

PROCEDURAL FAIRNESS AS A COMPONENT OF LEGALITY:
IS A RECONCILIATION BETWEEN *ALBUTT* AND
MASETLHA POSSIBLE?
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INTRODUCTION

In *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) the Constitutional Court expanded the concept of legality. It did so by finding that rationality, as a component of legality, required that the victims of politically motivated crimes had first to be afforded a hearing before the President could exercise his power to pardon prisoners who had been found guilty of committing these crimes, and who had not sought amnesty from the Truth and Reconciliation Commission (“TRC”). The effect of *Albutt* is that the principle of legality is now capable of imposing procedural-fairness standards on the exercise of public power where it would be irrational not to do so, regardless of whether the exercise of such power amounts to administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). Surprisingly, the Constitutional Court held that it was ‘not necessary’ to determine whether the exercise of the President’s pardoning power amounts to administrative action in terms of the PAJA (*Albutt* para 83). The court was content to leave this question ‘open to another day’ (*ibid*).

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Prior to *Albutt*, in *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) a majority of the Constitutional Court, having determined that the dismissal of the then head of the National Intelligence Agency ('NIA'), Mr Billy Masetlha, did not amount to administrative action, reasoned that although the President's exercise of the power to dismiss was subject to the requirements of legality, it would be inappropriate 'to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action' (*Masetlha* para 77).

There are two respects in which *Albutt* and *Masetlha* appear to be at loggerheads with each other. First, in *Masetlha*, the court was at pains to examine whether or not the conduct in question amounted to administrative action in terms of the PAJA; something the court regarded as an unnecessary waste of time in *Albutt*. Secondly, the majority of the court in *Masetlha* took the view that the exercise of executive power ought not to be constrained by procedural fairness, whereas in *Albutt* the court, without engaging with *Masetlha*, and confining itself to the 'specific demands of reconciliation and nation-building' that arose in *Albutt*, found that procedural fairness ought to be imposed on the exercise of the President's pardoning power in that case (Michael Bishop & Jason Brickhill 'Constitutional law' (2011) 3 *JQR* § 2.3.1).

In this note I consider and contrast *Masetlha* and *Albutt*, highlighting the 'tension' between the two decisions (*ibid*) by addressing first the different approaches towards the need to conduct an 'administrative action' inquiry, and the importance of doing so, particularly in procedural fairness cases; and secondly, the different approaches towards procedural fairness as a component of the legality. Finally, I consider the potential scope for imposing procedural fairness as a requirement of rationality in the future.

MASETLHA AND THE ABSENCE OF AN AUDI REQUIREMENT

On 20 March 2006, following the 'Macozoma affair', a scandal involving the alleged unauthorised and clumsy surveillance of Macozoma by operatives of the NIA, and the resultant suspension of Billy Masetlha, the then head of the NIA, the President amended Masetlha's term of office so that it expired on 22 March 2006, some 21 months and nine days earlier than his original term (*Masetlha* paras 9 and 105). The President did so on the basis that the relationship between him, as head of state and of the national executive, and Mr Masetlha, as head of the NIA, had disintegrated irreparably (*Masetlha* paras 9 and 17–18). Mr Masetlha challenged the lawfulness of the amendment of his term of office, which effectively resulted in his dismissal as head of the NIA.

In the High Court it was found that the President's power to dismiss was implicit in s 209(2) of the Constitution of the Republic of South Africa, 1996 (which provides for the President's power to appoint the head of the NIA), and amounts to executive power in terms of s 85(2)(e) of the Constitution. As such, 'the authority to dismiss was not susceptible to judicial review in terms

of the Promotion of Administrative Justice Act' (*Masetlha* para 23). The High Court held that the President's conduct had to 'conform to the principle of legality' and could 'not be exercised in bad faith, arbitrarily or irrationally', but that the irreparable break-down of the relationship between the parties constituted a lawful and rational basis for what amounted to the dismissal of Masetlha (*Masetlha* paras 24–5).

Moseneke DCJ, writing for a majority of the Constitutional Court, agreed that the President had the implicit power to dismiss Masetlha (by amending his term of office) in terms of s 209(2) of the Constitution (as read with s 3(3)(a) of the Intelligence Services Act 65 of 2002, which enjoins the President to appoint a Director-General for each of the Intelligence Services) (*Masetlha* para 68), and then turned to consider whether the President's conduct could be reviewed on any basis.

