

MINI-DISSERTATION

An analysis of the constitutionality of the President's reliance on 'prerogative powers' as the basis of appointing and dismissing Cabinet members - An interrogation of the meaning of section 91(2) of the Constitution

By

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INTRODUCTION

There is no debate that when appointing or dismissing a cabinet member, the President is exercising a legitimate power granted exclusively to him or her by section 91(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution).¹ This specific section entitles the President to compose his cabinet by authorising him or her to appoint or dismiss a Deputy President and Cabinet Ministers. The provision further empowers the President to assign powers and functions to Cabinet members, and concludes by stating that the President may also dismiss them. It was by virtue of this constitutionally granted power that on 9 December 2015, former President Jacob Zuma "...decided to remove Mr Nhlanhla Nene as Minister of Finance, ahead of his deployment to another position."²

No further explanation was forthcoming from the former President about why he dismissed Minister Nene, except that it was his prerogative; and this position was supported by the African National Congress (ANC) when it expressed that: "President Jacob Zuma has exercised his constitutional prerogative to appoint a new finance Minister".³ This support is significant because it came from the governing party in South Africa, by virtue of its majority in Parliament, which effectively empowers the ANC to control who is voted into office as President of the Republic of South Africa, as required by section 86(1) of the Constitution.⁴

The problem with both statements is that they appear to suggest that "constitutional prerogative" is understood to mean unfettered power to appoint or dismiss a member of Cabinet for any reason. This in my view is tantamount to the retention of the erstwhile "prerogative powers", that prevailed under white minority rule that was premised on the Westminster constitutional system. The two statements are also significant in that they give the public a glimpse of how a former President and the governing party of South Africa perceive the nature of the powers of the President of the Republic.

It is my intention to assess the constitutional validity of what potentially appears to be a misunderstanding of the nature of the President's power to compose and reshape cabinet in terms of section 91(2). It seems that "constitutional prerogative", as understood by both President Zuma and the ANC, is incompatible with the broader constitutional principles underpinning South Africa's constitutional democracy, which is founded on the rule of law and the supremacy of the constitution.⁵ This is so because section 2 of the Constitution contains the supremacy clause, which invalidates any law

¹ Section 91(2) of the Constitution of the Republic of South Africa, 1996 which reads: "The President appoints the Deputy President and Cabinet Ministers, assigns their powers and functions, and may dismiss them".

² Official Presidency Statement issued on 9 December 2015-<https://www.thepresidency.gov.za>.

³ Mail and Guardian Online Newspaper 9 December 2015:<https://www.mg.co.za>.

⁴ Section 86(1) states that: "At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or man from among its members to be President".

⁵ Section 1(c) of the Constitution states that: The Republic of South Africa is one, sovereign, democratic state founded on the following values: (c) supremacy of the constitution and the rule of law.

or conduct inconsistent with the Constitution and demands that the obligations imposed by it be fulfilled.⁶

As a result, the rule of law is a broad constitutional value that must be applicable to how the power in section 91(2) is to be exercised by the President, consequently I intend in chapter 1 to trace the origin and nature of the concept of “prerogative powers”, which generally seems to be the only reason that the erstwhile President of South Africa was willing to provide as the basis of his decision to appoint and dismiss members of cabinet. In particular, a concise discussion of the origins of prerogative powers from their English law roots, until their formal introduction to South African law in the time of the Union of South Africa in 1910, to the Republic of South Africa in 1961, until the interim Constitution of 1993 and final Constitution of 1996 will be undertaken.

After a brief analysis of the applicable law through the aforementioned period, a discussion and conclusion will be offered regarding the current status of prerogative powers under the Constitution of 1996, which will then lead to a further, but brief discussion of whether or not such a “presidential prerogative” should still form part of South Africa’s current legal discourse.

In chapter 2 there will be a discussion of how the power in section 91(2) of the Constitution ought to be interpreted and how other relevant constitutional values apply to this exclusive presidential power. Having answered this question, then the guiding principles on how such powers should be exercised will emerge. It will consequently be apposite in chapter 3 to discuss the critical question of the justiciability of the exercise of the powers in section 91(2), in other words, whether it is appropriate to legally challenge the exercise of such powers that are only granted to the President in a court of law by way of judicial review? If the answer to the last-mentioned question is in the affirmative, this then raises the question of the applicable standard of judicial review.

In chapter 4 there will be a discussion of the doctrine of legality and its implications on the President’s power to appoint or dismiss a member of Cabinet. Chapter 5 will be dedicated to a discussion of the most relevant cases that came before the Constitutional Court, which dealt with the legal requirements for the proper exercise of the President’s powers to appoint senior public functionaries. It is my contention that binding legal precedents already exist as a result of these cases, which dealt with previous presidential conduct, where much light was shed on exactly what is legally required from the President when exercising his or her official power to appoint or dismiss senior officials. This chapter will dissect and extract such applicable principles primarily from the three most relevant Constitutional Court cases, namely: *Democratic*

⁶ Section 2 of the Constitution reads: “The Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

Alliance v President of the Republic of South Africa (Simelane),⁷ *Billy Lesedi Masetlha v President of the Republic of South Africa (Masetlha)*,⁸ *Minister of Defence and Military Veterans v Motau and Another (Motau)*.⁹

The *Masetlha* and *Simelane* matters specifically dealt with the President's power to appoint and dismiss high level senior government officials, and the *Motau* matter dealt with a member of the Executive's power to dismiss members of the board of directors of a state owned company. These matters contain applicable legal principles to support my conclusions relating to the fact that other constitutional values apply to the exercise of section 91(2), which then gives content to how such power should be validly exercised by the President.

The relevance of the *Motau* judgment in relation to section 91(2) is the fact that the power of a Minister to appoint a board of directors, is similar to that of a President when appointing Cabinet members, as the objectives of their appointment are similar, because they deal with a corporate relationship between the President, (political principal) and Cabinet members (executive authority of national government department), which imposes fiduciary duties on them to oversee the management of the state departments and state-owned entities under their care.

In Chapter 6, there will be a summary of all the applicable principles gleaned from the case-law that has emerged and the principles expounded therein can be applied to a proper interpretation of the meaning of section 91(2) and in particular, such meaning will be applied to the dismissal of Minister Nene.

⁷ *Democratic Alliance v President of the Republic of South Africa and Others* 2013(1) SA 248 (CC) (*Simelane*).

⁸ *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) (*Masetlha*).

⁹ *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) (*Motau*).

CHAPTER 1

COMMON LAW POWERS OF THE HEAD OF STATE OR GOVERNMENT, INCLUDING PREROGATIVE POWER

Introduction

As a result of the reluctance by former President Zuma to take the public into his confidence by disclosing his reasons for making appointments and dismissals to cabinet and his propensity to regularly state that he was exercising his presidential prerogative, it has become necessary to exactly understand what this “prerogative” entails and if it is compatible with the current constitutional dispensation premised on the supremacy of the constitution and rule of law.

The starting point of understanding the origins of prerogative powers in their original form should be English law, because present day South Africa was created from former British colonies (Cape Colony and Natal) and Boer republics (Orange Free State and Transvaal), which would later form the Union of South Africa in 1910, after the British Parliament passed the South Africa Act of 1909 declaring it a British dominion.¹⁰

1.1 Definition and scope of prerogative powers

AV Dicey defined the royal prerogative as the “residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.”¹¹ Whilst William Blackstone described it as “those powers that ‘the King enjoys alone, in contradistinction to others, and not to those he enjoys in common with any of his subjects’.”¹² It has been stated broadly that the defining characteristic of the prerogative is that its exercise does not require the approval of Parliament, beyond this bare account, there is little agreement either on the definition or the concept itself.¹³

If Dicey’s definition is to be favoured, it would mean that prerogative means or represents that part of the Crown’s power that has survived historical reforms and can still be exercised.¹⁴ However, both definitions from Dicey and Blackstone received support in English case law and this dualistic approach prevented the emergence of a singular and uniform legal understanding of exactly what the term entails. However, what can be deduced from these definitions, is that at least there’s agreement that the prerogative was the exclusive power exercised by the reigning Monarch.¹⁵ The scope of the royal prerogative is notoriously difficult to determine, but it is clear that the existence and extent of the power is a matter of common law, making the courts a final

¹⁰ *Encyclopaedia Britannica*, page 5-<http://www.britanica.com/>

¹¹ *Review of the Executive Royal Prerogative Powers: Final Report, 2009* -paragraph 26.

¹² *Paragraph 26 supra*.

¹³ *The Royal Prerogative. International Journal of Constitutional Law* 2010, 8(1):146-155.

¹⁴ *The British constitution, law reform and parliamentary legislative process, chapter 1, page 11.*

¹⁵ *Review of the Executive Royal Prerogative Powers: Final Report, 2009, Ministry of Justice of Britain-*paragraph 25.

arbiter of whether or not a particular type of prerogative exists.¹⁶ Although it is still uncertain what the exact definition of prerogative powers is, at a basic level it can be accepted to be the reigning monarch's power of: deployment and use of armed forces overseas, making and ratifying treaties, acquisition and ceding of territory, granting mercy, honours and appointing Ministers.¹⁷

1.2 Prerogative powers traditionally in English law

In England and elsewhere, Kings and Queens as reigning monarchs tended to wield absolute power in the affairs of the state prior to the seventeenth century, the turning point came with the English Civil War (1642-1648) and the battle between the royalists (who supported King Charles I) and parliamentarians who sought to challenge the King's powers (led by Oliver Cromwell).¹⁸

The King's prerogative was at the centre of the constitutional crises of 17th century England and it was not long before a settlement was reached which sought to define the appropriate balance of these powers. This revolutionary period in English politics ended with the king being invited by Parliament to maintain his position, but to give up much of his power, resulting in King William III agreeing to a bill of rights for the protection of individual rights and liberties, and parliamentary dominance over the monarchy was declared.

