

# Judicial review of executive power: Legality, rationality and reasonableness (2)

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## **Abstract**

For the sake of context, the abstract of this contribution is repeated below (see (2015) 30(1) *SAPL* for Part 1 of this article).

Early in the life of the South African democratic dispensation, the Constitutional Court distinguished the conduct of the President as the head of the executive branch of government from an administrative action. However, it held that executive conduct was, like all exercise of public power, constrained by the constitutional principles of legality and rationality. So, as a necessary incident of the rule of law, the executive may not exercise powers or perform duties not conferred upon it by the Constitution and the law. The cases decided since then demonstrate in practical and theoretical terms the democratic aphorism that no one is above the law and everyone is subject to the Constitution and the law. In the process, the Constitutional Court has entertained appeals for the review of executive powers such as where, *inter alia*, the President had acted on wrong advice or terminated the appointment of the head of the National Intelligence Agency; the legality of Ministerial Regulations and of the rationality of the presidential appointment of the Director of the National Prosecuting Authority. The role of reasonableness as a ground of review of executive conduct rather than administrative action has been demonstrated in the many cases where the distinction has been made between the rationality test and the reasonableness test. The conclusion, therefore, is that, through their interpretation of the Constitution and review of executive powers, the courts have developed a code of principles regarding the rule of law, good government, and democracy.

## **5 Illegality on other grounds**

The principles of legality, rationality and reasonableness and their links to procedural fairness with particular reference to executive conduct and the

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instances where the right to be heard has been upheld or denied in respect of executive conduct is discussed in part 1 of this article. In this second and final part, the other aspects of the challenges of the unconstitutionality of the executive conduct not yet discussed are brought together.

### ***5.1 Presidential function and constitutional responsibility***

It has already been observed that the executive power of the Republic of South Africa is vested in the President by the Constitution. Section 84 of the Constitution relates to the functions of the President as both Head of State and Head of the National Executive. The executive authority of the Republic – which the President exercises together with the members of his Cabinet – is set out in section 85. The Constitutional Court has had occasion to draw a distinction between these two provisions in *Minister for Justice and Constitutional Development v Chonco*.<sup>1</sup> The applicants for presidential pardon had alleged that the Minister failed to process their applications made under section 84(2)(j) and the question was whether that failure amounted to a breach of a constitutional obligation of the Minister in her capacity as member of the national executive under section 85(2)(e) of the Constitution. It was contended that the Minister had no constitutional obligation to process the applications for pardon, since the function was vested exclusively in the President as the Head of State in terms of section 84(2)(j). In the alternative, it was averred that the failure by the Minister to take a decision regarding each of the applications constituted administrative action and was reviewable under section 6(2)(g) of PAJA.

It was held that the final decision to grant or not to grant a pardon and the constitutional responsibility for that decision rested with the President as the head of State;<sup>2</sup> and that what separated the President's exercise of powers and functions under section 84 from the exercise of executive powers by the President, together with other members of his Cabinet in terms of section 85(2), was that the former were performed collectively by the President and members of his Cabinet.<sup>3</sup> In the present case, there was no collective action and as with the President's unrestricted power to initiate the preliminary process, the President had the power to make a final decision that did not have to bear any reference to the recommendation made during the preliminary process. Langa CJ held that if the preliminary process were to be treated as a collective action, then, the result would be to 'prevent the President from exercising a function and power accorded solely to him or her, so frustrating his or her powers as Head of State. The President must accordingly retain the sole ability to remove his or her instructions,

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<sup>1</sup>2010 4 SA 82 (CC).

<sup>2</sup>*Id* para 35.

<sup>3</sup>*Id* para 37.

bypass the process initiated by him or her or transfer the preliminary consideration elsewhere.<sup>4</sup>

Furthermore, the advice rendered, whether by request or standing practice, did not take away the character of the powers and functions of the Head of State or transform it into national executive powers characterised by their collective exercise. Whatever preparatory steps that might have been taken by the Minister and her department squarely fell within the auxiliary powers of the President in the decision-making process and could not be separated therefrom nor were they external to that process.<sup>5</sup> In the final analysis, the President retained full powers and functions, and for all practical purposes, he was the bearer of all obligations in the greater pardons process under section 84(2)(j).<sup>6</sup> It was therefore incorrect for the Minister to be dragged in for breach of administrative action when she was not the correct party from whom the applicants could obtain relief. The Minister had no public power to exercise in these circumstances and, hence, hence could not be held accountable for any unjust administrative action that might have occurred.<sup>7</sup> There is a jurisdictional angle to the problem as section 167(4)(e) provides that presidential obligations, such as presidential functions exclusively meant for the Head of State, were reviewable only by the Constitutional Court. So, the finding that the powers, functions and obligations involved in this case were vested solely in the President meant that, properly, the matter should have come directly to the Constitutional Court.<sup>8</sup> The joinder of the President should have been the proper course to follow in these proceedings.<sup>9</sup> This is in accord with the court's earlier warning in *Von Abo v President of the Republic of South Africa*<sup>10</sup> that a claimant who seeks to vindicate a constitutional right by impugning the conduct of a State functionary must identify the functionary and the impugned conduct with some degree of precision. This is because the Constitution has carefully apportioned powers, duties and obligations to organs of State and their functionaries. It has also imposed a duty on all who exercise public power to be accountable and responsive and to act in accordance with the law.<sup>11</sup>

In *Von Abo*, the Constitutional Court considered at length the presidential constitutional obligations and the issue of the jurisdiction of the courts having regard to section 167(4)(e) of the Constitution. The question of whether a specific

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<sup>4</sup>*Id* para 38.

<sup>5</sup>*Id* para 39.

<sup>6</sup>*Id* para 40.

<sup>7</sup>*Id* para 42.

<sup>8</sup>*Id* para 43.

<sup>9</sup>*Id* para 44.

<sup>10</sup>2009 5 SA 345 (CC) (*Von Abo*).

<sup>11</sup>*Id* para 50.

power exercised by the President under the Constitution or other law amounted to a 'constitutional obligation' for which only the Constitutional Court may decide in terms of section 167(4)(e) of the Constitution was a complex one. However, it was neither prudent nor pressing to describe what 'constitutional obligation' meant except that ready examples of constitutional obligations specifically entrusted to the President could be found in section 84(2) of the Constitution. Many of these powers and obligations vested in the President as Head of State and head of the national executive and may correctly be described as functions the Constitution required the President to perform. Moseneke DCJ continued:

Ordinarily, they would be matters that have important political consequences and which call for a measure of comity between the judicial and executive branches of the State. Some of the obligations do relate to decisions on crucial political questions, referred to in *Doctors for Life*<sup>12</sup> and necessarily implicate separation of powers issues. Moreover, the decisions to be tested for constitutional compliance are those of the highest office of the Head of State and the head of the national executive. And for that reason the Constitution provides that disputes of that order must be decided by this court only.<sup>13</sup>

The court found that it was impermissible to hold that when the conduct of the government, as represented by the national executive or of one or more members of the Cabinet, was impugned on the ground that it was inconsistent with the Constitution and thus invalid, that dispute related to the conduct of the President and therefore the ensuing order of constitutional invalidity must be confirmed by the Constitutional Court on the ground that it related to the conduct of the President within the contemplation of sections 167(5) and 172(2)(a) of the Constitution. If that were to be the case, it would mean that in theory every order against the government or a member of the Cabinet must be confirmed by the Constitutional Court before it had any force or effect. That 'would defeat the scheme of Chapter 5 of the Constitution; it would blur the careful jurisdictional lines between this court and other superior courts drawn by Chapter 8 of the Constitution; and would lead to an unwarranted increase of confirmation proceedings in this court'.<sup>14</sup>

Prior to the *Von Abo* case, the Constitutional Court had held that the provision of diplomatic protection at the request of a citizen whose rights were violated in and by a foreign State, which is what was sought by the plaintiff in that case, was a matter which formed part of the executive function of government. Thus, it was up to the government to decide whether protection should be given,

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<sup>12</sup>*Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 24.