Masetlha argued that his dismissal fell to be reviewed and set aside because it did not comply with the procedural fairness requirements: of the PAJA; or (alternatively) of the principle of legality; or (further alternatively) recognised by our common law in *Administrator, Transvaal, & others v Traub & others* 1989 (4) SA 731 and *Administrator, Transvaal & others v Zenzile & others* 1991 (1) SA 21 (A) (*Masetlha* para 74). In rejecting Mr Masetlha's common law argument Moseneke DCJ distinguished the facts of *Zenzile* (supra) from the facts before it on the basis of 'the special legal relationship that obtains between the President as head of the national executive, on the one hand, and the Director-General of an intelligence agency, on the other' and because the President's power to dismiss derives from national legislation and the Constitution (*Masetlha* para 75).

Moseneke DCJ went on to find that the dismissal of Masetlha was an exercise of executive power in terms of s 85(2)(e) of the Constitution, was excluded from the definition of 'administrative action' under s 1 of the PAJA, and for this (conceptual) reason, not subject to the procedural fairness standards contained in the PAJA (*Masetlha* para 76). The court felt that the power to appoint and dismiss were 'conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security' (*Masetlha* para 77). In defining the executive constraints that would be placed on the exercise of executive power (generally), Moseneke DCJ held emphatically (*Masetlha* para 78) that '[t]he authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. *Procedural fairness is not a requirement*' (emphasis supplied).

Moseneke DCJ agreed with the High Court that the breakdown of the relationship of trust between the parties constituted a rational basis for dismissing Masetlha (*Masetlha* para 86).

In his minority opinion, in which Madala J concurred, Ngcobo J (as he then was) agreed that the President had the (implicit) power to dismiss Masetlha, but disagreed that the President could unilaterally alter Masetlha's term of office without consulting Masetlha, finding that the President's failure to consult was inconsistent with the rule of law (*Masetlha* para 108). In

considering whether the doctrine of legality, an aspect of the rule of law, has a 'procedural component', Ngcobo J held that '[i]n the context of the Constitution' the rule of law refers to 'a wider concept and a deeper principle' than mere non-rational decisions: that of 'fundamental fairness' (*Masetlha* para 179). For Ngcobo J, the requirement of 'fundamental fairness' ought to extend to the exercise of executive powers because 'those who exercise public power must act fairly' (*Masetlha* para 180). Acting fairly would involve decision-makers being afforded 'the opportunity to hear the side of the individual to be affected by the decision' and would enable decision-makers 'to make a decision after considering all relevant facts and circumstances', which would serve to minimise arbitrariness (*Masetlha* para 184). In this regard, Ngcobo J held (*Masetlha* para 184):

'There is indeed an inter-relationship between failure to act fairly and arbitrariness. In this sense, the requirement of the rule of law that the exercise of public power should not be arbitrary, has both a procedural and substantive component. Rationality deals with the substantive component, the requirement that the decision must be rationally related to the purpose for which the power was given and the exercise of the lawful reason for the action taken. The procedural component is concerned with the manner in which the decision was taken. It imposes an obligation on the decision-maker to act fairly. To hold otherwise would result in executive decisions which have been arrived at by a procedure which is clearly unfair being immune from review.'

Ngcobo J also referred to *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) where the court recognised this procedural component of the rule of law in the form of the maxim *audi alteram partem*, which 'provides that no one should be condemned unheard' (*Masetlha* para 187). In Ngcobo J's view, for *Masetlha*, *audi alteram partem* would entail 'at a bare minimum' that he be informed of the proposed action against him and the reasons for it, and permitted an opportunity to comment thereon (*Masetlha* para 195). By unilaterally altering *Masetlha*'s term of office without consulting him, the President acted contrary to this maxim, and in breach of legality (*Masetlha* para 207). Hence Ngcobo J held (*ibid*) that

'the President had no power to unilaterally alter the applicant's term of office so as to terminate the employment contract prior to its expiry date. On the contrary, the President was required by the duty to act fairly to consult the applicant prior to taking the decision to alter the term of office of the applicant. In all the circumstances, the President acted beyond his powers . . . and therefore *in breach of the doctrine of legality*.' (Emphasis supplied.)