Especially from this point onwards, Parliament began to gain power at the monarch's expense. The prerogative powers incrementally came under the control of an elected executive through Parliament in England, to the extent that the monarch today is only a ceremonial figure with very limited political powers.

1.3 Prerogative powers in South African constitutional law from 1910 to 1996

When the Boer republics [Transvaal and Orange Free State] were annexed by Britain and later formed part of the Union of South Africa in 1910, together with the erstwhile British colonies [Cape Colony and Natal], the 'prerogative powers' were retained.¹⁹

These common-law powers continued to form part of the law into the era of the declaration of South Africa as a Republic in 1961; and this position was concretised further by the adoption of the 1961 Constitution under white minority rule (the 1961 Constitution).²⁰ Sections 20(1) and (2) of the 1961 Constitution regulated the State President's authority to appoint a specific number of Ministers (18) at his pleasure.²¹ Furthermore, section 7(4) of the 1961 Constitution empowered the President to retain

¹⁶ *Review of the Executive Royal Prerogative Powers: Final Report, 2009* -paragraph 27

¹⁷ *Review of the Executive Royal Prerogative Powers: Final Report, 2009* -para 12

¹⁸ *The British constitution, law reform and parliamentary legislative process, supra* at page 11.

¹⁹ *Mansingh v President of the Republic of South Africa, 2014 (2) SA 26 (CC), para 23.*

²⁰ *The Republic of South Africa's Constitution, Act 32 of 1961.*

²¹ *Section 20(1) and (2) of the Republic of South Africa's Constitution, Act 32 of 1961 state: " (1) The State Attorney may appoint persons not exceeding eighteen in number to administer such departments of State of the Republic as the President may establish. (2) Persons appointed under sub-section (1) shall hold office during the pleasure of the State President and shall be Ministers of the Republic".*

the powers and functions that were possessed by the Queen before the commencement of the 1961 Constitution.²²

Venter notes that eminent writers of South African law observed that before South Africa became a Republic, colonial English constitutional law caused a similar pattern to be followed, leading Hahlo and Kahn to state that the Executive (Cabinet) had secured control over the prerogative in that it could be exercised without reference to the sovereign.²³ What is equally important is the content of section 7(5) of the 1961 Constitution which clarified the retention of the prerogative, by stating that the constitutional conventions which existed immediately prior to the commencement of the 1961 Constitution would not be affected by the provisions of that constitution.²⁴

Two decades later, section 6 of the Republic of South Africa Constitution Act (the 1983 Constitution),²⁵ further codified a number of prerogative powers under the control of the State President, namely: section 6(2) which made the President commander-in-chief of the South African Defence Force, section 6(3) (b) which empowered the President to confer honours, section 6(3) (d) also empowered the President to pardon or relieve offenders and section 6(3)(e) empowered the President to enter or ratify international conventions, treaties and agreements.²⁶

Beukes indicated that the codification of the prerogative power further complicated matters (referring to the prerogative to pardon), because since 1910 the prerogative was a common-law power, the fact that it was later embodied in legislation raised difficult questions, such as whether it meant that the nature of the prerogative had been changed into a statutory power and what the effect thereof was? Did it for example affect the justiciability of the act? ²⁷

Beukes further noted that some of these questions were addressed in *Smith v Minister of Justice*,²⁸ a case that dealt with a review application of the Advisory Release Board, a body which advised the Minister of Justice against releasing the applicant (Smith) from prison in terms of section 69 of The Prisons Act, Act No. 8 of 1959 (Prisons Act).²⁹ Section 8 of the Prisons Act authorised the President to order the release of any prisoner, if at any time it appeared expedient to him.³⁰ The Court stated that in the

²² Section 7(4) of the Republic of South Africa's Constitution, Act 110 of 1961 stated that: "The State President shall... as head of State have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative."

²³ Francois Venter in *Constitutional Court Review* (2011) 4: "Reviewing Acts of the Head of State: Confusing Grace with Amnesia", page 172.

²⁴ Section 7(5) of the 1961 Constitution states: "The constitutional conventions which existed immediately prior to the commencement of this Act shall not be affected by the provisions of this Act."

²⁵ The Republic of South Africa Constitution Act 110 of 1983 (the 1983 Constitution).

²⁶ See section 6(2), 6(3) (b) SA Public Law, 6(3) (d), section 6(3)(e) of the 1983 Constitution.

²⁷ Margaret Beukes- 1993 SA Public Law in "A study in severe legal positivism, or: is expediency synonymous with arbitrariness", page 166, para 1.

²⁸ *Smith v Minister of Justice* 1991 3 SA 336 (T).

²⁹ The Prisons Act 1959, Act No. 8 of 1959 (the Prisons Act).

³⁰ Section 8 of the Prisons Act: "Notwithstanding anything to the contrary in any law contained, if at any time it appears to him expedient, the State President may authorise the release of any prisoner either

case of the convicted prisoner, the 'gift of liberty or remission of sentence' is the act of the sovereign alone and only the sovereign has the power to break the prisoner's chains, by the exercise of the powers inherently vested in him. The power to override any rule of the law or to grant exemption from its effects, is essentially part of his prerogative.'³¹

In this matter the court simply re-stated the traditionally held view that the courts may not review the manner in which the prerogative is exercised, this according to Beukes, was quite unfortunate because at the time when this pronouncement was made, the trend had already begun in England to lean towards a position that promoted the review of the exercise of the prerogative,³² as expressed in the landmark 1984 case of *Council of Civil Service Unions v Minister of Civil Service*, where the House of Lords held unambiguously that a decision-making power derived from common law and not statutory source, is not "for that reason only" immune from judicial review; and that is so in respect of prerogative powers.³³

This development in Britain did not help the South African situation, which was much more complicated and far from being clear.³⁴ This difficulty arose because section 6(4) of the 1983 Constitution provided that: "The State President shall as head of State have such powers and functions as were immediately before the commencement of this Act possessed by way of prerogative." This meant that South Africa's position on the prerogative to appoint ministers under the 1983 Constitution was further regulated by statute, specifically sections 24(1) and (2), where section 24(1) declared that Ministers serve at the pleasure of the President.³⁵

In the 1983 Constitution in section 6(4), the position of the 1961 Constitution was retained when it provided that: "The State President shall as head of State have such powers and functions as were immediately before the commencement of this Act possessed by the State President by way of prerogative."³⁶ Beukes highlights that this codification resulted in a blurring of the distinction between prerogatives derived from common law, and other discretionary powers derived from statute. The problem was compounded by the 'lumping together' of the traditional prerogatives with 'a kind of catch-all provision' that the State President has the power to 'exercise such powers

unconditionally or on probation or parole as he may direct, and may grant remission of a portion of the sentence of any prisoner".

³¹ Beukes- "A study in severe legal positivism, or: is expediency synonymous with arbitrariness" *supra*, page 167, para 4.

³² Beukes *supra*, page 168, para 3.

³³ *Council of Civil Service Unions and Others v Minister for the Civil Service* 1985 AC 374.

³⁴ Beukes *supra*, page 168, para 4.

³⁵ Section 24(1) and (2): "The State President may appoint as many persons he may from time to time deem necessary to administer such departments of State of the Republic as the State President may establish, or to perform such other functions as the State President may determine. (2) Persons appointed under subsection (1) shall hold office during the State President's pleasure and shall be the Ministers of the Republic".

³⁶ Beukes *supra*, page 168, para 3.

and perform such functions as may be conferred upon or assigned to him in terms of this Act or any other law' (s 6(3)(h) of the 1983 Constitution).³⁷

Such a situation in my opinion, could never be conducive to the development of a clear understanding of the parameters within which prerogative powers should be exercised, because South Africa imported a common-law power from England, where it was decided that such powers could be reviewed, and yet in South Africa the courts were still prevented from reviewing this same power. This situation in my opinion prevented the legal development of a better understanding of the parameters within which this 'prerogative' was to be exercised in the South African context.

The process of carrying this 'prerogative' forward in South African law continued right up to the relatively recent transitional period of the interim Constitution of 1993 (the 1993 Constitution), where no express reference to the term 'prerogative powers' was made, but a careful analysis reveals that those presidential powers originating from the royal prerogative, were codified and inserted into the list of powers contained in section 82(1) of the 1993 Constitution.