<sup>13</sup>*Von Abo* (n 10) para 37.

<sup>14</sup>*Id* para 42.

and, if so, what form the diplomatic intervention should take. The Constitutional Court stated in *Kaunda v President of the Republic of South Africa*<sup>15</sup> that 'if government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly'. The duty and function to give proper consideration to a legitimate request for diplomatic intervention by government was one carried out in terms of section 85(2) read together with section 92(1) of the Constitution, which made it clear that the Minister concerned bore the constitutional responsibility to execute the assigned powers and functions. Thus, any failure of the national executive or one of its members to discharge its obligations must be remedied accordingly and a court was entitled to require the government or the Minister concerned to fulfil its constitutional responsibilities. It would however be inappropriate to attribute the conduct of the government or of a member of the Cabinet to the President, for no reason other than that he or she was the head of the national executive. The primary responsibility rests upon the appropriate member of the Cabinet, and although the President might bear the residual political responsibility, it could not be said that the primary obligation was not fulfilled by the Cabinet member, and that that failure constituted 'conduct of the President' within the meaning of section 172(2)(a) of the Constitution.<sup>16</sup>

## 5.2 *President acting on wrong advice*

Quite apart from being the case in which the Constitutional Court laid down the legality and rationality tests for judicial review of executive conduct in modern South African constitutional jurisprudence, *Pharmaceutical Manufacturers Association of South Africa: In Re: Ex parte the Application of the President of the Republic of South Africa*<sup>17</sup> is also authority for the principle that the Executive was not only entitled but constitutionally obliged to approach the court in the event of an error in the interpretation or application of the law by the office of the President. The court was, in that case, considering the presidential conduct in bringing an Act of Parliament into effect before the requisite regulations to enable the Act to operate were promulgated. It was held that where no criteria had expressly been set for such a decision, the power to bring legislation into force imposed a duty to bring the Act into force as soon as it might properly be judged to be appropriate to do so, having regard to all relevant factors. The said relevant factors did not in themselves become jurisdictional facts on which the exercise of the President's decision depended. It was for the President to decide which

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<sup>15</sup>2005 4 SA 235 (CC) para 80.

<sup>16</sup>*Von Abo* (n 10) para 45.

<sup>17</sup>2000 3 BCLR 241 (CC) (*Pharmaceutical Manufacturers*).

factors were relevant and, in the light of these, make a political judgment as to whether it was appropriate to bring the Act into force;<sup>18</sup> and, the question of whether a court could interfere with a decision made in good faith by the President in exercise of such power, and that the Constitution required more of public officials exercising their powers than had been required of them before the enactment of the interim Constitution. The Constitution placed further significant constraints upon the exercise of public power through the Bill of Rights and the founding principles enshrining the rule of law. This requirement of the rule of law is that the exercise of public power by the Executive and their functionaries must be rationally related to the purpose for which the power had been given. It follows, therefore, that in order to pass constitutional scrutiny, the exercise of public power by the Executive and other functionaries, at the least, had to comply with that requirement.<sup>19</sup>

However, the setting of the rationality standard did not mean that the courts could or should substitute their opinion as to what was appropriate for the opinions of those in whom the power had been vested. As long as the purpose sought to be achieved by the exercise of public power was within the authority of the functionary, and as long as the functionary's decision, viewed objectively, was rational, a court could not interfere with the decision simply because it disagreed with it or considered the power to have been inappropriately exercised.<sup>20</sup> It was held further that the question whether a decision was rationally related to the purpose for which the power had been granted called for an objective inquiry. To conclude that a decision, viewed objectively, was in fact irrational but could pass muster simply because the person who took it mistakenly and in good faith believed it to be rational would be to place from above substance and would undermine an important constitutional principle.<sup>21</sup>

Affirming the conclusions arrived at by the Full Bench of the then Transvaal Division<sup>22</sup> respecting the invalidity of the proclamation as correct, the Constitutional Court held that the President's decision to bring the 1998 Act into operation in circumstances in which he had done could not be found to have been objectively rational on any basis whatsoever. That the President had mistakenly believed that it was appropriate to bring the Act into force and had acted in good faith in so doing did not put the matter beyond the court's power of review. Indeed, it would be strange if in a situation such as this, where the President himself, supported by the Minister of Health and the professional associations

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<sup>18</sup>*Id* paras 80-81.

<sup>19</sup>*Id* para 85.

<sup>20</sup>*Id* para 90.

<sup>21</sup>*Id* para 86.

<sup>22</sup>*Pharmaceutical Manufacturers Association of South Africa: In Re: Ex parte the Application of the President of the Republic of South Africa* 1999 4 SA 788 (T).

most directly affected by the 1998 Act, had approached the court as a matter of urgency, contending that a fundamental error had been made and that the entire regulatory structure relating to medicines and control of medicines had been rendered unworkable, a court did have the power to set aside a decision so clearly irrational.<sup>23</sup>

### 5.3 *MEC acting in accordance with the dictates of openness and transparency*

Before the constitutional era, the Appellate Division had held in *Raja and Raja (Pty) Ltd v Ventersdorp Municipality*<sup>24</sup> that the interest a municipality had to act on behalf of the public entitled it to approach a court to have its own act in granting a certificate to obtain a trading licence declared a nullity. Similarly, in *Transair (Pty) Ltd v National Transport Commission*,<sup>25</sup> it held that an administrative body vested with wide powers of supervision over air services to be exercised in the public interest, had the necessary *locus standi* to ask a court to set aside a licence it had irregularly issued. Under the constitutional regime, the performance of all public functions are traceable to the Constitution, hence the foregoing common law approach has been given even stronger force. So, since the *Pharmaceutical Manufacturers* judgment, the courts have held that, depending on the legislation involved, and the nature and functions concerned, a public body may not only be entitled but duty-bound to approach a court to set aside its own irregular administrative act.<sup>26</sup>

A classical illustration of the Constitutional Court's approach to the principle that where a functionary perceives some irregularity in his or her decision, such functionary should strive not to abide by it, but to have a court pronounce upon the unlawfulness of the decision comes with the court's recent judgment in *Khumalo v MEC, Education, KwaZulu-Natal*.<sup>27</sup> Although the decision in that case turned on the delay rule,<sup>28</sup> the court's decision on the MEC's approach to the court to declare the irregularities in the process of promoting certain personnel in the department unlawful is instructive in the present context. It was contended at the Labour Court that the MEC needed to approach the court in terms of section

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<sup>23</sup>*Id* para 90.

<sup>24</sup>1961 4 SA 402 (A) at 407 D-E.

<sup>25</sup>1977 3 SA 784 (A) at 792H-793G.

<sup>26</sup>*Municipal Manager: Quakeni Local Municipality v FV General Trading* CC 2010 1 SA 356 (SCA) para 23; *Pepcor Retirement Fund v Financial Services Board* 2003 6 SA 38 (SCA) para 10; *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (CC) para 36.

<sup>27</sup>2014 3 BCLR 333 (CC) (*Khumalo v MEC*).

<sup>28</sup>See generally, Okpaluba 'Reflections on the delay factor in an application for judicial review: Gauteng e-tolling litigation and other cases', especially para IV (forthcoming).