ALBUTT AND AN AUDI REQUIREMENT IN EXCEPTIONAL CIRCUMSTANCES

Albutt arose from the creation by former President Thabo Mbeki in November 2007 of a special dispensation process pursuant to which prisoners who had been convicted of politically motivated crimes, but who had for a number of reasons not applied for amnesty to the TRC, could be pardoned

(*Albutt* para 4). Prior to litigation, the President had declined requests for victim participation in the special dispensation process (*Albutt* para 8). In the Constitutional Court the issue at stake was ‘whether the President is required, prior to the exercise of the power to grant a pardon to [a] group of convicted prisoners, to afford the victims of these offences a hearing’ (*Albutt* para 1).

In the court a quo (in the unreported decision of *Centre for the Study of Violence and Reconciliation & others v President of the Republic of South Africa & others* [2009] ZAGPPHC 35) it was held that the exercise of the power to pardon conferred on the President under s 84(2)(j) of the Constitution was administrative action in terms of the PAJA (*Centre for the Study of Violence and Reconciliation* (supra) at 26 and *Albutt* para 11). The High Court — applying the common law rule of construction *unius inclusio est alterius exclusio* — adopted the view that because the presidential pardoning power was not (in contrast to certain other powers) expressly excluded from the definition of ‘administrative action’ in s 1 of the PAJA, quite simply the legislature could not have intended to exclude it (*Centre for the Study of Violence and Reconciliation* (supra) at 25). Given the High Court’s finding that the exercise of the presidential pardoning power amounted to administrative action for purposes of the PAJA, it followed that the President was subject to the procedural requirements imposed by the PAJA, and his failure to comply with those requirements would render the exercise of his power unlawful (*Centre for the Study of Violence and Reconciliation* (supra) at 27 and *Albutt* paras 11–12). The President was thus (on an interim basis, pending the outcome of proceedings for final relief) interdicted from granting any pardons in terms of the special dispensation (*Centre for the Study of Violence and Reconciliation* (supra) at 30 and *Albutt* para 13).

In light of the finding in *Centre for the Study of Violence and Reconciliation*, a prisoner who stood to benefit from the special dispensation, Ryan Albutt, sought leave to appeal directly to the Constitutional Court to declare s 1 of the PAJA unconstitutional in the event that the definition of administrative action was found to include the exercise of the power to grant pardons to prisoners under s 84(2)(j) of the Constitution (*Albutt* para 2).

Three grounds were proffered to the Constitutional Court as the basis upon which Albutt’s appeal should be dismissed, and the challenge to the President’s decision not to permit victim participation in the special dispensation process should be upheld. It was argued first that the President’s decision was irrational, secondly that the context-specific features of the process required the President to afford the victims a hearing, and thirdly that the exercise of power to grant pardons constitutes administrative action which ‘triggers the duty to hear people affected’ (*Albutt* para 47).

In dealing with the first challenge, the Constitutional Court (per Ngcobo CJ) pointed out that the exercise of all public power must comply with the Constitution and the doctrine of legality, which is part of the rule of law, and that this in turn requires that the exercise of the power to grant a pardon must be rationally related to the purpose sought to be achieved thereby (*Albutt* para 49). The Constitutional Court held (*Albutt* para 50):

‘To pass constitutional muster therefore, the President’s decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution.’

In evaluating the rationality of the means to achieve constitutionally permissive objectives, courts must show a high degree of deference to the executive and the test is not ‘whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved’ (*Albutt* para 51). Only if the means chosen are, objectively speaking, not rationally related to the objective sought to be achieved would they fall short of the standard demanded by the Constitution (*ibid*). The objectives of the special dispensation purpose were found to be those of ‘nation-building and national reconciliation’ (*Albutt* para 55). Further, excluding victims of politically motivated crime from participation in the special dispensation process would keep them and their dependents ignorant about what happened to their loved ones and ‘leave their yearning for the truth effectively unassuaged’ (*Albutt* para 61). This would ‘perpetuate [the victims’] legitimate sense of resentment and grief’, which would not be ‘conducive to nation-building and national reconciliation’ (*ibid*). Victim participation was thus found to be ‘crucial’ to these objectives of the special dispensation process (*Albutt* paras 59 and 68). In the circumstances, it was found that ‘it could hardly be suggested that the exclusion of the victims from the special dispensation process is rationally related to the achievement of the objectives of the special dispensation process’ (*Albutt* para 68).

In considering whether the particular features of the special dispensation process required the President to hear victims, the court found that ‘the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation require, *as a matter of rationality*, that victims must be given the opportunity to be heard in order to determine the facts on which pardons are based’ (*Albutt* para 72, emphasis supplied).