In *President of the Republic of South Africa and Another v South African Rugby Football Union 2000 (Sarfu)*,³⁸ the Constitutional Court was called upon to decide a matter where it had to consider the nature of the powers granted to the President by section 82(1)(k) of the 1993 Constitution.³⁹ At issue was the constitutional validity of two presidential notices that appeared in the Government Gazette on 26 September 1997, in particular the one announcing the appointment of a commission of enquiry into the administration of rugby.⁴⁰ In this matter the South African Rugby Union (Sarfu) alleged that the President in making a decision to appoint commission of enquiry, abdicated this power to the Minister of Sport and had also not afforded Sarfu's president a hearing before making his decision.⁴¹

The Constitutional Court observed that the entire portion dealing with section 82(1) in the interim Constitution, contained powers which were historically non-statutory or prerogative powers which traditionally inhered in the English monarch, and the Constitutional Court considered a number of English cases and concluded that some aspects of the exercise of the royal prerogative, are subject to judicial review by virtue of the landmark 1984 case of *Council of Civil Service Unions*. In reaching its decision after careful analysis of the history of prerogative powers, the Constitutional Court distinguished the South African position from that of contemporary English law, by stating that in accordance with the 1993 Constitution, impugned action by any organ of state would be tested against the discipline of the Constitution and in particular, the

³⁷ *Beukes supra*, at page 168, paragraph 6 & page 169, paragraph 1

³⁸ *President of the Republic of South Africa and Another v South African Rugby Football Union 2000(1) SA 1 (CC)*.

³⁹ *Section 82(1) (k) of the interim Constitution: to pardon or relieve offenders, either unconditionally or subject to such conditions as he or she may deem fit, and to remit any fines, penalties or forfeitures.*

⁴⁰ *Sarfu supra*, para 5.

⁴¹ *Sarfu supra*, para 28.

Bill of Rights- it further clarified the applicable and prevailing legal position by stating that whether the President is exercising constitutional powers as the head of the executive (that is Cabinet) or head of state, he is acting as an executive organ of government.⁴²

This finding had the effect of completely removing the arbitrary aspect of the erstwhile prerogative power and opened the way for such powers to be brought under judicial review.⁴³ This was a major paradigm shift from how prerogative powers had been treated in the past, which was characterised by the inability of the courts to review their exercise by the executive. The Constitutional Court accepted that all impugned actions by an organ of state must be measured against the principles of the 1993 Constitution and in reaching its decision, the Court emphatically held that there are no powers derived from the royal prerogative, which are conferred upon the President other than those enumerated in Section 82(1) (which later became section 84 in the 1996 Constitution).⁴⁴

Conclusion

This declaration of the applicable legal standard by the Constitutional Court was extremely significant in that it affirmed that the royal prerogative (and later Presidential prerogative) had been absorbed into the new constitutional order and therefore the common-law notion of a President acting on the basis of prerogative powers was no longer consistent with South Africa's constitutional dispensation. The Court amplified this point further by stating that whether the President is exercising constitutional powers as the head of the executive (that is Cabinet) or as head of state, he is acting as an executive organ of government.⁴⁵

After more than a decade, in 2014 the Constitutional Court adjudicated *Mansingh v General Council of the Bar and Others*, in the context of addressing the President's power to confer honours and went further in clarifying the position, by stating that:

"The Constitution, under s 84(2), codifies some of the powers that were formerly prerogative powers of the Crown. There are no compelling purposive or historical reasons exist why the President's powers should be shackled to the prerogative powers. Doing so would bind him to the past, rather than allow him to break with it to the extent necessary under our new democratic dispensation".⁴⁶

This in my opinion had the effect of completely removing the arbitrary nature of the erstwhile understanding of prerogative powers, and simultaneously reiterated the legal standard applicable to how such a power ought to be exercised. It is now clear to see that in essence, the content of prerogative powers was codified or written into section 84 of the Constitution of 1996, cementing a new constitutional dispensation at variance with the common-law powers formerly exercised by the English monarch, and later

⁴² *Sarfu supra*, para 11.

⁴³ *Sarfu supra*, para 10.

⁴⁴ *Sarfu supra*, para 38.

⁴⁵ *Sarfu supra*, para 11.

⁴⁶ *Mansingh v General Council of the Bar and Others 2014(2)SA 26(CC) para 24*

transferred to the President of the Republic of South Africa under the constitutions of 1961 and 1983. It is evident that this was the finalisation of the codifying process of what previously were common-law powers into section 84 of the final Constitution of 1996.

As a result, we can conclude that this fundamentally altered the constraints that are now applicable on the President, because the powers originating from the prerogative are now subject to a test of constitutional compliance. When explaining the limitations that are now applicable on the exercise of all public power, the Constitutional Court in *Affordable Medicines* stated that:

“Our constitutional democracy is founded on, among other values, the '(supremacy of the Constitution and the rule of law'. 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'. 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”.⁴⁷

All public power includes also the power to appoint or dismiss Cabinet members. Since the erstwhile prerogative powers are now codified in section 84 of the 1996 Constitution, which makes the exercise thereof subject to a test of constitutional compliance. In other words, in exercising his or her powers to compose Cabinet in terms of section 91(2) of the Constitution, the President must do so in a manner that is consistent with South Africa's constitutional values.

⁴⁷ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 48 & 49.

CHAPTER 2

2. SECTION 91(2) AND OTHER APPLICABLE CONSTITUTIONAL VALUES

2.1 Introduction

In this chapter I will deal with the proposition that in exercising his or her powers to compose Cabinet in terms of section 91(2) of the Constitution, the President must do so in a manner that promotes the achievement of other relevant constitutional values. It is my contention that it was actually designed by the Constitution, that the President's power to appoint or dismiss members of Cabinet would actually promote the achievement of other rights that are meant to uplift the citizenry of South Africa.

It is also my intention to advance the argument that when the President appoints or dismisses a cabinet member, such exercise of power must actually be based on the promotion of an actual constitutional value which the President is attempting to uphold. In order to arrive at this conclusion, it will be important to interrogate the question of why the President has been empowered to compose Cabinet, as well as the power to dismiss members thereof.

This will require that the correct manner of interpreting constitutional provisions to be discussed first, because the Constitutional Court has stated that a contextual approach is the best method of achieving the correct interpretation of the meaning of a particular statutory provision. After such a discussion of all the applicable values to the exercise of this Presidential power, a conclusion will be offered on how other underlying constitutional values must be infused into section 91(2) of the Constitution.

2.2 Supremacy of the Constitution and the rule of law

Section 1(c) of the Constitution prescribes that the supremacy of the constitution and the rule of law are the founding principle of South Africa's legal order. These founding values found expression in various judgments that have come before the Constitutional Court, such as in the *Pharmaceutical Manufacturer's* case, where the Court held that: "The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law."⁴⁸ The Constitutional Court in the same matter further stated that:

"the exercise of all public power must comply with the Constitution and every exercise of public power including every executive act, be rational. For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given."⁴⁹

It was also held by the Constitutional Court that the question of whether the President has acted lawfully or not, is a constitutional matter.⁵⁰ This is the basis of my assertion

⁴⁸ *The Pharmaceuticals Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*, 2000 (2) SA 674 (CC) 1, para 20.

⁴⁹ *Pharmaceuticals Manufacturers Association of South Africa and Another: In re: Ex Parte President of the Republic of South Africa and Others*, 2000 (2) SA 674(CC) 1, para 20.

⁵⁰ *Pharmaceutical Manufacturers supra*, para 20.

that every official act by the President must be lawful and this also includes when he or she is making appointments to Cabinet, consequently the executive indeed has a legal standard it must comply with, namely: legality, which is inclusive of the rule of law (which legality is an aspect of, and in particular the rationality principle).

The principle of legality also applies to section 83(b) and (c), which further places legal duties on the President to uphold, defend and respect the Constitution as the supreme law of the Republic. This is the underlying value that must underpin all the President's actions. In addition, the President is further obligated to promote that which will advance the Republic.⁵¹ This in my view is the basis for the argument that the President is obligated to set the tone for the rest of the country by promoting the rule of law, therefore a proper interrogation must be undertaken of what the intention was, when these powers were entrusted to the President.

The exercise of all presidential power must therefore be constitutionally compliant or valid in law. This in my opinion means that in appointing or dismissing a cabinet member, the President must have constitutional or lawful reasons for doing so. In other words, the President must act lawfully under all circumstances, specifically he or she must act in a constitutionally justifiable manner at all times.

2.3 Accountability and efficient, economic and effective use of resources

The most eloquent exposition of the essence of the responsibility and trust placed in the office of the President, and the expectation that resides in that office was expressed by Mogoeng CJ in the *Nkandla case*,⁵² when he stated the following about the President:

“His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed.”

Further to that, section 84(2) of the Constitution states that: “The President exercises executive authority, together with the other members of the cabinet by, (c) co-ordinating the functions of state departments and administrations; and (e) performing any other executive function provided for in the Constitution or in national legislation”.⁵³

Section 92(3) (a) of the Constitution also adds another legal requirement by prescribing that members of Cabinet must act in accordance with the Constitution.⁵⁴

⁵¹ Section 83(b) of the Constitution states: “The President must uphold, defend and respect the Constitution as the supreme law of the Republic, and (c) promotes the unity of the nation and that which will advance the Republic”.

⁵² *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*, 2016 (3) SA 580, paras 20-21.

⁵³ Section 84 (2) of the Constitution states that: “The President exercises executive authority, together with the other members of the cabinet by, (c) co-ordinating the functions of state departments and administrations; and (e) performing any other executive function provided for in the Constitution or in national legislation”.

⁵⁴ Section 92(3) (a): “Members of Cabinet must (a) Act in accordance with the Constitution”.

This validates the proposition that at cabinet level, only lawful conduct is expected and no abuse of power is allowed, this also applies to the act of constituting Cabinet after an election in compliance with section 86 of the Constitution.