9 of the Public Service Act<sup>29</sup> which empowered her to appoint and promote persons in the department; and that her oath of office required her to ensure the supremacy of the rule of law. Further, that the demands for just administrative action under section 33 of the Constitution and PAJA required her 'to act on the purported irregularities and, in so doing, to encourage a culture of accountability, openness and transparency in the exercise of public power'.<sup>30</sup> The Labour Court granted the relief sought and declared the promotion and the 'protected' promotion unlawful, unreasonable and unfair.<sup>31</sup> Although the Labour Appeal Court held that the Labour Court erred in not properly evaluating the legal effect of the MEC's delay when it considered setting aside the promotions, it nonetheless dismissed the appeal against the Labour Court judgment.<sup>32</sup>

Notwithstanding the split of the Constitutional Court as to whether the application was based on section 158(1)(h) of the Labour Relations Act 1995, according to Skweyiya J,<sup>33</sup> or section 7(1) of PAJA, as Zondo J held in his concurring judgment,<sup>34</sup> both agreed that it was one of judicial review under the principle of legality which required that all exercise of public power must, at a minimum, be lawful and rational. It was not applicable only to the exercise of public power so described as 'administrative action' under PAJA, it was applicable to all exercise of public power.<sup>35</sup> The alleged unlawful promotion and 'protected' promotion were clearly located in the realms of illegality and irrationality. Furthermore, there was the duty of a State functionary such as the MEC to rectify unlawfulness within her department. This is underlined by the dictates of the rule of law which was explained by Skweyiya J thus:

The rule of law is a founding value of our constitutional democracy.<sup>36</sup> It is the duty of the courts to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. The supremacy of the Constitution and the guarantees in the Bill of Rights add content to the rule of law. When upholding the rule of law, we are required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of Rights.<sup>37</sup>

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<sup>29</sup> 103 of 1994.

<sup>30</sup> *Khumalo v MEC* (n 27) para 12.

<sup>31</sup> *MEC, Education, KwaZulu-Natal v Khumalo* 2011 1 BCLR 94 (LC).

<sup>32</sup> *Khumalo v MEC, Education, KwaZulu-Natal* (2013) 34 ILJ 296 (LAC).

<sup>33</sup> *Id Khumalo* para 28.

<sup>34</sup> *Id* paras 77, 92 and 94.

<sup>35</sup> *Fedsure Life Insurance v City of Johannesburg TMC* 1999 1 SA 374 (CC) paras 58-59; *Pharmaceutical Manufacturers Association* (n 17) paras 84-86.

<sup>36</sup> Section 1 of the Constitution of the Republic of South Africa (Constitution).

<sup>37</sup> *Khumalo* (n 32) para 29.



In this regard also, the Constitutional Court upheld the Labour Court to the effect that section 195 of the Constitution compelled the MEC in the public interest to eliminate illegalities in public administration. Thus, it held that its dictum in *Njongi v MEC, Department of Welfare, EC*,<sup>38</sup> that it was always open to a government official to admit, without qualification, that an administrative decision was wrongly taken, applied equally to unlawful acts committed deliberately, negligently or in good faith.<sup>39</sup> The LAC had held that the MEC was not only entitled but duty bound to approach the court to set aside the irregular administrative act.<sup>40</sup> The Constitutional Court then held that section 195 laid a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct the unlawfulness through the appropriate avenues. This duty was founded on the basis of accountability and openness in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a). When read in the light of section 1(c) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.<sup>41</sup> Accordingly, the MEC's action in seeking to rectify the irregularities brought to her attention in this case must be viewed 'as a bold effort to fulfil her constitutional and statutory obligations to ensure lawfulness, accountability and transparency in her Department'.<sup>42</sup>

#### 5.4 *Vagueness of legislative administrative action*

Clarity, certainty and accessibility are basic requirements of a legal and judicial order. A citizen must be clear as to what the law is at any given point in time. Accessibility means that the law must be published, for, until such legislative or subordinate legislation is promulgated and published, it would not interfere with vested rights, create any legal obligation nor would it confer rights. At common law, vagueness and unreasonableness of ministerial or departmental regulations or municipal bye-laws were grounds for challenging delegated legislation.<sup>43</sup> Now,

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<sup>38</sup>2008 4 SA 237 (CC) para 56.

<sup>39</sup>*MEC, Education, KwaZulu-Natal v Khumalo* (n 31) para 38.

<sup>40</sup>*Khumalo v MEC, Education, KwaZulu-Natal* (n 32) para 41, citing *Municipal Manager: Quakeni Local Municipality v FV General Trading CC* 2010 1 SA 356 (SCA) para 23.

<sup>41</sup>*Khumalo* para 35, citing (at para 37) s 5(7)(a) of the Public Service Act 1994 as fortifying, in the context of public sector employment, the possibility of such a functionary seeking recourse in the courts.

<sup>42</sup>*Khumalo* para 38.

<sup>43</sup>See, eg, *Kruse v Johnson* [1898] 2 QB 91; *R v Jopp* 1949 4 SA 11 (N); *Zacky v Germiston Municipality* 1926 TPD 380; *Osborn v Durban Corporation* 1929 NPD 277; *Rex v Shapiro* 1935 NPD 155.

under the constitutional scheme, the rule of law as a founding value of the Constitution requires that the law be formulated in a clear and accessible manner. O'Regan J once said that a law that is vague, in the sense of being unclear, will not constitute a 'law' within the contemplation of the Constitution. Similarly, 'a vague law will not constitute a law contemplated by section 36 of the Constitution'.<sup>44</sup> One can look at the matter by reference to the type of situation where excessive discretion is vested in a decision-maker. As the Constitutional Court pointed out in *Dawood v Minister of Home Affairs*,<sup>45</sup> it is one thing to require a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and quite another to confer a broad discretion upon an official, 'who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights'. O'Regan J then held that it is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable<sup>46</sup> only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. 'In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the immigration officials and the DG (Director General) by subsections 26(3) and (6) is constrained by the provisions of the Bill of Rights and, in particular, what factors are relevant to the decision to refuse to grant or extend a temporary permit. If these rights are to be infringed without redress, the very purposes of the Constitution are defeated'.<sup>47</sup>

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<sup>44</sup>*Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* 2010 2 SA 181 (CC) para 100.

<sup>45</sup>2000 3 SA 936 (CC) paras 46 and 47; *Janse van Rensburg NO v Minister of Trade and Industry NNO* 2001 1 SA 29 (CC) paras 24-25.

<sup>46</sup>The term 'justifiable' has been defined by Froneman DJP delivering the lead opinion in the labour review case of *Carephone (Pty) Ltd v Marcus NO* 1998 10 BCLR 1326 (LAC) at 1336F to mean 'able to be legally or morally justified, able to be just, reasonable, or correct; defensible'. It does not mean 'just', 'justified' or 'correct'. On its plain meaning the use of the word 'justifiable' does not ask for the obliteration of the difference between review and appeal.

<sup>47</sup>*Dawood* para 47. Applying the principle that rules must be stated in a clear and accessible manner, Du Plessis J held in *Lawyers for Human Rights v Minister of Home Affairs* 2003 8 BCLR 891 (T) at 895-897 that although there were no guidelines as to when the immigration officer may decide to detain the illegal foreigner since it was based on 'reasonable suspicion' that the person was an illegal immigrant. However, the trial judge held that the discretion to arrest or not to arrest on reasonable suspicion was not in violation of the rule of law in the absence of a guideline. At the Constitutional Court, it was held that the applicants' contention that s 34(8) offended the rule of law in that it allowed arbitrary detention at the instance of an immigration officer had no substance in

### 5.4.1 *Affordable Medicines Trust case*

The legality of the power of the Minister of Health to make certain regulations in the subject of dispensing medicine of which the infringement of the fundamental right to practice one's trade without interference was called into question in *Affordable Medicines Trust v Minister of Health*.<sup>48</sup> Among the questions that Ngcobo J addressed in his judgment for the Constitutional Court was whether in exercising the power to make regulations, the Minister was authorised by the enabling Medicines and Related Substances Act<sup>49</sup> to link licences to specific premises. Further, whether the linking of a licence to dispense medicine to particular premises infringed section 22 of the 1996 Constitution? It was held that in exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations, the Minister exceeded the powers conferred by the empowering provisions of the Medicines Act, the Minister would have acted *ultra vires* and in breach of the doctrine of legality. The finding that the Minister acted *ultra vires* was, in effect, a finding that the Minister acted in a manner that was inconsistent with the Constitution and that his or her conduct was invalid.<sup>50</sup> The rationale for so holding was stated by Ngcobo J in these words:<sup>51</sup>

Our constitutional democracy is founded on, among other values, the 'supremacy of the Constitution and the rule of law'.<sup>52</sup> The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'.<sup>53</sup> And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'.<sup>54</sup> This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control. The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.<sup>55</sup> The doctrine

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the context of the section. It was not arbitrary to cause the detention of a person who had just arrived at a port of entry in South Africa, and who was reasonably suspected by an immigration officer on duty at the port of entry to be an illegal foreigner. Indeed, reasonable suspicion by an immigration officer constituted just cause for the detention – per Yacoob J, *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC) para 32.