Ngcobo CJ then elected not to invoke the reasoning embraced wholeheartedly in his minority opinion in *Masetlha*, that procedural fairness is an important component of the rule of law, separate from, but supportive of, the requirements of rationality and non-arbitrariness, finding it unnecessary to do so (*Albutt* para 73 and *Masetlha* para 179). Here lies the heart of the tension between *Masetlha* and *Albutt*, an issue to which I shall return later in this note.

Ngcobo CJ also found it unnecessary to deal with the third ground for the challenge to the President’s decision not to permit victim participation in the special dispensation process, namely that the exercise of power to grant pardons constitutes administrative action for purposes of the PAJA, which ‘triggers the duty to hear people affected’ (*Albutt* paras 47 and 81). Ngcobo CJ made this finding on the basis that the ‘central question’ whether victims of applicants for pardons under the special dispensation process were entitled to a hearing had already been answered in the affirmative (pursuant to a

rationality inquiry), with the result that there was no need to delve into ‘difficult questions’ such as:

1. whether ‘PAJA merely regulates the exercise of the power [to grant pardons] or whether it in effect reclassifies executive action as administrative action’;
2. ‘whether it is constitutionally permissible for the legislature to do either of these [things]’;
3. ‘whether the exercise of the power to grant a pardon under section 84(2)(j) constitutes administrative action’; or
4. ‘whether PAJA, upon its proper construction, includes within its ambit the exercise of the power to grant pardon[s] under section 84(2)(j) [of the Constitution]’ (*Albutt* paras 80–1).

Ngcobo CJ then went on to chastise the High Court for answering the question whether the power to pardon falls within the ambit of PAJA (*Albutt* paras 81–2):

‘Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so. There may well be cases, and they are very rare, when it may be necessary to decide an ancillary issue in the public interest. This is not such a case.’

As I shall discuss in the next part of this note, Ngcobo CJ’s treatment of the application of the PAJA as an ‘ancillary’ question is problematic. Not only is it inconsistent with prior rulings of the Constitutional Court, it also undermines the important role of the PAJA in our administrative law.

MASETLHA AND ALBUTT: AT LOGGERHEADS

The importance of the interpretation and application of the PAJA

Albutt tells us that questions relating to the interpretation and application of the PAJA in administrative justice cases are merely ‘ancillary’, whilst rationality (as a component of legality) ought to be treated as a primary issue. This contrasts starkly with decisions of the Constitutional Court such as *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC) (see para 22), and most notably, *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & others* 2006 (2) SA 311 (CC) (see para 95–6), where Chaskalson CJ held:

‘PAJA is the national legislation that was passed to give effect to the rights contained in section 33. It was clearly intended to be, and in substance is, a codification of rights. It was required to cover the field and purports to do so.

A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That

would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation.’

Similarly in *New Clicks* (supra) Ngcobo J (as he then was) warned against the creation of ‘two parallel systems of [administrative] law’ (para 436), thus reinforcing that ‘PAJA must not be bypassed but must be applied where it is applicable’ (Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 133). Hoexter argues convincingly (ibid at 134, footnote omitted) that

‘[t]his first question in any administrative-law case ought surely to be whether the most specific and most detailed norm, the PAJA, is applicable, and not whether the problem is capable of being solved by the rule of law, a far more general and abstract constitutional doctrine’.

Arguably an ‘administrative-law case’ should be conceived broadly, as one in which the conduct in question *might* (but does not necessarily) amount to ‘administrative action’ in terms of s 1 of the PAJA, alternatively s 33 of the Constitution.

Had the Constitutional Court in *Albutt* dealt first with the question of the application of the PAJA, which it ought to have done in accordance with the approach mandated by *New Clicks* (supra) and *Bato Star* (supra), and found the PAJA to be applicable, it could conceivably have disposed of the case without reference to the question of rationality as an incidence of the rule of law at all — its approach could have been inverted entirely. Indeed, in *Masetlha*, only after excluding the PAJA as a basis for reviewing the President’s conduct did the court embark on an analysis of legality. That the Constitutional Court in *Albutt* avoided the question of the application of the PAJA in the context of the High Court’s finding that the exercise of the President’s pardoning power was administrative action, and even saw fit to chastise the High Court for following the approach mandated in *New Clicks* (supra) and *Bato Star* (supra), and followed in *Masetlha*, is incongruous. There may be good reasons why exercises of public power that do not (because of the technical definition in s 1 of the PAJA) amount to administrative action in terms of the PAJA ought nevertheless to be subjected to some of the standards imposed by the PAJA. However, it remains important to justify why conduct that is not, definitionally, ‘administrative action’, is nonetheless subjected to some of the standards imposed by the PAJA. Otherwise in every instance where conduct might be ‘administrative action’, legality could simply be invoked with the result that the PAJA, the constitutionally mandated legislation seeking to give effect to the right to just administrative action in terms of s 33 of the Constitution, is continually undermined (Cora Hoexter ‘The rule of law and the principle of legality in South African administrative law today’ in Marita Carnelley & Shannon Hoctor (eds) *Law, Order and Liberty, Essays in Honour of Tony Mathews* (2011) 55 at 67). As Hoexter (ibid) points out,

