CJ had this to say about fairness as a ground of review:

> The unfairness of a decision in itself has never been a ground for review. Something more is required. The unfairness has to be of such a degree that an inference can be drawn from it that the person who made the decision had erred in a respect that would provide grounds for review.[87]

However, section 33(1) also requires administrative action to be *reasonable*. Determining reasonableness inherently involves a consideration of the merits (ie substance) of the decision—and this blurs the traditional distinction between appeal and review.

In *Bato Star*,[88] O'Regan J, writing for the majority, held that '[a]lthough the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant.'[89] She then cautioned that

86 2002 (3) SA 265 (CC) ('*Bel Porto*').
87 ibid para 86.
88 ibid para 45.
89 *Bato Star* (n 9) para 45.

> [t]he court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.[90]

But how can the courts manage to apply reasonableness as a ground of review without usurping the functions of administrators, as *Bato Star* requires?[91] By showing judicial deference, it seems. In *Bato Star*, O'Regan J described this in the following terms, quoting from the House of Lords judgment of *R (on the application of ProLife Alliance) v British Broadcasting Corporation*, where it was stated:

> … although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the limits of that power are. That is a question of law and must therefore be decided by the courts.[92]

The Constitutional Court gave the standard of review the following content:

> What will constitute a reasonable decision will *depend on the circumstances* of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. *The court should take care not to usurp the functions of administrative agencies.* Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.[93]

The reticence of our courts to embrace the constitutional imperative that everyone has the right to administrative action that is 'reasonable' is, in our view, surprising. The courts have frequently recognised that one of the reasons for insisting on procedural fairness is to ensure better and more accurate decision-making and to enhance the legitimacy of such decisions.[94] Notably, as we highlighted above in our discussion of *Albutt*, the Constitutional Court *per* Justice Ngcobo has already recognised that, in the rationality enquiry, process plays a sometimes important role in ensuring that the decision is rationally connected to the outcome of the decision. If one is to accept that the ultimate goal is to ensure correct, accurate and legitimate decisions on the part of the

90 ibid.

91 Cora Hoexter, *Administrative Law in South Africa* (2 edn, Juta 2012) 351.

92 [2003] 2 All ER 977 (HL) ('*ProLife Alliance*'), quoted in *Bato Star* (n 9) para 47

93 *ProLife Alliance* (n 92) para 45 [own emphasis].

94 See, for example, *Joseph & Others v City of Johannesburg & Others* 2010 (4) SA 55 (CC), where Skweyiya J repeated at para 42 that procedural fairness is 'also likely to improve the quality and rationality of administrative decision making and to enhance its legitimacy.'

administration, then the standard of reasonableness provides an appropriate yardstick for achieving this end.

Yet the courts have consistently refrained from exercising the constitutional muscle that section 33 so readily provides. While the importance of procedural fairness is now well established, the importance of substantively correct outcomes—surely of no less importance than fair procedure—has been relatively neglected. Substantively fair outcomes in codes of dismissal have long been a statutory imperative in the employment context.[95] The reluctance to extend this to other fields of law is therefore surprising, as is the reluctance of the courts to insist that fair process and good outcomes are related.

Fortunately, we have seen a recent move by the Constitutional Court to draw a closer link between process and outcome. It has done so in a context that for South Africans calls out for judicial intervention: the field of procurement law, and facing the crisis of corruption.[96]

> For any South African concerned about the state of the nation, public procurement is important for reasons that go to the heart of our democracy. That is because public procurement is a breeding ground for corruption, a fact that is widely acknowledged,[97] and which is also (although it does not make one feel better about the scale of our local problem) an international phenomenon.[98]

95 See s 188 of the Labour Relations Act 66 of 1995, which requires that any dismissal which is not automatically unfair must be for a fair reason (in addition to being in accordance with a fair procedure). See generally John Grogan, *Workplace Law* (9 edn, Juta 2007) 461. Dismissals are currently dealt with in the Code of Good Practice: Dismissal, which sets substantive fairness standards for dismissals—see also John Grogan, *Dismissal, Discrimination and Unfair Labour Practices* (2 edn, Juta 2007) 405.

96 For a fuller discussion, see Max du Plessis and Andreas Coutsoudis, 'Reflections on *AllPay* and Judicial Review of Tenders and Accountability: Of the Fight against Corruption, the Long-arm of the Law, and Questions that Remain Unanswered (Legally and Factually)' *New York Law School Workshop: Twenty Years of South African Constitutionalism* <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Coutsoudis.pdf> accessed 13 November 2017.