<sup>48</sup>2006 3 SA 247 (CC).

<sup>49</sup>Act 101 of 1965.

<sup>50</sup>2006 3 SA 247 (CC) para 50.

<sup>51</sup>Paragraphs 48-49.

<sup>52</sup>Section 1(c) of the Constitution.

<sup>53</sup>Section 2 of the Constitution.

<sup>54</sup>Section 172(1)(a), 1996 Constitution.

<sup>55</sup>*Pharmaceutical Manufacturers* (n 17) para 20.

of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.<sup>56</sup> It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'.<sup>57</sup> In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.<sup>58</sup>

Ngcobo J also addressed the issue of vagueness because it was contended that regulation 18(5) was vague in that it required the Director-General to make decisions based on facts that were not objectively ascertainable. The Judge acknowledged that the doctrine of vagueness was developed by the courts to regulate the exercise of public power at common law.<sup>59</sup> Now that the exercise of public power is regulated by the Constitution, the supreme law, the doctrine of vagueness is an aspect of the rule of law which, in turn, is one of the foundational values entrenched in the democratic State. It requires that laws must be written in a clear and accessible manner although what is required is reasonable certainty and not perfect lucidity. It does not require absolute certainty of laws but, that a law must indicate with reasonable certainty to those who are bound by it what is required of them so that they might regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives.<sup>60</sup> Where it is contended that the legislation or regulation, as in this case, is vague or uncertain, the court must first construe the legislation or regulation applying the normal rules of construction, including those required by constitutional adjudication. The ultimate question is whether so construed, the legislation or regulation indicates with reasonable certainty to those who were bound by it what was required of them.<sup>61</sup> So, if the question is asked: does the impugned regulation 18(5) convey a

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<sup>56</sup>*Pharmaceutical Manufacturers* para 17; *Fedsure Life Assurance* para 58.

<sup>57</sup>*Fedsure Life Assurance* (n 35) para 19.

<sup>58</sup>*Pharmaceutical Manufacturers* (n 17) para 19.

<sup>59</sup>*Baxter Administrative law* (1984) 529.

<sup>60</sup>*Affordable Medicines* (n 48) para 108. This judgment of Ngcobo J was said to have 'lucidly summarized the applicable principles to a challenge on the basis of vagueness in a constitutional dispensation' by Smuts J of the High Court of Namibia in *Lameck v President of the Republic of Namibia* 2012 1 NR 255 (HC) para 89 where the court was considering whether the definitions of 'corruptly' and 'gratification' in the Anti-Corruption Act 8 of 2003 was limitless, unreasonable and impermissibly wide and did not adhere to the principle of legality which was entrenched in the Constitution. It was held that the principles enunciated in *Affordable Medicines* applied with equal force to the position in Namibia.

<sup>61</sup>*Id* para 109.

reasonably certain meaning to those who were affected by it?<sup>62</sup> Ngcobo J held that the regulation in question set out factors to which the Director-General must have regard in considering an application for a licence. The provisions of this sub-regulation required the Director-General, in considering an application for a licence, to have regard to, among other factors, the existence of other licensed health facilities in the vicinity of the premises from where the compounding and dispensing of medicines was intended to be carried out, the geographical area to be served by the applying medical practitioner, the estimated number of healthcare users in the geographical area to be served by the applying medical practitioner and the demographic considerations including the disease patterns and health status of the users to be served. These factors were to be taken into consideration when deciding whether to refuse or issue a licence to dispense medicines. They were formulated in unambiguous terms hence there was no room for any doubt about what those factors were. The Director-General had no doubt as to what factors he or she was required to consider in deciding an application for a licence to dispense medicines. It was therefore not possible to treat the provisions of regulation 18(5) as being vague.<sup>63</sup>

#### 5.4.2 The *New Clicks*' case

The vagueness or otherwise of the Ministerial Regulations relating to a Transparent Pricing System for Medicines and Scheduled Substances of 2004 was in issue in *Minister of Health v New Clicks SA (Pty) Ltd*.<sup>64</sup> This provoked a lively debate and disagreement among the judges of the Constitutional Court on the point. The Judges were however unanimous on the point made by Chaskalson CJ that, although vagueness was not specifically mentioned in PAJA as a ground for review, it was within the purview of section 6(2)(i) which included, as a general ground for review, administrative action that was otherwise 'unconstitutional or unlawful'. The court reaffirmed its earlier decision in *Affordable Medicines* to the effect that vagueness was an aspect of the rule of law whereby it was a requirement implicit in all empowering legislation that regulations had to be consistent with, and not contradict, one another. Regulations which failed to comply with these requirements would contravene section 6(2)(i) of PAJA.<sup>65</sup>

On the application of the principle of vagueness to the facts before them, the majority in a judgment read by Yacoob J held that regulation 5(2)(c) was not void for vagueness but that the words 'single exit' must be severed from Appendix A

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<sup>62</sup>*Id* para 110.

<sup>63</sup>*Id* para 111.

<sup>64</sup>2006 2 SA 311 (CC).

<sup>65</sup>*Id* para 246.

to the Regulations wherever they appeared.<sup>66</sup> On his part, Chaskalson CJ held that considering all the problems and uncertainties in construing regulation 5(2)(c) as a whole, it was too uncertain to be enforced, and held it was void for vagueness.<sup>67</sup> Although Ngcobo J (O'Regan J concurring) agreed with the Chief Justice that the regulation in question was invalid for vagueness, he based his reason on the failure of the regulation to provide manufacturers any guidance as to how they were required to deal with different prices for the same product in different countries. This failure must be viewed against the obligation to introduce a transparent pricing system. The absence of guidance thus left the manufacturers at large to select any price they choose. This could not be said to be consistent with the policy objectives of section 22G(2) of the Medicines and Schedule Substances Act 101 of 1965 and was therefore invalid for vagueness.<sup>68</sup>

The court was also split in respect of regulation 8(3) which dealt with increases of the single exit price during the year. The majority held that it was not void for vagueness,<sup>69</sup> but Chaskalson CJ (Langa DCJ, O'Regan and Sachs JJ concurring) held that regulation 8(3) was confusing, badly worded and, if regard was had to regulations 5, 7 and 8(1), too vague to be understood by those bound by it. It was therefore invalid on those grounds.<sup>70</sup> On his part, Ngcobo J held that regulation 8(3) was void for vagueness as it could not be reconciled with regulation 5(2)(a) to which it was subject.<sup>71</sup> The scheme regulation 8 had in mind was that whatever increase that was made by manufacturers, such increase should not go beyond the increase determined by the Minister in terms of regulation 8(1), unless such increase was authorised by the Minister in terms of regulation 9(1).<sup>72</sup> For that reason, regulation 8(3)(i) was void for vagueness. However such defect could be cured 'by deleting the words "as first published" and inserting the words "amount of increase determined by the Minister in terms of regulation 8(1) as being the extent to which", in front of the words "single exit price of the medicine or scheduled substance", and inserting the words "may be increased" in front of the words in that year'. With the deletion and insertions, the outcome was that regulation 8(3)(i) would now read: 'such increase does not exceed the amount of increase determined by the Minister as being the extent to which the single exit price of the medicine or scheduled substances may be increased in respect of the year'.<sup>73</sup>

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<sup>66</sup> *Id* paras 804-811.

<sup>67</sup> *Id* para 277.

<sup>68</sup> *Id* para 491.

<sup>69</sup> Per Yacoob J, para 822-835.

<sup>70</sup> Per Chaskalson CJ *id* para 291.