‘reliance on the principle of legality subverts s 33 of the Constitution. The use of the principle of legality so as to avoid the administrative action inquiry detracts from the entire scheme laid down in s 33, whose purpose is “to establish a coherent and overarching system for the review of all administrative action”’.

Moreover, in procedural fairness cases in particular, the application of the PAJA ought to be a primary inquiry, because whether or not the PAJA applies could make an important difference to the standard of procedural fairness applied. In this regard, Iain Currie ('What difference does the Promotion of Administrative Justice Act make to administrative law' (2006) 15 *Acta Juridica* 325 at 335–6; author's emphasis, and footnotes omitted) states:

'PAJA is *general* administrative law, applicable to all instances of administrative action as defined. Taking PAJA seriously as a general *legislative* statement of the duties of administrators when they perform administrative action in accordance with powers granted by other legislation should give the Act a supplementary effect on that other legislation. PAJA provides in other words a set of legislated rules and principles with general effect aimed at ensuring the lawful, reasonable and procedurally fair exercise of particular administrative power. In the case of procedural fairness, this would mean that the rules and principles of s 3 and s 4 supplement other powers to exercise administrative action.'

A finding in *Albutt* that the exercise of the President's pardoning power amounted to administrative action would undoubtedly have influenced the standard of procedural fairness that was applicable. If the action was treated as 'affecting the public' for purposes of s 4 of the PAJA, notice and comment procedures as provided for in s 4(3) might have been appropriate, whereas if the action was treated as affecting only individuals for purposes of s 3, the basic requirements of procedural fairness contained in s 3(2)(b)(i) ought to have been imposed, with the possibility of the additional requirements of s 3(3) being imposed.

All that the Constitutional Court had to say about the standard of procedural fairness to be imposed in *Albutt* was that its judgment did 'not imply or entail that the President, in affording a hearing to the victims of those applying for pardon under the special dispensation process; the President [was] bound to replicate the procedures, investigations and hearings of the TRC' (*Albutt* para 77). Nothing was said about the nature of the hearing to be afforded to the victims. If the PAJA had been the basis for the decision in *Albutt* it would have been reasonably clear — from detailed legislative provisions — what were the parties' respective rights and obligations. The judicial inquiry in *Albutt* began and ended with whether victims were entitled to a hearing, and 'fizzled out' at the stage of considering the content of procedural fairness. Hoexter uses this term 'fizzle out' to describe what happens to administrative law cases once the 'administrative action' inquiry has been completed, but it is arguable that the same phenomenon occurred in *Albutt* notwithstanding the 'administrative action' inquiry having been bypassed altogether (Hoexter 'The rule of law' op cit at 64).

Given this 'fizzling out' it is hardly surprising that there remains discord as to whether the procedures followed in the special dispensation process have yielded a constitutional outcome (Press Release: Zuma's Presidential Pardon Process "Unconstitutional" 15 June 2012 available at [http://ictj.org/news/zuma's-presidential-pardons-process-\"unconstitutional\"](http://ictj.org/news/zuma's-presidential-pardons-process-\), accessed on 24 June 2012). According to the South African Coalition for Transitional Justice,

President Jacob Zuma was set to recommend 150 criminals for pardons, despite its protestations that the special dispensation process ‘eschewed the exposure of the full truth of apartheid era crimes as well as crimes committed well into South Africa’s constitutional democracy’ (ibid).