In analysing the identity of who the President is accountable to, Kruger states that: “the President serves at the pleasure of the National Assembly. As head of executive, he is responsible - together with the rest of Cabinet, for the conduct of government, its officials and its institutions.”⁵⁵ Whilst the President is the head of the national executive, his Ministers are the executive authorities of the various state departments to which the President has appointed them to lead. It seems to me that in considering the context of why members of Cabinet are appointed, the purpose must be to have a team of elected representatives from Parliament, to assist the President in discharging his or her duties to govern the country in a constitutionally valid manner, as they co-ordinate the functions of state departments and administrations.

As a result, we can accept that the Constitution has introduced into the management of the state democratic values of transparency, ethical conduct, accountability and efficient management of resources to address the injustice and inequality produced under apartheid. It is my contention that these values are intended to apply to all levels of government and bind all functionaries entrusted with public power (executive or administrative).

It is my further contention that this applies to all organs of state and all levels of government, which means that these values are binding upon the President as well, when he intends filling vacancies in Cabinet. Since all state conduct must be seen through the prism of the Constitution, to find the proper meaning of these sections, the appropriate starting point is with the jurisprudential principles that govern the task of statutory interpretation.⁵⁶ The Constitutional Court stated that in order to determine the context of a statute: “The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law”.⁵⁷

In making this assessment, the Constitutional Court would have to interpret the law, that is section 91(2), in accordance with the fundamental tenet of statutory interpretation, the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. The three important interrelated riders to this general principle are that: a) statutory provisions should always be interpreted purposively, b) the provision must be properly contextualised and 3) finally, all statutes must be construed in a matter that is consistent with the Constitution and where possible, legislative provisions ought to be interpreted to preserve their constitutional validity.⁵⁸

⁵⁵ Johan Kruger, *Centre for Human Rights, 2017: “Appointing the Cabinet-Some Constitutional Facts”*, para 9.

⁵⁶ *Bertie Van Zyl (Pty)Ltd & Another v Minister of Safety & Security & Others, 2010(2)SA(CC) para 19*

⁵⁷ *Bertie Van Zyl (Pty) Ltd & Another supra, para 21.*

⁵⁸ *Cool Ideas 1186 CC v Hubbard and Another 2014(4) SA 474 (CC), para 28.*

The Constitutional Court further expanded how a constitutionally compliant interpretation could be achieved, when it emphatically held that a purposive approach to statutory interpretation is required.⁵⁹ Ngcobo J (as he then was) stated that:

“The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, Section 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights”.⁶⁰

This will also require that a specific section in the Constitution should not be interpreted in isolation, including section 91(2), because this provision must be read in context and conformity with all applicable principles. Put differently, other relevant sections of the constitution are also directly applicable and binding on the President’s exercise of his or her power to appoint or dismiss a Cabinet member.

In following the guidance of the Constitutional Court above, the Supreme Court of Appeal (SCA) in *Natal Joint Pension v Endumeni Municipality* stated that:

“ Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument...having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence”.⁶¹

In light of the guidance provided by the Constitutional Court, the question that must be answered is what constitutional purpose is served by appointing Cabinet members? Chief Justice Mogoeng eloquently elucidated the purpose behind state power being entrusted to any organ of state when he stated that:

“One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck”.⁶²

Members of Cabinet are not only accountable to the President for the performance of their duties, but also have collective responsibility for cabinet’s decisions.⁶³ It is therefore clear when looking at the fact that section 85(2) of the Constitution does not place the executive authority of the Republic only on the person of the President, but also on the members of Cabinet collectively. Hence, they are accountable to

⁵⁹ *African Christian Democratic Party v Electoral Commission and Others* 2006(3) SA 305(CC), para 34.

⁶⁰ *In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004(4) SA 490, para 91.

⁶¹ *Natal Joint Pension Fund v Endumeni Municipality* 2012(4) SA 593(SCA), para 18.

⁶² *Economic Freedom Fighters v Speaker of the National Assembly and Others; supra, para 1 (Nkandla case).*

⁶³ Section 85(2) states: “The President exercises executive authority, together with other members of the Cabinet...”

Parliament as well, which is the citizen's representative body bearing a constitutional duty to scrutinize and oversee executive decisions.⁶⁴

The fact that members of Cabinet have a duty to account to the people of South Africa, in my view also introduces an element of the suitability of Cabinet members to advance the interest of citizens. This objective will be achieved when, in addition to their policy making duties, they also supervise and oversee the activities of the state departments to which they were appointed to lead - which essentially entails the implementation of legislation in line with section 85(2) (a), (b) and (c).⁶⁵

In turn Cabinet members are also members of Parliament who must also account and report to Parliament for the various activities undertaken by their Departments in terms of sections 92(2)⁶⁶ and 92(3) of the Constitution.⁶⁷ Thus it will be incongruent with the overall objectives of the Constitution, if their appointment or removal to Cabinet positions, which entrusted them with collective executive authority, is not subject to a corresponding legal standard that extends beyond the narrow and outdated concept of 'the pleasure' of the President. In my view, a contrary position would be inimical to the promotion of accountability. When referring to the constitutional value of accountability in the aforementioned *Nkandla* case, Mogoeng CJ drew attention to the basic democratic values underlying the governing of public administration (which is led by the Cabinet), as stipulated in Section 195 of the Constitution.

Section 195 of the Constitution lays down the basic values and principles governing public administration-some of which are: a) a high standard of professional ethics, b) efficient, economic and effective use of resources, f) accountable g) transparency and accessibility.⁶⁸ The most relevant sections of the constitution applicable in my view are 195(1) (f) and (g), which prescribe that the values of accountability and transparency must be observed and promoted in the administration of government, which is the preserve of administrative law. It can be argued that the Constitution indeed seeks to bring about radical change in the public administration founded on constitutionalism, accountability and the rule of law, as opposed to the erstwhile apartheid regime that

⁶⁴ Section 42(3) of the Constitution states that: *The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this byscrutinizing and overseeing executive action.*

⁶⁵ Section 85(2)(a),(b) and (c)-*The President exercises executive authority, together with other members of the Cabinet, by (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise; (b) developing and implementing national policy; (c) co-ordinating the functions of state departments and administrations.*

⁶⁶ See footnote 67 below.

⁶⁷ Section 92(2) of the Constitution states that: *"Members of Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions."*

⁶⁸ Section 195 of the Constitution states that: *Public administration must be governed by democratic values and principles enshrined in the Constitution, including the following principles: - a) A high standard of professional ethics, b) Efficient, economic and effective use of resources, f) Public administration must be accountable g) transparency must be fostered by providing the public timely, accessible.*

trampled on citizens' rights and was unresponsive, unaccountable, abused State power and resources.⁶⁹

The contents of section 195(2) of the Constitution, indicate how widespread these values are, by emphasizing that the above principles apply to administration in every sphere of government, organs of state and public enterprises.⁷⁰ Although these sections relate to the day to day administration of the government, these requirements in my view, also impose a legal duty on Cabinet members responsible for a specific state department at the highest level. If this is not the case, it would be an anomaly as these principles would only bind the departmental officials, but not the member of Cabinet leading that department.

In my opinion this would be unconstitutional and a violation of the rule of law and the constitutional imperative of accountability, because such a position would place a higher standard of compliance on departmental officials, but a lesser one on their political principals who are tasked with overseeing their activities in managing state resources and implementing legislation. An argument that asserts that these values do not apply to Cabinet members would also be contrary to section 92(3) of the Constitution, which requires that: "Members of Cabinet must (a) Act in accordance with the Constitution".⁷¹ The Constitutional Court already stated in *Motau* that a Minister must have in mind the Department's policy aims when selecting Board members, and must select people who are capable of carrying out those aims and who share the Department's policy vision,⁷² it is my contention that the same applies to a President appointing Cabinet members.

As a result, the President and all members of his Cabinet are bound to act in a manner that promotes accountable conduct, accompanied by the efficient and economic use of state resources, anything short of this will certainly be declared inconsistent with the constitutional values which are the foundation of South Africa's democracy.

2.4 Academic and other commentators on the limitations that are applicable to public power

The question of what constitutional or political considerations may limit the powers of the President to appoint and dismiss an individual Cabinet minister has received some attention from legal scholars. De Vos considered this question, but his argument mainly focused on the political considerations of the decision when he stated that:

“...the question is what constitutional or political considerations may limit the powers of the President to hire and fire individual Cabinet minister? The short answer is that the president

⁶⁹ *EFF v Speaker of the National Assembly and Others supra at para 1*

⁷⁰ Section 195(2) of the Constitution states that: *The above principles apply to (a) administration in every sphere of government, (b) organs of state and (c) public enterprises. -in particular subsections (a)(b) & (c)*

⁷¹ Section 92(3) (a), which states that: *“Members of Cabinet must (a) Act in accordance with the Constitution”.*

⁷² *Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC)(Motau),para 48.*

has the absolute power, bestowed upon him by the Constitution, to decide who serves in Cabinet. But this does not mean that there are no informal political limitations on how this power can be exercised.”⁷³

In order to promote that which will advance the Republic, Kruger accepts that the appointment of persons to Cabinet is in principle made on political considerations. However, in commenting on former President Zuma’s Cabinet reshuffle of May 2017, he re-asserts the applicable limitations on the President’s power by stating that:

“... the importance of appointing individuals with experience, skill and integrity, cannot be overemphasised. Whether or not the government succeeds in improving the quality of life of each person or acts in a responsive and transparent manner, is very much up to cabinet.”⁷⁴