<sup>71</sup> Per Ngcobo J *id* para 496.

<sup>72</sup> *Id* para 497.

<sup>73</sup> *Id* para 498.

### 5.5 Breach of a cooperative governance obligation

The South African system of government is a mixture of the federal and the unitary systems woven together by the principles of cooperative government as a thread linking the National, Provincial and Local Government three-tier structure.<sup>74</sup> The system of cooperative government otherwise referred to as Chapter 3 obligations are spelt out in sections 40 and 41 of the Constitution. While section 40 states the rationale that informs cooperative governance, section 41 lays down the principles or the ground rules for the operation of the cooperative government system and intergovernmental relations. Section 40 provides that: (1) 'in the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, independent and interrelated. (2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.' Section 41(1) stipulates a host of what all the spheres of government and all organs of state within each sphere must do, *inter alia*, to preserve the peace, national unity and the indivisibility of the country. Critical to this discussion, however, is section 41(3) which compels an organ of state involved in an intergovernmental dispute to make reasonable effort to settle the dispute by resort to mechanisms and procedures provided for that purpose, 'and must exhaust all other remedies before it approaches a court to resolve the dispute'.

The principal purpose of the section 41(3) obligation was to keep the organs of state out of the courts and away from litigation. The obligation to avoid litigation does not amount to paying lip service to settlement; it is an obligation on the parties to make serious efforts towards settlement.<sup>75</sup> It requires that an organ of state re-evaluate its position 'fundamentally'.<sup>76</sup> Further, apart from the general duty of avoiding legal proceedings against one another, section 41(3) of the Constitution requires organs of state to make every reasonable effort to settle disputes through the existing mechanisms and procedures and to exhaust all other remedies before resorting to litigation.<sup>77</sup> Appropriately suitable for the present discussion is the recent challenge in *Minister of Police v Premier of the Western Cape*<sup>78</sup> where the Police Minister argued that the Premier of the Western Cape breached her cooperative governance obligations in three different

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<sup>74</sup>Sections 40–41 of the Constitution.

<sup>75</sup>*National Gambling Board v Premier*, KZN 2002 2 SA 715 (CC).

<sup>76</sup>*Id* para 33.

<sup>77</sup>*Uthukela District Municipality v President of the Republic of South Africa* 2003 1 SA 678 (CC) para 19.

<sup>78</sup>2014 1 SA 1 (CC).

respects. First, by appointing a commission of inquiry to investigate alleged inefficiencies in the performance of the Police Service in Khayelitsha township in the City of Cape Town, the Premier usurped the powers and functions of the Minister and the Commissioner of Police contrary to section 41(1)(e) of the Constitution.<sup>79</sup> Secondly, although the Premier was acting within the powers given to a province, and did not have to declare a dispute, she was nonetheless obliged by section 41(1)(h)(iii) and (iv) to inform other organs of state and consult them on matters of common interest as well as to coordinate actions.<sup>80</sup> Thirdly, the Premier did not make serious efforts to settle the dispute before resorting to litigation whereas the Minister and the Commissioner did make such efforts. All these arguments were rejected by the court which held that spheres of government and organs of state were obliged to respect and arrange their activities in a manner as would advance intergovernmental relations and bolster cooperative governance. If not, they would be in breach of the constitutional requirement to the contrary effect. Yet, 'more and more disputes between or amongst spheres of government and organs of state end up in courts and in this court, in particular'.<sup>81</sup>

Moseneke DCJ drew attention to the costs to the public purse involved in these litigations including the present. Not only that, litigation stands in the way and delays much needed services to the population at large as well as other activities of government. Here, for instance, 'effective policing in Khayelitsha and the functioning of the Commission may have to await the outcome of litigation. Courts must be astute to hold organs of state to account for the steps they have actually taken to honour their cooperative governance obligations well before resorting to litigation'.<sup>82</sup> The court also rejected the applicants' argument that the terms of reference of the Commission to undertake 'a systematic investigation of policing in Khayelitsha' were vague and overbroad. The question is, viewed objectively, were the terms of reference 'reasonably comprehensible to the commissioner and affected parties so as to determine the nature or ambit of a commission's mandate with reasonable certainty'.<sup>83</sup> Put differently, 'the ultimate question is whether, so construed, the [terms of reference] indicates with reasonable certainty to those bound by it what is required of them'.<sup>84</sup> Applying

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<sup>79</sup>*Id* para 61.

<sup>80</sup>*Id* para 62.

<sup>81</sup>*Id* para 64. See also *eThekweni Municipality v Ingonyama Trust* 2013 5 BCLR 497 (CC); *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC); *MEC for Health, KZN v Premier, KZN: In re Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1023 (CC); *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC).

<sup>82</sup>*Id* para 64.

<sup>83</sup>*SARFU* (3) para 229.

<sup>84</sup>*Affordable Medicines* (n 48) para 109.



these tests, the terms of reference did not suffer from over-breadth or vagueness; their reach was capable of being ascertained with reasonable certainty. They reflected and tracked the wordings of the enabling section 206(5) of the Constitution as they required the Commission to investigate complaints received by the Premier relating to allegations of inefficiency of the Police Service stations in Khayelitsha or a breakdown on relations between Khayelitsha community and members of the Police Service stationed at the named police stations.<sup>85</sup> The decision of the Premier to establish a commission of inquiry was therefore not inconsistent with the Constitution.

### 5.6 *Reviewability of prosecutorial discretions: Approach of common law courts*

The question whether prosecutorial discretion to institute or not to institute, to continue or discontinue, prosecution is subject to judicial review and is a question that has troubled common law courts for years. The constitutional requirement that the prosecuting authority be independent, and should exercise its functions without fear, favour or prejudice<sup>86</sup> makes the courts hesitant to interfere with prosecutorial discretions. Accordingly, the court will only interfere where the prosecutor had acted patently illegally or irrationally<sup>87</sup> such as where he or she acted *mala fide*<sup>88</sup> or for ulterior purposes.<sup>89</sup> It means that the prosecutor, like every public functionary, is subject to the tests of legality and rationality.<sup>90</sup>

In *Sharma v DDPP Trinidad and Tobago*<sup>91</sup> the Chief Justice of Trinidad and Tobago challenged the decision to charge him in judicial review proceedings

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<sup>85</sup> *Minister of Police* (n 78) para 68.

<sup>86</sup> Section 179(4) of the Constitution. The SAPS Act 1995 was successfully challenged in *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) for establishing a crime-busting body without safeguarding its independence and impartiality.

<sup>87</sup> *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order* 1994 1 SA 387 (C).

<sup>88</sup> *Mitchell v Attorney General, Natal* 1992 2 SACR 68 (N).

<sup>89</sup> *NDPP v Zuma* 2009 2 SA 277 (SCA) para 38. Although the recent decision of the SCA in *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 5 SA 24 (SCA) paras 41-43 and 48 did not concern the exercise of prosecutorial discretion, it illustrates the exercise of statutory powers for ulterior purpose. The MEC had sacked members of the Gambling Board and it was clear that she had done so because they had refused to accommodate a company, African Romance, at the behest of the MEC. It was held that in doing so, she had failed to consider the confines of the statutory provisions on which she relied or the consequences for the *fiscus* or on transparent and accountable governance. In other words, she had acted beyond her legal powers and contrary to the principle of legality and, hence, her decision to dissolve the Board was set aside.

<sup>90</sup> *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) paras 78-81; *Affordable Medicines* (n 48) paras 48-49.