The question whether or not the PAJA is applicable, therefore, is not a mere ‘ancillary’ issue, to be left undecided in cases like *Albutt*. Where procedural fairness standards are at stake, whether or not the PAJA applies makes a significant difference to the outcome of such matters and the relief to be granted. For a start the discord now surfacing in relation to the process that has been followed by the President in relation to the special dispensation process could have been avoided had it been made clear in *Albutt* what procedure ought to have been followed. This is because

‘[t]he PAJA, for all its problems, offers litigants some degree of certainty about what the requirements of administrative justice are and what circumstances will attract them. Even allowing for the fact that some of this is false certainty — the elements of the definition of administrative action are highly manipulable and contingent, after all — the statute goes into considerable detail about matters such as procedural fairness and the giving of written reasons. The principle of legality is far less nuanced and far less certain as to its contents in particular cases.’ (Hoexter ‘The rule of law’ op cit at 67–8.)

The Constitutional Court’s refusal to engage with the PAJA is not, in the circumstances, a matter of mere judicial minimalism or avoidance; it is a failing which has the effect of denigrating the important role that s 3 and s 4 have in reforming our administrative law (on the potential of ss 3 and 4 to reform our administrative law see Currie op cit at 334, and on the question of avoidance see further Hoexter *Administrative Law* op cit at 136).

What the Constitutional Court ought to have done is explain whether or not the exercise of pardoning powers amounts to administrative action as defined in the PAJA and, if not, whether the definition of administrative action is unconstitutional. Alternatively, it should have explained why standards of procedural fairness ought nevertheless to apply to the exercise of such power (either because procedural fairness is a component of legality, as Ngcobo J argued in *Masetlha*, or because procedural fairness was required by rationality in the circumstances of the particular case). Had the Constitutional Court considered the proper application and interpretation of the PAJA, it could have rejected the formalistic reasoning adopted by the High Court in *Centre for the Study of Violence and Reconciliation* (supra) and looked at the case through the lens of whether it was the sort of matter to which the requirements of administrative justice in general, and the provisions of the PAJA specifically, ought to apply. The ‘palisade of qualifications’ surrounding the ‘cumbersome’ definition of ‘administrative action’, though not without difficulties, is undoubtedly intended to focus the judicial mind on this question (*Grey’s Marine Hout Bay & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) para 21). In bypassing the application of PAJA, the court ignored important questions about the desirability, necessity and possibility of imposing the requirements of the PAJA, questions which were

carefully considered in the court's earlier jurisprudence (see, for example, *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) Section 21 Inc* 2001 (2) SA 1 (CC) and *New Clicks* (supra)).

By considering, for instance, the question whether the President's pardoning power amounts to conduct of an 'executive' rather than 'administrative' nature, the Constitutional Court might have looked at how closely related the exercise of the President's pardoning power was to policy matters, a factor that was taken into account in *President of the Republic of South Africa & others v South African Rugby Football Union* 2000 (1) SA 1 (CC) ('SARFU') para 143. This inquiry might have led the Constitutional Court to the conclusion that granting a pardon is distinct from the political power exercised by the President when, for example, he decides to appoint a commission of inquiry, and that in the absence of a framework for taking into account representations from victims in the special dispensation process, it was desirable to impose the specific requirements of the PAJA. Though they are 'difficult', these are precisely the sort of issues the Constitutional Court is mandated to consider, so as to avoid 'subverting s 33 of the Constitution', and to ensure 'a coherent and overarching system for the review of all administrative action' (*Albutt* para 80 and Hoexter 'The rule of law' op cit at 67). This is not to say that the principle of legality ought not to remain as a 'backstop, a safeguard and a safety net', just that sound judicial reasoning requires that legality ought only to be invoked having considered whether the PAJA might apply, and determined that it is not applicable (Hoexter *ibid* at 63). Indeed, had the PAJA been found to be applicable in *Albutt*, the nebulous principle of legality need not have come into the picture at all, and the further conflict between *Albutt* and *Masetlha* which I now address, would not have arisen.

Procedural fairness as a component of legality

The finding in the majority judgment in *Masetlha* that although the President's exercise of the power to dismiss was subject to the requirements of legality, it would be inappropriate 'to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action' (*Masetlha* para 77), has been criticised for setting 'the law of procedural fairness back twenty years' (Cora Hoexter 'Clearing the intersection? Administrative law and labour law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209). Hoexter (*ibid* at 231) argues:

'When one considers how well established the *audi alteram partem* principle is in our law generally, and how well established it is in the context of dismissal (at least in administrative law), the majority's conclusion seems sadly retrogressive.'