Kruger further states that:

“The exercise of executive power in our constitutional democracy is clearly not limitless. It is constrained by the Constitution and the rule of law. Considering a number of well-reported events, one may be excused for thinking that either the previous Cabinet or National Assembly (or both) may not always have familiarised themselves entirely with the notion of ‘limited power’ and accountability.”⁷⁵

Venter at first sight seems to hold a similar view to De Vos when he states that:

“... in law there are no limitations on the leader of the majority party regarding the selection, dispatch and control of members of Cabinet. Limitations on the President that may exist in this regard are therefore almost wholly dependent on the political culture of the governing party. As long as a President remains in command of the majority party, he may require Cabinet and Parliament to do his or her bidding, albeit thankfully within the bounds of the constitution”.⁷⁶

Venter towards the end of his statement differs with De Vos (on the constitutional limitation aspect), by recognising the fact that such powers are not entirely unlimited as they must be exercised within the bounds of the Constitution. The statements of these scholars are in my view premised on the contents of section 86 of the Constitution, which stipulates how the President is elected into office by members of Parliament at its first seating after an election.⁷⁷

These statements are based on the fact that members of Parliament are drawn from political parties and therefore in practice, the party with the majority of seats in Parliament effectively elects the President.⁷⁸ It is indeed correct that this is practically

⁷³ De Vos P- *Opinionista* (29 March 2017) - “What powers and rights does Zuma have to sack members of his Cabinet”, paragraph 1.

⁷⁴ Kruger J, *Centre for Human Rights*, 2017: “Appointing the Cabinet-Some Constitutional Facts”, paragraph 1.

⁷⁵ Kruger J, *Centre for Human Rights*, 2017: “Appointing the Cabinet-Some Constitutional Facts”, paragraph 10, <http://www.cfr.org.za>.

⁷⁶ Venter F, *Constitutional Court Review* (2011) 4: “Reviewing Acts of the Head of State: Confusing Grace with Amnesia”, page 167.

⁷⁷ Section 86 (1) & (2) of the Constitution of the Republic of South Africa, 1996.

⁷⁸ Francois Venter in *Constitutional Court Review* (2011) 4: “Reviewing Acts of the Head of State: Confusing Grace with Amnesia”, page 167.

how the leader of the majority party in South Africa becomes President of the Republic, however I cannot agree with the notion that there are no limitations on the President's powers, because such a conclusion loses sight of the inherent constitutional limitations that are extant as a consequence of the interwoven values that permeate throughout the Constitution and form its foundation.

Furthermore, the Constitutional Court in *Sarfu* stated that when considering the President's powers (in relation to how to appoint a commission of enquiry), the President must act in good faith and not misconstrue the nature of his power. The Court concluded that the President had acted in accordance with those constraints when he appointed the commission of inquiry which is a constitutional power entrusted exclusively to him.⁷⁹

Corder highlights the observations of Sachs J in *Independent Newspapers v Minister of Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another*, although the case dealt with the question of what information could be made public in relation to South Africa's intelligence services, its principles are applicable to Section 91(2). This is so because of the indissoluble link between democracy and openness that was identified by Sachs J when he stated that:

“the transformation required of the intelligence services by the Constitution: from its role as a ‘shadowy and all-powerful’ prop of the beleaguered apartheid regime, to their current function ‘which was to keep government well informed, so that it can confidently fulfil its responsibilities towards ensuring a better life for all in a country undergoing major transformation’.”⁸⁰

The effect of this observation in my opinion is that even a highly secretive part of the ‘intelligence world’ will not be kept away from the public without a sound reason in law, and the effect thereof is that the tendency to rely on ‘national security’ as a reason to keep certain decisions secret, will no longer be tolerated in our constitutional dispensation. In my view, this should also apply equally to Cabinet appointment or dismissal, because the President's pleasure or prerogative could easily be substituted for ‘national security’.

If in the interest of transparency, such a sensitive area of the government's operations is not out of bounds, surely the exercise of executive power to appoint or dismiss members of cabinet should also not be excluded from the requirements of openness, with the result being that the President is obliged to make his reasons known for appointing or dismissing a cabinet member, if this information is requested in a legal process where the protection of other constitutional rights are at stake. Furthermore, Sach's observation clearly puts ensuring a better life for all in a country undergoing major transformation at the centre of how public should be exercised.

Brassey expands on the legal standard applicable to officials stating that:

⁷⁹ *Sarfu supra* page 33, para (b) & (c).

⁸⁰ Corder H, 2009 *Constitutional Court Review*, “Principled calm amidst a shameless storm: testing the limits of the judicial regulation of legislative and executive power”, page 256.

“In the public domain, officials are given their powers in order to promote the public interest. Whatever they may think, officials are not given their powers to promote their own interests or those of their colleagues, family or friends. They are, as the name so aptly indicates, public servants: their job is to serve the public. The sources of this duty are technically, the Constitution, but ultimately it owes its existence to the fact that it is an incident of, the concomitant of, the power that the law has conferred. The public servant stands in the same relation to the public as a trustee to a ward, the power they enjoy is, as we lawyers say, granted *sub modo* and can properly be exercised only for the benefit of others.”⁸¹

2.5 Practical example of how other constitutional values apply to section 91(2)

An incident that included the dismissal of a Cabinet member occurred in 2005, when former President Thabo Mbeki (Mbeki) exercised his power in terms of section 91(2) to dismiss the then Deputy President Jacob Zuma (Zuma). In my view this incident showed how the Constitution was given effect to, by ensuring that the rule of law was upheld. In the official statement delivered to a joint sitting of Parliament in June 2005, Mbeki amongst others that stated:

“Both the Deputy President and I are acutely sensitive to the responsibilities we bear as prescribed by our Constitution. We understand very well that we should at all times act in a manner that seeks to “uphold, defend and respect the Constitution”, as required by the same Constitution. As I have already indicated, this includes, among other things, the need to “respect the constitutional status, institutions, powers and functions of government in the other spheres”,... as President of the Republic I have come to the conclusion that the circumstances dictate that in the interest of the Honourable Deputy President, the Government, our young democratic system, and our country, it would be best to release the Honourable Jacob Zuma from his responsibilities as Deputy President of the Republic and Member of the Cabinet...”⁸²

It is my view that Mbeki’s decision displayed a great deal of insight of the constitutional demands placed on the office of the President and Cabinet members; and further showed a keen appreciation of how important it is to promote above all else, the best interest of South Africa’s democratic system and its people by upholding the rule of law.

The context of Mbeki’s dismissal of his deputy was premised on a court ruling that had implicated Zuma in a corrupt relationship with his financial advisor, Shabir Shaik. In light of this ruling, Mbeki considered the respect that had to be accorded to other constitutional institutions such as the courts and the role they play in our constitutional system. He saw it fit to dissociate the Cabinet from a member who was tainted by the potential of criminal conduct.

In my view, Mbeki may have been prompted to act due to an appreciation of the demands of constitutionalism. Constitutionalism has been described as being “firmly

⁸¹ Martin Brassey, 2009 *Constitutional Law Review: ‘Back off but back up! Administrative Law Rightly Yields to Labour Law’*, page 222.

⁸² Official statement of dismissal which was delivered to a joint sitting of Parliament on 14 June 2005 by President Mbeki-<http://www.dirco.gov.za>.

rooted in the doctrine of separation of powers and the subordination of the exercise of governmental power to legal rules”.⁸³

2.6 Conclusion

In light of what has been discussed above, the contextual meaning of why the President is empowered to appoint Cabinet members begins to become clearer. The purpose behind the President’s authorisation to make appointments through section 91(2), is that at a basic level, cabinet is appointed to assist him or her in his executive duties of ensuring the proper governance of the country as the elected head of the National Executive. This appointment or dismissal is for the purpose of advancing a better life for all in a country undergoing major transformation from a repressive history, to one firmly rooted in the observance of the rule of law. This will only be achieved when the President makes justifiable appointments to cabinet, which are based on the constitutional values of the promotion of the rule of law, advancement of the interests of the republic, accountability, efficient and economic use of resources and openness.

I further contend that when the President acts, he or she must do so in good faith, apply his own mind and not attempt to misconstrue the nature of his powers. When making Cabinet appointments or dismissals, the President must be guided by the need to ensure that the executive authorities of the various government departments are sufficiently suitable to provide accountable legal and political leadership that will attain the efficient and economic use of resources, underpinned by high standards of professional ethics and transparency, as required by section 195 of the Constitution. Appointments or dismissals of Cabinet members by the President cannot be devoid of legal reasons for the exercise of such public power.

These are the underlying constitutional values that underpin the President’s authority to make appointments or dismissals to Cabinet. Mbeki applied his mind to the legal duties of his office and went further by taking the nation into his confidence, when he publicly disclosed the reasons for dismissing his deputy. If it can be objectively proven that these values and objectives were not uppermost when a President makes an appointment or dismissal in terms of section 91(2), then that such conduct may give rise to a court challenge, because it would be possible to argue that the President acted contrary to his constitutional duty to act in good faith and not to misconstrue the nature of his power.⁸⁴

This will require that the obvious question of the suitability of subjecting this exercise of the President’s power to judicial review be answered. If answered in the affirmative, then the equally pertinent question of what is the appropriate level of scrutiny on the exercise of this executive power will also need to be answered?