<sup>91</sup> 2007 1 WLR 780 (PC).

which failed before the Judicial Committee of the Privy Council. It was held<sup>92</sup> that, although a decision to prosecute was in principle susceptible to judicial review on the ground of interference with a prosecutor's judgment,<sup>93</sup> such relief is a highly exceptional remedy; 'rare in the extreme';<sup>94</sup> 'sparingly exercised';<sup>95</sup> 'very rare indeed';<sup>96</sup> 'very rarely';<sup>97</sup> and 'only in highly exceptional cases'<sup>98</sup> will the court grant a relief, and, even so 'very hesitantly'<sup>99</sup> disturb the decisions of an independent prosecutor and investigator. The court must be satisfied that the claim had a realistic prospect of success. Decisions have been successfully challenged where the decision is not to prosecute;<sup>100</sup> in such a case the aggrieved person could not raise his or her complaint in the criminal trial or on appeal and judicial review would afford the only possible remedy.<sup>101</sup> Otherwise, as an American Judge once put it, the decision to prosecute is 'particularly ill-suited to judicial review'.<sup>102</sup> It was further held that, since all the issues could best be investigated and resolved in a single set of criminal proceedings, permission for judicial review ought not to have been granted and had rightly been set aside.

There are policy reasons why the common law courts are reluctant to subject the decision to prosecute or not to prosecute to judicial review or why they very sparingly, grant judicial review or set aside the decision to prosecute.<sup>103</sup> The rationale for the courts' attitude was summarised by Lords Bingham and Walker in *Sharma* as follows:<sup>104</sup>

- The great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.<sup>105</sup>
- The wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into

<sup>92</sup>*Id* para 5.

<sup>93</sup>*Matalulu v DPP* [2003] 4 LRC 712 (Fiji SC) at 735-736; *Mohit v DPP, Mauritius* [2006] UKPC 20 paras 17 and 21.

<sup>94</sup>*R v Inland Revenue Commissioners, Ex parte Mead* [1993] 1 All ER 772 at 782.

<sup>95</sup>*R v DPP, Ex parte C* [1995] 1 Cr App R 136 at 140.

<sup>96</sup>*R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 para 49.

<sup>97</sup>*R (Birmingham) v Director of the Serious Fraud Office* [2006] 3 All ER 239 para 63.

<sup>98</sup>Per Lord Bingham, *R (Corner House Research) v Director of Serious Fraud Office* [2008] 4 All ER 927 (HL) paras 30-31.

<sup>99</sup>*Kostuch v Attorney General of Alberta* (1995) 128 DLR (4<sup>th</sup>) 440 at 449.

<sup>100</sup>[2006] UKPC 20 para 18.

<sup>101</sup>*R (Pretty) v DPP* [2002] 1 AC 800 (HL) para 67; *Matalulu v DPP* [2003] 4 LRC 712 at 736.

<sup>102</sup>Per Powell J, *Wayte v US* 470 US 598 at 607 (1985).

<sup>103</sup>*In re Smalley* [1995] AC 623 at 642-643; *DPP v Crown Court, Manchester* [1994] 1 AC 9 at 17.

<sup>104</sup>[2007] 1 WLR 780 (PC) para 5.

<sup>105</sup>*Matalulu v DPP* [2003] 4 LRC 712 at 735; *Mohit v DPP* [2006] UKPC 20 para 17.

- account.<sup>106</sup>
- The delay inevitably caused to the criminal trial if it proceeds.<sup>107</sup>
  - The desirability of all challenges taking place in the criminal trial or on appeal.<sup>108</sup> In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself.<sup>109</sup>
  - The blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts.<sup>110</sup>
  - The powers are entrusted to the officers themselves and no one else.
  - The powers are conferred in very broad and un-prescriptive terms.<sup>111</sup>

## 5.7 The South African approach

Just like in many aspects of South African public law, the first port of call is to ascertain whether the Constitution or PAJA has changed the common law. Here, the first step is to establish whether the act or decision is accommodated or excluded from the definition of 'administrative action' in section 1 of PAJA. In that regard one finds that, while no mention is made about prosecutorial discretions generally, 'a decision to institute or discontinue a prosecution' is excluded from the definition of 'administrative action' in PAJA.<sup>112</sup>

### 5.7.1 Decision to prosecute or not to prosecute

It has already been observed in *Democratic Alliance v President of the Republic of South Africa*<sup>113</sup> that the combined object of the empowering provisions of section 179 of the Constitution and section 9 of the National Prosecution Authority Act 32 of 1998 was to safeguard the independence of the Authority. Although that

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<sup>106</sup>*Mohit v DPP* [2006] UKPC 20 para 18.

<sup>107</sup>*R v DPP, ex parte Kebeline* [2000] 2 AC 326 (QB) 371; *Pretty* [2002] 1 AC 800 (HL) para 77.

<sup>108</sup>*Ex parte Kebeline id* 371; *Pepushi* [2004] EWHC 798 para 44.

<sup>109</sup>*R v Horseferry Road Magistrate's Court, Ex parte Bennett* [1994] 1 AC 42 (HL). Per Lord Lane CJ, *Attorney General's Reference (No 1 of 1990)* [1992] QB 630 at 642: "We should like to add to that statement of principle by stressing a point which is somewhat overlooked, namely, that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for stay."

<sup>110</sup>*DPP v Humphreys* [1977] AC 1 (HL) at 24, 26, 46 and 53; *Imperial Tobacco Ltd v Attorney General* [1981] AC 718 (HL) at 733 and 742; *Kostuch* (1995) 128 DLR (4th) 440 at 449-450; *Pretty* [2002] 1 AC 800 (HL) para 121.

<sup>111</sup>Per Lord Bingham, *R (Corner House Research) v Director of Serious Fraud Office* [2008] 4 All ER 927 (HL) paras 30-31.

<sup>112</sup>Section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

<sup>113</sup>2013 1 SA 248 (CC) (*Simelane's case*)

case concerned the legality or rationality of the appointment by the President of the head of the National Prosecution Authority, it did not concern discretion to prosecute in which case the courts have held that as such they will not interfere with decisions to prosecute where the discretion was improperly exercised in that it was illegal and rational,<sup>114</sup> *mala fides*,<sup>115</sup> or deployed for ulterior purposes.<sup>116</sup> It was in *Zuma v National Public Prosecution Authority*<sup>117</sup> that the courts were called upon to intervene in the exercise of prosecutorial discretion.

If the decision to prosecute could only be brought within the realm of judicial review in exceptional circumstances, what then, about the application of the *audi alteram partem* rule? In responding to the application for judicial review in *Zuma v National Public Prosecution Authority*<sup>118</sup> where it was argued that in deciding to prosecute him for some criminal charges, the Prosecuting Authority was under a duty to hear him, the High Court approached the matter from the angle that the decision to prosecute was, in general, an administrative decision to which the *audi alteram partem* rule with its offspring the doctrine of legitimate expectation applied.<sup>119</sup> The Supreme Court of Appeal rejected this approach for two reasons.<sup>120</sup> First, it was not shown that such a right exists at common law for, unless it was shown that there was dishonesty, *mala fides* or an exceptional circumstance, the decision of the Director of Public Prosecutions to prosecute is not amenable to judicial review.<sup>121</sup> In effect, it is a power that must be 'sparingly exercised'.<sup>122</sup> Secondly, it is not the law under the Constitution and PAJA to imply in general terms that a decision to prosecute is an administrative action to which the *audi* principle and its offspring legitimate expectation applied.<sup>123</sup> Under section 1(b)(ff) of PAJA, a decision to prosecute or continue prosecution is not subject to judicial review and although the Act does not specifically deal with the decision not to prosecute, it would appear that it is not subject to review within the context of section 1(b) and (e) of the Act, such a decision not having been classified as administrative action. For the same reasons, the court dismissed the claim of legitimate expectation, that decisions to prosecute were not reviewable under PAJA. In any event, the problem with this argument was that there was nothing on the papers to suggest that the appellant decided not to afford the respondent

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<sup>114</sup> *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order* 1994 1 SA 387 (C).

<sup>115</sup> *Mitchell v Attorney General, Natal* 1992 2 SACR 68 (N).

<sup>116</sup> *Zuma v National Public Prosecution Authority* 2009 2 SA 277 (SCA) para 38.

<sup>117</sup> *Ibid.*

<sup>118</sup> [2008] ZAKZHC 71.

<sup>119</sup> *Id* paras 47-53.

<sup>120</sup> 2009 2 SA 277 (SCA) para 35.