Plasket describes Moseneke DCJ's finding that procedural fairness is not a component of the rule of law as 'simply wrong' (Clive Plasket 'Administrative Law' 2008 *Annual Survey of South African Law* at 41). He states (*ibid*): 'Every theory of the rule of law, but for that pale version that would have

legitimized the law of Nazi Germany and Apartheid South Africa, includes procedural fairness.'

As Hoexter argues, if the majority wished not to impose principles of procedural fairness on the exercise of the President's power to dismiss the head of the NIA, it ought to have treated *Masetlha* as an exceptional case rather than eroding well established general principles of procedural fairness ('Clearing the intersection?' op cit at 233). It has also been suggested that the only sensible way to read the majority decision in *Masetlha* is to regard the findings on procedural fairness and the rule of law not as the general rule, but driven by the specific context of the case: that of the need to protect national security, which cannot be achieved if the President's relationship of trust with the head of the NIA has broken down irreparably. So, Krüger argues that the majority's approach in *Masetlha*, 'if not read in context and with care' could 'set a perilous precedent reducing the constraints on the exercise of executive power, significantly and potentially eroding the supremacy of the Constitution in that respect' (R Krüger 'The South African Constitutional Court and the rule of law: The Masetlha judgment, a cause for concern?' 2010 (13) *PER* 468 at 485). Krüger's reading of *Masetlha* is, however, not how *Masetlha* is generally understood (see Bishop & Brickhill op cit § 2.3.1). The majority decision in *Masetlha* therefore remains authority for the problematic proposition that in general, executive power ought not to be constrained by procedural fairness requirements, since procedural fairness is not a component of the rule of law.

Albutt represents an important shift away from the majority's approach in *Masetlha* in relation to procedural fairness as a component of legality, but does not overrule *Masetlha*. Given the strenuous and convincing objections to the majority judgment in *Masetlha*, why did the Constitutional Court in *Albutt*, instead of treating the special dispensation process as an exceptional case, not take the opportunity to clarify, or even overrule *Masetlha*? The *Albutt* court's refusal to overrule *Masetlha*, instead preferring to ignore Ngcobo J's minority opinion in *Masetlha* and adopting an excessively minimalist approach, is in keeping with the Constitutional Court's palpable fear of overruling its own decisions, having failed to develop a principled basis upon which to do so (see in this regard Jason Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional Court Review* 79). This fear would account for Ngcobo CJ's absolute refusal in *Albutt* to interfere with the approach adopted by the majority in *Masetlha*, and for his finding that it was unnecessary to delve into the rich reasoning espoused in his minority opinion in *Masetlha*, which asserted that in general, procedural fairness is a component of the rule of law. There is, however, no doubt that 'the [minority] approach of Ngcobo J in *Masetlha* was a portent of what was to come in *Albutt*', and that the *Albutt* court was able, given the very specific facts of that case, to do what a majority of the *Masetlha* court was unprepared to do: develop the principle of legality so that it includes a procedural fairness component where this is required by rationality (Hoexter 'The rule of law' op cit at 60).

Could the Constitutional Court have adopted a more principled approach in *Albutt*, so as to distinguish it from *Masetlha*? Perhaps the court could have

recognised that the political nature of some decisions might render it inappropriate, by virtue of the separation of powers doctrine, to subject them to the requirements of procedural fairness (as in *SARFU* (supra) and possibly even *Masetlha*), whilst the deliberative nature of other decisions could mean that it is unnecessary to do so (as in *Fedsure* (supra)). Further, practical reasons, such as the need to run an efficient administration, or the need to make a decision on an urgent basis might make it appropriate to bypass — some, if not all of — the requirements of procedural fairness (*Masetlha* para 206). It is regrettable that the court in *Albutt* declined to explore these possible bases upon which procedural fairness might be an important component of the rule of law in some circumstances, but not in others.

CONCLUDING REMARKS: THE FUTURE SCOPE FOR PROCEDURAL FAIRNESS IN RULE OF LAW CASES

Given the Constitutional Court's refusal to overrule or clarify *Masetlha*, the future scope for the imposition of procedural fairness as a component of the legality is limited to cases where a failure to impose procedural fairness standards in the context-specific circumstances of the particular case would be irrational. However, Hoexter ('The rule of law' op cit at 61) argues that 'it is difficult to think of a decision whose rationality would not be enhanced by hearing both sides impartially. There is thus tremendous scope for the further development of procedural fairness as a requirement of the principle of legality and rationality.'