⁸³ Mnyongani, 2011(2) *Speculum Juris*, “The Judiciary as a Site of the Struggle for Political Power: A South African Perspective”, page 1, para 1.

⁸⁴ Sarfu, page 33 paras (b) & (c).

CHAPTER 3

3. JUSTICIABILITY OF SECTION 91(2) OF THE CONSTITUTION

3.1 Introduction

In this chapter, I will discuss the critical question of whether or not it is suitable or appropriate to review the exercise of the President's exclusive power in section 91(2) in a court of law? A related question was posed in the *Motau* case, when the Constitutional Court grappled with the question of what was the appropriate level of scrutiny on the exercise of executive power? The question was premised on the view that a high level of scrutiny may not be appropriate, if the executive power deals with particularly sensitive subject matter or policy matters, for which courts should show the Executive a greater level of deference.⁸⁵

It was within this context that the suitability of reviewing the purpose for cabinet appointment or dismissal in a court of law will be engaged.

3.2 Is it inappropriate for courts to review the President's decision to appoint or dismiss a member of his or her Cabinet?

It was expressed by the Constitutional Court that it is inappropriate for courts to unduly interfere with decisions, where the power under consideration is legislative in nature and influenced by political considerations for which public officials are accountable to the electorate.⁸⁶ The exercise of the power in section 91(2), in my view falls under the executive authority influenced by the political considerations referred to by the Court, therefore it is correct that the President should be allowed a wide discretion when deciding who forms part of his Cabinet. The basis of this view is that when the executive appoints high level functionaries, this is akin to the formulation of policy, which should accord the executive a great measure of discretion. The presence of a wide-ranging discretion is often indicative of this broad policy-making power.⁸⁷

In my view this is what prompted Zweli Mkhize, former premier of Kwazulu-Natal's Provincial Government and former Treasurer-General of the governing ANC, to express the view that Judge Bashir Vally's ruling ordering former President Zuma to provide the Democratic Alliance (DA) with records and reasons for his Cabinet reshuffle on March 2017 amounted to 'judicial overreach'.⁸⁸ The ruling related to an interlocutory order in the judicial review (still pending) brought by the DA against former President Zuma's dismissal of another Minister of Finance, Pravin Gordhan and his deputy Mcebisi Jonas in 2017.⁸⁹

⁸⁵ *Motau at para 43.*

⁸⁶ *Motau at para 43.*

⁸⁷ *Motau supra at 43.*

⁸⁸ *The Citizen Online Newspaper, 11 May 2017-<https://www.citizen.co.za>.*

⁸⁹ *Democratic Alliance v President of the Republic of South Africa and Others 2017 (4) SA 253 (GP).*

In support of his view, Mkhize stated that members of parliament should have used the national legislature to hold the President accountable for his executive team, as opposed to approaching the courts, he specifically said that:

“If people were asking him in Parliament, I think that would have been appropriate. If people asked him why did you appoint this person and not this person and raising it in Parliament, it would have been fair and that is the platform where he is supposed to account as the President appointed by that particular Parliament.”⁹⁰

Presumably, Mkhize’s stance is informed by the understanding that Cabinet appointments are the sole preserve of the President and therefore no interference with his choices should take place under any circumstances. It is my contention however, that this still does not automatically mean that no standard of review is applicable to the power in section 91(2). On the contrary, the Constitutional Court has already pronounced on the appropriate standard of review dealing with polycentric matters or executive decisions in *Sarfu*, where Chaskalson CJ stated, in the course of assessing the validity of the President’s conduct that: “a court was obliged to look at the cogent and uncontested evidence of the President and gauge its legality in light of the Constitution.”⁹¹

Chaskalson further stated that under our new constitutional order, the exercise of all public power, including the exercise of the President’s powers under section 84(2), is subject to the provisions of the Constitution which is the supreme law.⁹² The specific reference to section 84, also covers subsection (2)(e) of the same section, which deals with the President’s powers necessary to perform functions of head of state and head of the executive, particularly the making of appointments required by the Constitution or legislation.

In my view, this is also inclusive of the power in section 91(2); the mere fact that a power is exercised by a member of the Executive is not in itself determinative, because in the *Pharmaceuticals* case, the Constitutional Court interpreted the constitution’s applicability to all public power by stating that:

“The principle of legality requires that every exercise of public power, including every executive act, be rational. For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given.”⁹³

In light of this understanding, endorsing the aforementioned ‘judicial overreach’ argument, would mean that the President’s power to appoint Cabinet is beyond the reach of a judicial review. This would effectively endorse the incorrect view that the power of the President in section 91(2) is unfettered and effectively endorse absolutism and arbitrary decision-making. Such a state of affairs would be a return to

⁹⁰ *The Citizen Online Newspaper*, 11 May 2017- <https://www.citizen.co.za>.

⁹¹ *Sarfu supra*, para 38.

⁹² *Democratic Alliance v President of the Republic of South Africa and Others 2017 (4) SA 253 (GP)*.

⁹³ *Pharmaceuticals Manufacturers supra*, para 85.

a culture that is the antithesis of the constitutional principles of accountability and transparency, which are binding on all organs of state, inclusive of the President.

In addressing an identical ‘overreach’ argument, Yacoob ADCJ in *Simelane* made short shrift of the argument that the separation of powers doctrine would be offended if the Constitutional Court were to set aside the President’s appointment of Menzi Simelane as the National Director of Public Prosecutions (NDPP), when he stated that it is difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry.⁹⁴ Yacoob stated that it was wrong to conclude that enquiring into the rationality of the means adopted in executive decisions, somehow involved a lower threshold, than in relation to precisely the same decision involving the same process in the administrative context. This was wrong.⁹⁵

With great precision, Yacoob dissected this misconception by highlighting that the rationality enquiry does not conceive of differing thresholds, because it cannot be suggested that a decision that would be irrational in an administrative law setting, might mutate into a rational decision, if the decision being evaluated was an executive one. Either the decision is rational or it is not.⁹⁶ It is therefore immaterial if the decision is executive or administrative in nature, when the President appoints a cabinet member, he does so in terms of a particular section in the Constitution, namely section 91(2), consequently the view that the appointment of Cabinet members is purely a political decision that should not be interrogated by the Courts is untenable in our constitutional system.

This argument loses sight of the fact that the same separation of powers doctrine, which is the foundation of the ‘overreach argument’, also presupposes the operation of constitutional checks and balances, in order to prevent either branch of government from abusing its powers. It is imperative to note that the Constitutional Court has already held in the *Certification* case, that ‘in the Republic of South Africa there is no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.’⁹⁷ The ruling in the *Certification* case, asserts that no model of absolute separation of powers exists and this decision was premised amongst others, on the content of section 167(4) (e), which authorises the Constitutional Court to be the only court that may decide that the Legislative or Executive branch of government has failed to act constitutionally.⁹⁸

The principle of separation of powers, on the one hand, recognises the functional independence of branches of government and on the other hand, the principle of

⁹⁴ *Simelane supra*, para 44.

⁹⁵ *Simelane supra*, para 44.

⁹⁶ *Simelane supra*, para 44 *supra*.

⁹⁷ *Ex Parte Chairperson of the Constitutional Assembly; In re First Certification of the Constitution of the Republic of South Africa, 1996(4) SA 744 (CC)*, para 108.

⁹⁸ Section 167(4)(e): “Only the Constitutional Court may decide that Parliament or the President has failed to fulfil a Constitutional obligation”.

checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can therefore reflect a complete separation of powers: the scheme is always one of partial separation.⁹⁹

The judicial overreach argument is in my opinion a partial understanding of how our constitution is designed in its entirety, because indeed Parliament does have a role to play in the implications of the exercise of such presidential powers, however Parliament is not the only institution that has a role to play in this matter.

The Constitutional Court is another prominent institution that is lawfully empowered by section 167(4) of the Constitution to assess the legality of presidential conduct, in order to confirm that compliance with the Constitution has occurred, consequently this section empowers the Constitutional Court to make the final decision on whether the conduct of the President is constitutional or not.¹⁰⁰ It was explicitly stated that the President's exclusive powers were also reviewable, in the sense that the Constitutional Court alone was empowered by the Constitution to determine whether the President 'has failed to fulfil a constitutional obligation.'¹⁰¹ This view is supported by the finding in *Hugo* where it was stated that where a president is empowered to take certain decisions, this does not mean that if a president were to abuse this power vested in him, a court would be powerless, for it is implicit in the Constitution that the President will exercise that power in good faith.¹⁰²

Kriegler J lucidly declared that the exercise of Presidential power will be valid if exercised in good faith, for ostensible rational reasons and manifestly to the advantage of some members of a traditionally disadvantaged class.¹⁰³ This provision must be understood to contain a check on the legislature and executive by the judiciary. Our supreme law allows for each branch to have a constitutionally defined role to play in the oversight of the others; and some intrusion is allowed in order to strengthen accountability of one branch to the other, as long as it is within the parameters of what the Constitution permits. This intrusion is furthermore allowed by the provisions of the Constitution through the content of sections 167(3) (a) and (b) (ii) - which makes the Constitutional Court the highest court in the Republic that may decide constitutional matters.¹⁰⁴

⁹⁹First Certification case *supra*, para 109.

¹⁰⁰ Section 167 (5): "The Constitutional Court makes the final decision whether an Act, a Provincial Act or whether conduct of the President is constitutional, and must confirm whether an order of invalidity made by the Supreme Court of Appeal, High Court or court of a similar status, before that order has any force.