<sup>121</sup> *R v DPP, Ex parte Kebeline* [2000] 2 AC 326.

<sup>122</sup> *R v DPP, Ex parte C* [1995] 1 Cr App R 136 at 140.

<sup>123</sup> 2009 2 SA 277 (SCA) para 35.

the opportunity to make representations.<sup>124</sup> How legitimate was Mr Zuma's expectation? The answer seemed to be that whatever his expectation might have been, it must be such an expectation of which its legitimacy was based only on a promise, a practice of, or a clear and unambiguous representation by the administrator.<sup>125</sup> So, where the administrator has done nothing to create any legitimate expectation of whatever nature on the part of the applicant, whatever the former might have had could not be legitimate in the context of these proceedings.<sup>126</sup>

Although Chaskalson CJ was prepared to assume in favour of the appellants in *Kaunda v President of the Republic of South Africa*,<sup>127</sup> that different considerations might apply to a decision to prosecute and there might be circumstances in which a decision not to prosecute could be reviewed by a court, yet the courts would be slow to interfere with such decisions.<sup>128</sup> However, even if this assumption is made in favour of the appellants, they have failed to establish that theirs was a case in which such a power should be exercised. In any event, the appellant did not challenge the constitutionality of PAJA for excluding the review of the decision to prosecute. Again, the absence of such judicial review power does not mean that a failure to comply with a constitutional or statutory requirement to hear a party is not justiciable under the constitutional principle of legality irrespective of whether or not PAJA applies.<sup>129</sup>

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<sup>124</sup>(N 15) para 77. Cf in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 paras 91-94 and 103-104.

<sup>125</sup>*Zuma* 2009 2 SA 277 (SCA) para 80. See also *Walele v City of Cape Town* 2008 6 SA 129 (CC) paras 35 and 41; *South African Veterinary Council v Szymanski* 2003 4 SA 42 (SCA) para 19; *Minister of Defence v Dunn* 2007 6 SA 52 (SCA) paras 31-32. The Privy Council held in *Paponette v Attorney General of Trinidad and Tobago* [2011] 3 WLR 219 (PC) that the government's representations which had been relied on by the applicants, were clear, unambiguous and devoid of relevant qualification, and they had given rise to a legitimate expectation on the part of the applicants that, on relocation, they would not be under the control of P Corporation, their competitor, but that the management of maxi-taxi owners and operators themselves.

<sup>126</sup>*Radio Pretoria v Chairman*, ICASA 2003 5 SA 451 (TPD) para 24.7.

<sup>127</sup>2005 4 SA 235 (CC) para 84.

<sup>128</sup>*Gillingham v AG* 1909 TS 572; *Wronsky v Prokureur-Generaal* 1971 3 SA 292 (SWA); *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order* 1994 1 SA 387 (C) at 394H.

<sup>129</sup>2009 2 SA 277 (SCA) paras 35-36. See also s 2 of the Constitution; *President of the RSA v SARFU* (3)

<sup>129</sup>2000 1 SA 1 (CC) para 148; *Naidoo v National Director of Public Prosecutions* 2005 1 SACR 349 (SCA).

### 5.7.1.1 *Withdrawal of criminal and disciplinary proceedings: The Mdluli case*

The plaintiff in *Freedom Under Law v National Director of Public Prosecutions*,<sup>130</sup> a public interest organisation (FUL), applied for the review and setting aside of the decisions of the National Director relating to the withdrawal of criminal and disciplinary charges against Lt General Mdluli and his reinstatement as Head of Crime Intelligence within the South African Police Service (SAPS). FUL also sought an order directing that the charges be reinstated forthwith and prosecuted to finality. The main issues for Murphy J to determine were the lawfulness of these decisions and whether the courts can review prosecutorial decisions. The trial judge not only reviewed and set aside the four decisions of the prosecuting authority but proceeded to grant mandatory orders to the effect that the criminal charges be re-enrolled and prosecuted diligently and without delay. It was also ordered that the disciplinary charges be reinstated and proceeded with diligently and without delay.<sup>131</sup>

The reasoning of Murphy J was that while the constitutional requirement that the prosecuting authority be independent justified judicial restraint, the constitutional principle of legality required a decision-maker to exercise the powers conferred on him lawfully, rationally and in good faith – and courts were entitled to interfere where the principle was breached. Furthermore, a decision not to prosecute or to discontinue a prosecution was administrative action as defined in section 1 of PAJA, and accordingly, such a decision may be reviewed on the grounds enunciated in section 6 of PAJA and one of the remedies of section 8 of PAJA be appointed. Parliament, by enacting PAJA, had separated the power to review a decision not to prosecute or to discontinue to prosecute to the judiciary, who was therefore duty-bound under the doctrine of separation of powers to review such decision.<sup>132</sup>

In *NDPP v Freedom Under Law*,<sup>133</sup> the SCA affirmed the trial judge's setting aside of the NDPP's decision to withdraw the fraud and corruption charges against Lt General Mdluli of the SAPS; the setting aside of the Police Commissioner's decision to terminate the disciplinary proceedings against Mdluli; the reversal of the decision to withdraw the murder and related charges; and the decision of the Police Commissioner to reinstate Mdluli to his office. Brand JA who delivered the unanimous opinion of the court, reviewed the policy considerations which impelled the common law courts, as already noted in this article, not to interfere with the prosecutorial discretions, and came to the following conclusions:

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<sup>130</sup>2014 1 SA 254 (GNP).

<sup>131</sup>2014 1 SA 254 (GNP) para 241(c), (e) and (f).

<sup>132</sup>Paragraphs 122, 124, 128-134, 137 and 139.

<sup>133</sup>2014 4 SA 298 (SCA).

- (a) It has been recognised by this court that the policy considerations underlying the exclusion of a decision to prosecute from a PAJA review is substantially the same as those which influenced the English courts to limit the grounds upon which they would review decisions of this kind.
- (b) The English courts were persuaded by the very same policy considerations to impose identical limitations on the review of decisions not to prosecute or not to proceed with prosecution.
- (c) In the present context, there is no reason of policy, principle or logic to distinguish between decisions of these two kinds.
- (d) Against the foregoing background, the *dictum* of Navsa JA in *Democratic Alliance v Acting NDPP*<sup>134</sup> that decisions to prosecute and not to prosecute are of the same genus must be accepted and that, although on a purely textual interpretation, the exclusion in section 1(ff) of PAJA is limited to the former, it must be understood to incorporate the latter as well.
- (e) Although decisions not to prosecute are – in the same way as decisions to prosecute – subject to judicial review, it does not extend to a review on the wider basis of PAJA, but is limited to grounds of legality and rationality.<sup>135</sup>

On the strength of the well-established principle of legality which is ‘an alternative pathway to judicial review where PAJA finds no application’. According to Brand JA, the principle of legality which had been demonstrated in many cases and emphasised in the dictum of Ngcobo J in *Affordable Medicines Trust v Minister of Health*,<sup>136</sup> ‘acts as a safety net to give the court the degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power’.<sup>137</sup> This principle provides a more limited basis of review than PAJA and as much as its jurisprudence is yet to evolve, it currently includes review on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute.<sup>138</sup>

The main fault which the SCA found in the trial judgment had to do with the mandatory interdicts it granted to the effect that: (a) the NDPP should reinstate all the criminal charges against Mdluli and to ensure that the prosecution of these charges were enrolled and pursued without delay; and (b) the Police Commissioner should reinstate the disciplinary proceedings against Mdluli and to take all steps necessary for the prosecution and finalisation of these proceedings diligently and without delay.<sup>139</sup> The SCA held that these mandatory interdicts were

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<sup>134</sup>2012 3 SA 486 (SCA) para 27.

<sup>135</sup>2014 4 SA 298 (SCA) para 27.

<sup>136</sup>2006 3 SA 247 (CC) para 49.

<sup>137</sup>2014 4 SA 298 (SCA) 58 para 28.