I am less certain that many cases will arise where procedural fairness will be imposed as a requirement of rationality. As Price (Alistair Price 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network* and *Albutt*' (2010) 127 *SALJ* 580 at 587) points out, the effect of *Albutt* is that

'[a] duty to hear, when exercising public power, will exist where affording a right to procedural fairness is "the *only* rational means" (paras 69 and 90) — ie is necessary — to serve the legitimate government purpose(s) which the power in question is invoked or conferred to advance' (emphasis supplied).

The question, therefore, is not whether rationality would be 'enhanced' by a hearing, but rather whether a hearing is the 'only' means to achieve the relevant government purpose. *Albutt* was, in my view, an easy case — a refusal to afford a hearing to the victims of politically motivated crimes, in a special dispensation process designed to address the unfinished business of the TRC, was plainly irrational on this test. It also involved 'a question of procedural justice', which judges are arguably better placed to decide than the executive (ibid at 590). Recently, the Supreme Court of Appeal was prepared to recognise 'another semi-procedural element to rationality review' when it held that the Judicial Service Commission had acted irrationally when, confronted with two mutually destructive versions of events, it took a decision 'without first determining the veracity of the facts that form the basis for the decision', including by subjecting those facts to cross examination (see *Freedom Under Law v Acting Chairperson: Judicial Service*

Commission 2011 (3) SA 549 (SCA) paras 48–50, and the commentary thereon in Bishop & Brickhill op cit § 2.3.1). Given the judicial nature of the decision at issue in *Freedom Under Law* (supra), the court was arguably once again better equipped than the Judicial Service Commission to determine whether rationality had prevailed.

In difficult cases, involving ‘complex budgetary questions at different levels of government’, where the institutional competence of the court to intrude into the sphere of the other organs of state is less clear, it is doubtful whether our courts will be as willing to utilise rationality as a basis for imposing procedural fairness standards (Bishop & Brickhill op cit § 2.3.1). After all, a finding that government’s conduct is irrational is no mean feat. If, however, procedural fairness were to be acknowledged as a requirement of legality generally (rather than a requirement of rationality), there would be greater scope for the imposition of procedural fairness standards in the exercise of public power, since the court would not have to declare conduct irrational in order to impose procedural fairness standards. Then again, this would require that *Masetlha* be overruled or clarified: a prospect which, for now, seems unlikely.

POSTSCRIPT

Following the submission of this note, the Supreme Court of Appeal and the Constitutional Court in *Democratic Alliance v The President of RSA & others* 2012 (1) SA 417 (SCA) and *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) respectively (collectively the ‘DA decisions’ and individually the ‘DA (SCA)’ and ‘DA (CC)’ respectively) invoked *Albutt* in requiring that the appointment of Mr Menzi Simelane, our ill-fated erstwhile National Director of Public Prosecutions, ought to follow a rational process (*DA (SCA)* para 107–8 and 112 and *DA (CC)* paras 70, 74, 77 and 86–9). Both courts held that the President’s failure to investigate fully Mr Simelane’s fitness for office rendered the process of Mr Simelane’s appointment irrational (ibid). Although these cases made reference to a process element of rationality: the process by which the decision was made and the decision itself had to be rational (*DA CC* para 34–6), what they required, in the final analysis, was that well-established requirements of lawfulness ought to have been complied with: the President, in reaching his decision to appoint Mr Simelane, ought to have considered all relevant considerations and ought not to have made an error of fact (*DA SCA* paras 107–8 and 112 and *DA CC* paras 70, 74, 77 and 86–9). They do not, therefore, amount to an extension of the *Albutt* findings.

More recently, in the as-yet unreported decision of *Scalabrini Centre, Cape Town & others v Minister of Home Affairs & others* [2013] ZAWCHC 49 Rogers J relied upon *Albutt* and the *DA decisions* to assert (obiter) that a decision to close down a Refugee Reception Office in Cape Town (were it to be found not to amount to administrative action affecting the public) would fall to be set aside on the rounds of rationality, a requirement of legality, because the

state had failed to consult with, and obtain the views of certain ‘stakeholders’, which would, on the peculiar facts of the case, be irrational (*Scalabrini* (supra) paras 91–7). These obiter remarks reinforce the *Albutt* finding that in exceptional circumstances rationality may require the imposition of procedural fairness standards. However, what precisely those standards entail was left unanswered, since the detailed provisions of s 4 of PAJA were found to be applicable, the conduct in question having been classified as administrative action for purposes of PAJA (ibid paras 81–6).