¹⁰¹ *Minister of Justice & Constitutional Development v Chonco* 2010 4 SA 82 (CC) at paras 41 & 43.

¹⁰² *Hugo supra*, para 29.

¹⁰³ *Hugo supra*, para 64.

¹⁰⁴ Sections 167(3) (a) and (b) (ii) of the Constitution states that: "The Constitutional Court is (a) the highest court of the republic and (b) (i) may decide constitutional matters."

In light of this empowering provision, one may then ask what a constitutional matter is? The Constitution itself in section 167(7) provides the answer by stating that any issue involving the interpretation, protection or enforcement of the Constitution.”¹⁰⁵ It is clear that when appointing a cabinet member, the President exercises a constitutional power in terms of Section 91(2) of the Constitution, which makes the exercise of this power a constitutional issue, as section 167(7) of the Constitution provides that any issue involving the interpretation, protection or enforcement of the Constitution is a constitutional matter.¹⁰⁶

This then makes such a power also reviewable by the judiciary, as envisaged by section 167(7) of the Constitution. Furthermore, the Constitutional Court also stated in *Masetlha* that the review application brought against the President’s decision to dismiss the head of a government department turned on the direct application of the Constitution.¹⁰⁷

3.3 Conclusion

The President’s powers in terms of section 91(2) are sourced directly from the Constitution and the Constitutional Court has pronounced itself in numerous cases concerning Presidential powers to appoint or dismiss functionaries, albeit not yet on the appointment of a Cabinet member, however the principles of law expounded upon in these similar matters are also applicable to the appointment of Cabinet members too.¹⁰⁸ Consequently, our constitutional design expressly mandates judicial review of all public power, and in this regard judicial review has been endorsed as one of a number of legal instruments used to ensure lawful conduct by the President.

In other words, judicial review of the President’s conduct (and of Parliament) is one of the checks and balances that form part of South Africa’s constitutional scheme. The Constitutional Court further put the matter beyond doubt, when it stated that the exercise by the President of his powers under section 82(1) of the Constitution of the Republic of 1993 (which later became section 84 of the Constitution), may be subject to review by any court of appropriate jurisdiction in the same way as the exercise by him of other constitutional powers are subject to review.¹⁰⁹

This makes it very difficult to see how judicial review could be lawfully excluded from applying to the exercise of presidential powers, even in matters involving the appointment or dismissal of a Cabinet minister, as the source of this power clearly originates from a constitutional obligation that must be fulfilled by the President in compliance with section 167(4)(e), the exercise by the President of his powers under section 82(1) may be subject to review by any court of appropriate jurisdiction in the

¹⁰⁵ Section 167(7) of the Constitution states that: “A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.”

¹⁰⁶ Section 167(7) of the Constitution.

¹⁰⁷ *Masetlha supra, para 30.*

¹⁰⁸ *Masetlha supra, para 65.*

¹⁰⁹ *Hugo v President of the Republic of South Africa and Another, 1997(4)SA 1012(D), para:13*

same way as the exercise by him of other constitutional powers subject to review.¹¹⁰ My initial question on the suitability or appropriateness of judicial review is therefore answered in the affirmative, in the sense that our constitutional system allows for the judicial review of all public power, in order to ensure that the exercise of such public power is actually consistent with the Constitution, this role has been assigned to the Constitutional Court where the validity of any conduct by the executive or legislature is concerned.

It is therefore incorrect to argue that the President's power to compose his own Cabinet should not be challenged before the Courts, because such a challenge is permissible as no public functionary is above the law, including the President. Our constitutional system provides that if the President makes a decision to appoint or dismiss a cabinet member that is challenged in court, it is incumbent on him or her to prove the rationality of such a decision if and when it's legally challenged.

The question relating to the suitability of a review of the President's power to appoint cabinet members should therefore be laid to rest as being irrelevant, because it is appropriate to subject the exercise of an executive power under the principle of legality, as all conduct must be consistent with the Constitution in order to be valid. The President cannot evade scrutiny and accountability for the way in which he or she appoints or dismisses members of Cabinet, for the simple reason that he or she exercises state power and such conduct may lawfully be challenged in courts with the appropriate jurisdiction, as is the case with all other organs of state.

¹¹⁰ *Hugo supra, para 13.*

CHAPTER 4

4. PRINCIPLE OF LEGALITY, A MECHANISM TO CONTROL STATE POWER

4.1 Introduction

In this chapter a brief discussion will be undertaken of the definition and content of the doctrine of legality, as this has been identified as the correct standard against which the President's executive actions must be tested.¹¹¹

The practical realities of what and how a President selects members of his cabinet will also be discussed, which will be followed by an in depth explanation of an aspect of the doctrine of legality, which is rationality-an element that must be present in the exercise of all executive power, failing which, such exercise will inevitably be found to be unconstitutional and invalid.

4.2 Definition and content of the principle of legality

The doctrine 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, in this sense the Constitution entrenches the principle of legality and provides the foundation for the control of state power.¹¹² This is almost identical to the definition proposed by Hoexter, which also states that legality is an aspect of the rule of law and applies to every exercise of public power.¹¹³

Snyman adds more clarity when he states that at its very basis, the principle of legality can be described as a mechanism to ensure that the state, its organs and its officials do not consider themselves above the law in the exercise of their functions but remain subject to it.¹¹⁴ Venter adds a great measure of certainty by listing the various elements that make up this principle and the last two items on his list assist in completing the picture when he states that: "the doctrine of legality was authoritatively described to be understood as follows: ... * neither the legislature or executive may exercise a power or perform a function not conferred on them by law, and * validity of the exercise of public power must be clearly sourced in law."¹¹⁵

When all the aforementioned definitions and legal principles are applied to the President's power to appoint or dismiss a Cabinet member, a number of observations shedding light on how such power ought to be exercised emerge. It becomes clear that legality is sourced from the supremacy clause of the Constitution, because this clause

¹¹¹ *President of the Republic of South Africa and others v South African Rugby Union and Others* 2000(1) SA 1(CC) para 34(c.)

¹¹² *Affordable Medicines Trust and Others v Minister of Health and Others* 2006(3) SA 247 (CC), paras 48 & 49.

¹¹³ *Administrative Law in South Africa, 2nd Edition, Page 355 at para 6.*

¹¹⁴ *Snyman CR Criminal Law (2008), 6th Edition, page 36.*

¹¹⁵ *Venter: "Confusing grace with Amnesia" supra, at page 178.*

invalidates any law or conduct that is inconsistent with its values and demands that the obligations imposed by it, be fulfilled.¹¹⁶

To furthermore clarify the applicable legal standard to the President's exercise of his or her executive power to appoint Cabinet, in the *Pharmaceutical Manufacturers* case, the Constitutional Court stated that:

“... the doctrine of legality requires that every exercise of public power including every executive act, be rational. For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given.”¹¹⁷

In amplification of the application of the doctrine of legality, Choudhry interrogated the exposition of a related aspect of legality, which is the rule prohibiting the ‘unlawful abdication of power’ by a public entity on whom the power to make a decision has been conferred.¹¹⁸ Choudhry observed that the most familiar application of this doctrine is the rule against delegation, another limb of this doctrine which prohibits an office-bearer from acting ‘under dictation’, which occurs when a functionary vested with a power does not of his or her own accord to exercise the power, but does so on the instructions of another.¹¹⁹

The implication of this is that any functionary in government who must exercise a certain power must actually apply his mind in the exercise of such a power personally and not act under anyone's instruction. As a result, the President cannot be dictated to by any external organisation, if he or she allows this to happen, usurpation of the President's power to appoint would be at play and this would be contrary to the doctrine of legality. The rule of law, which is an aspect of the doctrine of legality, requires that he or she cannot under any circumstances allow others to dictate to him about who he will appoint or dismiss to Cabinet, as this would amount to the unlawful abdication of power as described in the *Sarfu*.

It is therefore immaterial whether the President is acting as head of the executive when appointing Ministers, or as head of state in pardoning offenders, all his actions must be accountable to the same standard of legality when acting in both capacities.

4.3 Legitimacy of President's requirement of trust in his Cabinet members

From the outset it must be conceded that there is merit in the argument that the President will logically only appoint people he trusts to Cabinet. This view was endorsed by the Constitutional Court in *Masetlha*, when the Court decided that the President had not acted irrationally when he dismissed Masetlha on the basis of an

¹¹⁶ Section 2 of the Constitution.

¹¹⁷ *Pharmaceuticals Manufacturers supra, Association of South Africa and Another: In re: Ex Parte President of the Republic of South Africa and Others, 2000 (2) SA 674 (CC) 1, para 20.*

¹¹⁸ Sujit Choudhry, *Constitutional Court Review, Volume 2, Issue 1, Jan 2009 - “He had a mandate”*; *The South African Constitutional Court and the African National Congress in a Dominant Party Democracy, page 66.*

¹¹⁹ *‘He had a mandate’ supra, page 66.*

irretrievable breakdown in trust.¹²⁰ It is indeed a fact that government business would be hindered if the President did not trust those he appoints to Cabinet, it is therefore very difficult to argue for the imposition of individuals whom the President does not trust. The exact nature of what considerations a President should take into account when exercising his section 91(2) powers is therefore still somewhat in a grey area, hence De Vos' viewpoint that the President has absolute power, bestowed upon him by the Constitution, to decide who serves in Cabinet.¹²¹

It is also true that when a functionary is entrusted with a discretion, as is with the power in section 91(2) of the Constitution, the weight to be attached to particular factors, is a matter for the functionary to decide, as long as he or she acts in good faith (reasonably and rationally), a court of law cannot interfere unduly.¹²² However, this still does not mean that the President can do as he pleases with the power contained in section 91(2) and ignore the implicit legal components of how that authority ought to be exercised in a constitutionally compliant manner. This is due to the fact that when the President is exercising his section 91(2) power, this is an executive act in terms of section 85(2)(e) of the Constitution,¹²³ and the principle of rationality directly applies.