97 Note, for instance, that Art 9 of the UN Convention against Corruption (UNCAC), to which South Africa is a party, specifically provides requirements for 'Public procurement and management of public finances' given the inherent risk of corruption in this area; and s 13 of the South African Prevention and Combating of Corrupt Activities Act 2004 specifically provides for 'Offences in respect of corrupt activities relating to procuring and withdrawal of tenders'; see Du Plessis and Coutsoudis (n 96) 'Introduction'.

98 For instance, the OECD has recently summarised the scale of the problem as follows: 'The financial interests at stake, the volume of transactions at the international level and the close interactions between the public and private sectors make public procurement particularly vulnerable to waste. Public procurement is more subject to bribery by international firms than other government activities such as taxation or the judicial system according to a survey of the World Economic Forum. The European Commission estimates that EUR 120 billion are lost each year to corruption in the 27 EU member countries, which is the equivalent of the whole EU budget. *In public procurement, studies suggest that up to 20–25% of the public contracts' value may be lost to corruption*' [emphasis added]: OECD, *Implementing the OECD Principles for Integrity in Public Procurement* (OECD Publishing 2013) 21.

It is therefore hardly surprising that it is in relation to matters of public procurement, and the corruption it spawns, that South Africa's constitutional revolution has faced, and will continue to face, some of its biggest challenges. Starting with the Arms Deal,[99] which still casts a long and lingering shadow, all South Africans know that serious questions are raised seemingly daily about some or other flawed or corrupt public service tender. The Constitutional Court's warning in *Glenister* is not hyperbolic: 'corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order.'[100]

Although not necessarily, or even generally, as a consequence of corruption, tenders have become the site of much legal contestation in the democratic South Africa, representing as they do the uneasy confluence of public and private interests and money. The heightened increase in tender litigation, and the related burdens imposed on the Bench, has led to opening lines such as those of the Supreme Court of Appeal's judgment in *AllPay*:[101] 'This is yet another case concerning a public tender.' These are words possibly of judicial exasperation and quiet resignation in the face of the ineffective administration of public processes and funds (or worse), and seemingly heralding

99 Sometimes referred to as the democratic South Africa's original sin: see, for example, Stephen Grootes, 'The NPA Going Down (in)Fighting' *Daily Maverick* (Johannesburg, 26 June 2014) <https://www.dailymaverick.co.za/article/2014-06-26-the-npa-going-down-infighting/#.WgmLvsaWaUk> accessed 13 November 2017; Staff reporter, 'The Editorial: Arms Probe Must Deliver Truth' *Mail & Guardian* (Johannesburg, 23 September 2011) <http://mg.co.za/article/2011-09-23-the-editorial-arms-probe-must-deliver-truth> accessed 13 November 2917; and Stephen Grootes, 'A Ghost in the Machine: Do the Zuma Spy Tapes Actually Exist?' *Daily Maverick* (Johannesburg, 22 October 2013) <http://www.dailymaverick.co.za/article/2013-10-22-a-ghost-in-the-machine-do-the-zuma-spy-tapes-actually-exist/#.VDOj_udf_yB> accessed 13 November 2017.

100 *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC) para 166. In that case, it is again perhaps ironic that it was Justice Ngcobo (for the minority) who re-emphasised the distinction between the rationality standard and reasonableness. Ngcobo CJ stated at para 68: 'Here we are not concerned with the question as to which of the two units between the DSO and the DPCI is more efficient than the other. We are concerned with whether the establishment of the DPCI is rationally related to a legitimate governmental purpose. As long as there is a rational relationship between the decision to disband the DSO and establish the DPCI and the governmental purpose to enhance the investigative capacity of the SAPS in relation to national priority crimes, it is irrelevant that the governmental purpose could have been achieved by retaining the DSO.'
We do not explore this finding here, but merely note that again—as with *Thint*—it may well be that too little attention was paid by Justice Ngcobo to the context in which the legislative challenge arose, the impact of the corruption upon South Africa, and the opening it might have provided—as the majority in that case confirmed – for the Court to demand that the process of replacing the disbanded 'Scorpions' must meet a higher standard than the rationality test. After all, it was Justice Ngcobo who stressed in *Doctors for Life,* quoted earlier (n 36 para 200 of the judgment), that 'the doctrine of separation of powers should not be used to avoid the judiciary's obligation to prevent the violation of the Constitution.'