<sup>138</sup>Para 29; *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 3 SA 486 (SCA) paras 28-30.

<sup>139</sup>*Freedom under Law v NDPP* 2014 1 SA 254 (GNP) para 241.

an impermissible transgression of the doctrine of separation of powers because, in so ordering, the court purports to assume the functions that fall within the domain of the executive. In terms of the Constitution, the authority to prosecute is vested in the NDPP while that of the control and management of the Police Services is the province of the Commissioner of Police, and the court could only interfere with these constitutional arrangements on 'rare occasions and for compelling reasons'. In the absence of this being a 'rare occasion' or there being any 'compelling reasons', the executive authorities should be given the opportunity to perform their constitutional mandates in a proper manner. The setting aside of the withdrawal of the criminal charges and the disciplinary proceedings would have had the effect of the charges and the proceedings being automatically reinstated and it was for the executive authorities to deal with them. So, by further issuing mandatory orders, the trial court 'went too far'.<sup>140</sup> In the final analysis the SCA set aside the said mandatory orders.

### 5.7.2 The decision to discontinue prosecution

There is the case involving the discontinued criminal prosecution of Jacob Zuma prior to his assuming office as President of South Africa and the Democratic Alliance (DA) challenged the National Director of Public Prosecution's decision to do so. The issues in *Democratic Alliance v Acting National Director of Public Prosecutions*<sup>141</sup> turned on whether: (a) the exercise of that power was reviewable in a court of law; (b) the acting NDPP was required to furnish the record of his decision; and (c) whether the political party had the standing to challenge that decision.<sup>142</sup> The Supreme Court of Appeal held that in a constitutional state such as South Africa there were by definition legal limits to the exercise of public power: the government, like everyone else, was bound by and equal before the law.<sup>143</sup> The power to enforce the rule of law resided in the judiciary through its powers of review under the rule of law, which extended beyond the confines of a review of 'administrative action' under the PAJA. When it decided to discontinue the prosecution, the NDPP exercised a public power which was subject to the rule of law review, even if it did not constitute administrative action. It was in the public interest and of direct concern to political parties such as the appellant to ensure, as parliamentary representatives of the public, that public institutions such as the National Prosecuting Authority acted in accordance with constitutional and legal

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<sup>140</sup>NDPP v Freedom under Law [2014 4 SA 298 (SCA) para 51.

<sup>141</sup>2012 3 SA 486 (SCA) paras 31-33, 37 and 44-45.

<sup>142</sup>*Id* para 27.

<sup>143</sup>*Id* para 31.



prescripts.<sup>144</sup> Thus, the DA had *locus standi* to act in its own interest, as well as that of the public, to pursue an application for the review of a decision to discontinue the prosecution of Mr Zuma, on the ground that the acting NDPP had unlawfully succumbed to political pressure in reaching its decision. The extent, however, to which the acting NDPP's decision was reviewable remained a question for the reviewing court.<sup>145</sup> As to discovery: although questions regarding the extent of the compellable record and its value to the court *a quo* were speculative and premature, it was nevertheless clear that, without the record of what was available to the first respondent when he decided to discontinue the prosecution, the review court would be unable to perform its constitutional review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed. There was in any event no bar to an order directing the office of the NDPP to furnish a reduced record, that is, one excluding the President's representations to the NDPP and any response thereto that would breach any confidentiality attaching to the representations.<sup>146</sup> The appeal was thus upheld and the matter was referred back to the High Court with an order directing the NDPP to produce and lodge the reduced record with the registrar of the SCA.

## 6 Conclusion

That the courts have exercised enormous powers of judicial review in the two decades of constitutionalism in South Africa is not in doubt. The powers they have exercised, and still exercise, undoubtedly emanate from the Constitution and are vested in them in the true spirit of democracy. It is also a fact that they have exercised their judicial authority with a mixture of progressive activism, on the one

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<sup>144</sup>*Id* para 37. Contra in *Freedom under Law v Acting Chairperson, Judicial Service Commission* 2011 3 SA 549 (SCA) para 50 where it was held that the decision of the JSC to dismiss the complaint that Hlophe JP attempted to improperly influence the Constitutional Court's impending judgment on the basis of a procedure inappropriate for the final determination of the complaint, and on the basis that cross-examination would not take the matter any further, constituted an abdication of its constitutional duty to investigate the complaint properly. Further, that the JSC decision to dismiss the complaint constituted administrative action and was reviewable in terms of s 6(2)(h) of PAJA for being unreasonable, in that there was no reasonable basis for it. It was also held in *Acting Chairperson, Judicial Service Commission v Premier, Western Cape* 2011 3 SA 538 (SCA) that the Provincial Premier was required to be part of the JSC when it sits to consider complaints of misconduct of a judge under s 178(1)(k) of the Constitution. Further, that the majority support for decisions required by s 178(6) was the majority of members entitled to be present according to s 178(1) and not merely the majority of those present and voting.

<sup>145</sup>*Id* para 45.

<sup>146</sup>*Id* para 37.

hand, and in non-absolute terms, on the other. Consequently, they have constantly applied restraints and self-constraints in circumstances where they consider that making a particular judicial order will otherwise impinge upon the doctrine of separation of powers and thereby amount to usurpation of the legislative or executive powers. By resorting to the doctrine of legality and irrationality, the courts have checked and balanced the exercise of executive powers and duties to ensure that they accord with the rule of law and the supremacy of the Constitution. They have through their judgments sought to press these principles home to the legislature, the executive, the political class and even the judicial arm. They have equally ensured that legislation and executive conduct did not violate the entrenched constitutional values and the fundamental rights of the individual.

One lesson that clearly emerges from this study is that, in a constitutional democracy based on the rule of law, where governmental powers are systematically distributed, obligations, rights and duties clearly demarcated and articulated as in the South African situation, there can be no question of unfettered executive power or the exercise of executive discretion unamenable to judicial review. The concept of untrammelled executive power is no more than a farce in the face of a Constitution which is the supreme source of power; a Constitution that guarantees equality before the law<sup>147</sup> and a Constitution that binds all organs of State. In such a constitutional environment, the State cannot be above the law. Every exercise of public power – be it executive, legislative, judicial or administrative – is subject to the constitutional principles of legality and rationality.<sup>148</sup>

The contemporary constitutional jurisprudence of South Africa is replete with cases abundantly illustrating the foregoing point which has become a norm of constitutional adjudication since *Pharmaceutical Manufacturers Association through SARFU (3)*; *Masetlha*; *Albutt*; *Association of Regional Magistrates*; down to *Scalabrini Centre*; and a host of the *Democratic Alliance* cases, among others. Given the very many disputes and issues that have come to the courts in the last twenty years and in view of the important role they have played in resolving those wrangles, there can be no doubt that, indeed, the judiciary has been the nerve-centre of the South African democratic experiment. Through their adjudicative role, they have attributed a functional meaning to the distribution of government functions and of enforcing that distribution in particular cases; their opinions as to what democracy means in law and practice, what the rule of law represents and what constitutionalism actually translates into in a real life situation; their adjudication over rights of individuals and the obligations of the State and its

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<sup>147</sup>Section 9(1) of the Constitution.

<sup>148</sup>Per Ngcobo J *Affordable Medicines* (n 48) para 35.

agencies, the courts have thereby shaped the political process as well as demonstrated their pride of place in a distinctly unique and significant way in the governance of the democratic State. Whether, however, the executive has learnt the lessons on constitutional values including accountability and democratic governance delivered through the pages of the judgments of the courts, or has heeded the admonitions adumbrated in the cases, are matters to be adjudged from future executive conduct, and is, totally outside this inquiry. This article therefore concludes that the courts' wide-ranging powers in adjudication notwithstanding, they still find space to distance themselves from matters that are not strictly within the realm of law; those issues that are political, and not suited for adjudication but which are reserved by the Constitution for the legislative or executive branch of government. They have found the doctrine of separation of powers, the principle of the rule of law and the supremacy of the Constitution as the most valuable tools of judicial review under the Constitution.