101 *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency, & Others* 2013 (4) SA 557 (SCA) para 1.

the Court's impatience with what it regarded as the litigious nature of perceived unmeritorious losing bidders.

The SCA found in *AllPay* that there was no reviewable irregularity (finding only what it termed 'inconsequential' irregularities). By the SCA's lights, the case had been reduced to '*yet another*' tender matter. To re-use the words of Chaskalson CJ in *Bel Porto*, quoted earlier, to the SCA the mere fact that there was unfairness in the process was not itself 'a ground for review. Something more [was] required.' However, by such a narrow view of fairness (that is, ignoring that fairness is not an end in itself, but translates into better ends), the SCA overlooked the very clear contextual indications that something rotten lay at the heart of the tender in question.

It was not to end there, however. After an appeal to the Constitutional Court, the Court rendered two judgments in the matter of *AllPay Consolidated Investment Holdings (Pty) Ltd v SASSA and Cash Paymaster Services (Pty) Ltd (CPS)*.[102] The *AllPay* merits judgment and *AllPay* remedy judgment—now the leading judgments in this country on tender reviews and remedies—bring into sharp focus a variety of questions about public procurement law (the bulk of which lie beyond this article).[103]

What the *AllPay* saga highlights, for present purposes, is the fundamental difference in approach to the irregularities by the SCA as compared to the Constitutional Court. The SCA found that even though the tender process in this particular matter was procedurally flawed, these were inconsequential irregularities which—despite their existence—would not have affected the final outcome of the award.

The SCA reasoned that an irregularity is inconsequential when, in a hindsight assessment of the process, the successful bidder would probably still have been successful despite the presence of the irregularity.[104] According to the approach of the SCA, procedural requirements are considered not on their own merits or on account of the safeguards they ensure as regards the outcome of the process itself, but instead through the lens of the final outcome. On appeal, the Constitutional Court went out of its way to put distance between itself and the views of the SCA in the matter. Crucially, it ruled that the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.[105] The Court held furthermore that the materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is

102 *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others* 2014 (1) SA 604 (CC) ('merits judgment'); *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others* 2014 (4) SA 179 (CC) ('remedy judgment').

103 For a detailed discussion, see Max du Plessis and Andreas Coutsoudis, 'Considering Corruption through the AllPay Lens: On the Limits of Judicial Review, Strengthening Accountability, and the Long Arm of the Law' (2016) 133 (4) SALJ 756.

104 See the *AllPay* (SCA judgment, n 101) paras 21 and 95; and *AllPay* (merits judgment, n 102) paras 17–21.

105 ibid para 22.

attained.[106] This means that the two are interrelated and cannot be severed and that even if it appears that an acceptable outcome is achieved, it is unacceptable if an improper process was followed to get there. As the Constitutional Court held,

> [i]f the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.[107]

The Constitutional Court specifically took issue with the reasoning of the SCA regarding its approach to irregularities and found it detrimental to important aspects of the procurement process.[108] In this regard the Constitutional Court held that the

> insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.[109]

That insistence, to be sure, was all the more explicable and desirable given, first, the tender at issue (in *AllPay*, to provide social grants to the poorest of the poor) and, secondly, the impact it may have on service delivery (and thus the achievement and fulfilment of fundamental rights to dignity and social assistance).

Between Bloemfontein and Braamfontein, then, the approach to public procurement was stark. The difference in judicial approach is not only confirmation of the difficult balance to be maintained between the 'integrity' of procurement processes (which the Constitutional Court's judgment places great emphasis on) and the ostensibly commercial need for the contracting authority to obtain what it stresses are the best services on the best terms to meet the authority's needs (a focus animating the SCA's decision to find no reviewable fault with the tender decision of SASSA, the South African Social Services Agency).

The differences between the SCA and the Constitutional Court also highlight the Constitutional Court's willingness to appreciate the context in which its decision was being rendered. To that end, it seems clear to us that the Court was able to insist on fair process not just because fairness is a good in itself, but in order to attain a further end of achieving the constitutional imperative to combat corruption. Here we need to stress a reality that cannot be lost sight of in South Africa: that bureaucratic corruption manifests insidiously in public procurement. As but one example, Transparency International warns of the absence of clear and objective tender criteria, stated in advance:

> The final opportunity to distort the outcome of competitive bidding is at the bid evaluation and comparison stage. Performed responsibly, this is an objective analysis of how each bid responds to the requirements of the bidding documents and a determination of which one is the best

106 ibid.
107 ibid para 24.
108 ibid.
109 ibid para 27.

> offer. *If the intention is to steer the award to a favoured bidder, the evaluation process offers almost unlimited opportunities: if necessary, and unless prevented from doing so, evaluators can invent entirely new criteria for deciding what is 'best', and then apply them subjectively to get the 'right' results. They are often aided in this process by issuing bidding documents that are deliberately vague and obscure about what requirements must be met and how selection decisions will be made.*[110]

The review standard set by the Constitutional Court in the *AllPay* merits judgment, and both the clarity provided and the insistence on strict fealty to procedural requirements and formalities (while recognising that there can still be, from a purposive perspective, immaterial procedural irregularities) is therefore to be welcomed. So too is the clear enunciation by the Court of the instrumental, not just intrinsic, value of upholding procedural fairness: it leads to better outcomes in tenders and guards against corruption. The process of the tender must be scrutinised closely by a court not only because fairness is a value worth respecting, but because—contextually, as South Africans, we know—that insistence on proper process helps to achieve a substantive outcome heralded in the promise of section 217 of the Constitution: an award to a contractor who offered the best bid, at the best price, and free of bribery or corruption.

Conclusion

In this article we have paid tribute to Justice Ngcobo's careful thinking about due process and his insistence through various important judgments on recognising three cardinal features of fairness, which have now come to resonate in the Constitutional Court's jurisprudence.

The first of these features is the importance of judicial vigilance where decisions have a profound and far-reaching impact on the subject's rights. Justice Ngcobo has repeatedly highlighted that a key concern for the Court is 'the consequences that an administrative decision might have on the individual.'[111] It appears that consequences on the individual and oversight by the Court bear a proportional relationship: the more adversely decisions trench directly and personally, the greater the demands of reasonableness imposed by the Court. As Justice Ngcobo wrote in *Matatiele*,

> The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.[112]

110 See Jeremy Pope, *TI Source Book – Confronting Corruption: The Elements of a National Integrity System*, (Transparency International 2000) 209 [emphasis added].

111 *Matatiele* (n 4) para 113.

112 ibid para 68.

So, too, in *Doctors for Life* Justice Ngcobo noted that 'the doctrine of separation of powers should not be used to avoid the judiciary's obligation to prevent the violation of the Constitution.'[113]

The second is that the application and scope of due process is context-specific—with our courts now repeatedly highlighting that context not only provides flexibility as to the due process enquiry, but also entails consideration for and an appreciation of the challenges and realities faced by South Africans. As we have seen, these decisions, while highlighting the contextual nature of procedural fairness, demonstrated how South Africa-specific concerns (historical: to break with our past (*Zondi*); present: the malaise of corruption and patronage (*AllPay*); the future: to ensure a vibrant, open democracy (*Doctors for Life*)) animate the due process enquiry—all the while with an appreciation of the likely impact of the law or rule in question on affected persons. The decisions also highlight how context is a variable matrix, and our courts—including Justice Ngcobo (in *Thint*)—may sometimes disagree about the appropriate standards to be employed.

The third feature of fairness dear to Justice Ngcobo is its democratic potential. Not only do Justice Ngcobo's judgments highlight the stark difference between our constitutional commitments of today and the trampling upon rights (procedural and substantive) in the past; his judicial writing also showcases the type of South Africa we are still journeying towards—one in which all people have a say, in a state which is committed to being open and accountable. Fairness therefore not only ensures procedural work and does substantive good in the lives of people affected by the State's decision-making, but the requirement of fairness is an essential feature of our democratic project. As the Supreme Court of Appeal has recently reiterated in *e.tv (Pty) Ltd*, discussed above:[114]

> There are of course differences between bylaws, administrative decisions and policies. But the same principle underlies the requirement of publication of a policy for comment: openness and accountability, the foundations of a democratic State, require the participation of those affected.[115]

It is not surprising that, in arriving at its views, the SCA was to invoke Justice Ngcobo's writings in *Doctors for Life*. That judgment, and many others, stand appropriately as confirmation of the centrality and durability of Justice Ngcobo's judicial thinking on fairness and due process, which we have been honoured to reflect on in this article.

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113 *Doctors for Life* (n 36) para 200.
114 See *e.tv (Pty) Ltd* (n 65) discussed above.
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