This means that the President can and should appoint those he or she trusts, but the same people that he trusts, must be appointed in a manner that is consistent with the rationality principle. The rationality principle is applicable to the appointment or dismissal to Cabinet positions, because the exercise of this power is not merely about an employment contract, but also concerns questions of whether public authority has been exercised in a constitutionally valid manner.¹²⁴

4.4 Rationality, an aspect of legality

In shedding more light on what the aims of the rationality principle are, the Constitutional Court explained that:

“...the rationality review is the evaluation of whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, the executive decision we are concerned with is constitutional.”¹²⁵

The crux of the rationality requirement is that the President's power must promote constitutional objectives, therefore his or her power to appoint Cabinet members cannot be used to further any aim that may undermine the rule of law. This is consistent with what Kriegler J stated in *Hugo*, that the exercise of Presidential power

¹²⁰ *Masetlha supra*, para 86.

¹²¹ *Pierre De Vos- Opinionista (29 March 2017) - “What powers and rights does Zuma have to sack members of his Cabinet”, para 1.*

¹²² *MEC for Environmental Affairs & Development Planning v Clairisons CC 2013(6) SA 235, para 22.*

¹²³ *Masetlha supra*, para 23.

¹²⁴ *Masetlha supra*, para 63.

¹²⁵ *Simelane supra*, para 32.

will be valid if exercised in good faith, for ostensible rational reasons and manifestly to the advantage of some members of a traditionally disadvantaged class.¹²⁶

In my view, the last-mentioned requirement of the President being required to act in a manner that will advantage some members of a traditionally disadvantaged class, is more akin to the advancement of the best interest of the citizens and this is what should underpin his or her authority to appoint or dismiss his or her Cabinet. The President's wide discretion under section 91(2) is not unduly restricted, however even that discretion must still be exercised within the parameters of the applicable legal standard, which has been interpreted by the Courts to be rationality.¹²⁷

In other words, the exercise of executive power must always seek to promote the objectives that underpin the purpose why a decision-maker has been empowered to act for the benefit of the public. It goes without saying that all public power is intended to advance the interests of the public, not the personal preferences of any person wielding public power. This requires that the President must always be able to objectively prove (when challenged) that the means he or she employed are related to the achievement of a legitimate government purpose. In my view this is one of the most important aspects of the implicit control of executive power, which is what rationality is all about.

If this was not the case, then it would have been impossible for the launching of a successful judicial review of former President Zuma's invalid decision, as decided by the Constitutional Court in *Simelane*, when his appointment of Simelane as the NDPP was set aside, on the basis that he had ignored proof that Simelane did not possess the required level of diligence and honesty to effectively carry out the demands of the position of NDPP. The former President's decision to appoint Simelane was invalidated because it did not conform to the principle of legality, in that such an executive power may not be exercised in bad faith, arbitrarily or irrationally.¹²⁸

4.5 Conclusion

It is my contention that a legal argument can be made that the principle of legality logically requires that the President objectively considers how his or her appointments or dismissal from Cabinet promotes the public interest and the rule of law. In my opinion, this is what the rationality requirement aims to promote, which is the supremacy of the Constitution in all spheres of public power.

The constitutional duty that will be entrusted by the President on a Cabinet member, naturally requires both unimpeachable character and leadership ability, and in order to properly supervise public servants in the execution of the duties they owe to the public in the effective and lawful governance of the country. As a result, the President's conduct in relation to appointments or dismissal to Cabinet must also be rationally

¹²⁶ *Hugo supra, para 64.*

¹²⁷ *Sarfu supra, para 11.*

¹²⁸ *Masetlha supra, para 23.*

related to promoting this legitimate government purpose; if this is lacking, the rule of law demands that such conduct be reviewed, invalidated and set aside on the basis that it is contrary to the legality principle.

The above contention is not a novel one, as it is based on principles that are consistent with the approach that has already been adopted by the Constitutional Court, when it dealt with similar questions on the legality of the President's appointments of senior government leaders, who were meant to head public institutions in the *Simelane* and *Masetlha* cases and concluded that such appointments needed to satisfy the principle of legality, in particular the aspect of rationality.¹²⁹

¹²⁹ *Democratic Alliance v President of the Republic of South Africa and Others* 2013(1) SA 248 (CC) (*Simelane*) and *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC)(*Masetlha*).

CHAPTER 5

5. CASE-LAW FROM THE CONSTITUTIONAL COURT WHERE THE PRINCIPLE OF LEGALITY WAS APPLIED TO SENIOR PUBLIC POSITIONS

5.1 Introduction

In this chapter, a discussion of three Constitutional Court cases will be undertaken, as the principles dealt with therein, provide guidance on how section 91(2) ought to be exercised. These three cases did not directly deal with the appointment or dismissal of Cabinet members, but rather senior public servants and it is my contention that the principles laid down in those matters, are also applicable to the appointment or dismissal of Cabinet members, as their functions are quite similar in that both positions deal with the duty of leading public institutions, albeit one at the level of a national executive authority that is politically accountable to Parliament, and the other at the level of senior civil servants who implement legislation and policies.

The principles laid down in the judgments below are in my opinion also applicable to Cabinet appointments, as such appointments are made by the President in terms of constitutional powers entrusted to him, and therefore it goes without saying that such powers must be exercised lawfully, in a constitutionally valid matter. The first two matters deal with the powers of appointment and dismissal by the President, the most notable being the matter of former President Mbeki's dismissal of Billy Masetlha as head of the National Intelligence Agency (*Masetlha*) and former President Jacob Zuma's appointment of Menzi Simelane (*Simelane*) as the National Director of Public Prosecutions (NDPP).¹³⁰ After discussing these two cases, an analysis of what applicable principles can be discerned from these cases and their implications on how the President ought to exercise his or her section 91(2) power will be made. At the end of the discussion of these two cases, an analysis of the implications thereof on the President's exercise of his or her section 91(2) power will also be made.

The third case is the *Motau* matter, which dealt with a decision by a member of the national executive (Minister of Defence) to dismiss the Chairperson and Deputy-Chairperson of the board of directors of a state owned company. This matter contains a very helpful distinction between executive and administrative powers of such an executive authority (minister), as well as providing a clear description of the nature of the relationship between an executive authority of a government department (minister), in relation to the non-executive management (board members) of a state owned company or parastatal. At the end of the discussion of this particular case, an analysis of the implications thereof on how the President should exercise his or her section 91(2) power will also be made.

¹³⁰ *Democratic Alliance v President of the Republic of South Africa and Others* 2013(1) SA 248 (CC) para 95 (*Simelane*) and *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 paras 63 and 90(CC)(*Masetlha*).

5.2 Masetlha

In *Masetlha v President of the Republic of South Africa*, former President Mbeki initially suspended and later terminated the employment of Masetlha as the head of the National Intelligence Agency (the Agency) by unilaterally amending his term of office to expire within two days of him being notified; just over 21 months earlier than the original term.¹³¹ The facts giving rise to this emanated on 31 August 2005 when businessman Saki Macozoma was placed under unauthorised surveillance by agents of the Agency. Masetlha was called upon to formally account for the surveillance by the Minister of Intelligence (the Minister) and he insisted that as head of the Agency, he had not authorised the operation and was unaware of the surveillance until the field operatives were exposed.¹³²

Masetlha in his report stated that the surveillance was attributable to one of his deputies, a Mr Njenje and the field operatives under his command. The Minister was dissatisfied with this explanation and instructed the Inspector-General of Intelligence (Inspector-General) to investigate the circumstances of the surveillance further.¹³³ The Inspector-General's report concluded that the surveillance had not been undertaken for the reasons given by the Agency operatives, but for another purpose. The report noted that Masetlha had deliberately sought to mislead the Inspector-General's investigation and the Minister, and recommended that disciplinary steps be instituted against him for failing to exercise the required degree of management and oversight on the surveillance operation.¹³⁴ In dismissing Masetlha, the President stated that the relationship of trust between him, as head of state and of the national executive, and Masetlha, as head of the Agency, had disintegrated irreparably.¹³⁵

Masetlha applied to the High Court for a judicial review of the President's decision and a declaratory order of unlawfulness of the President's conduct, and the High Court considered the crucial question of whether the dismissal was an exercise of executive or administrative power, particularly because the Constitution and other applicable legislative provisions were silent on the dismissal of a head of an intelligence service. It found that the power to appoint includes the power to dismiss, and concluded that the power to dismiss is implicit in section 209(2) of the Constitution,¹³⁶ which is an executive power in terms of section 85(2)(e) of the Constitution.¹³⁷

The High Court reasoned that the authority to dismiss was therefore not susceptible to judicial review under the provisions of the Promotion of Administrative Justice, Act

¹³¹ *Masetlha supra*, para 1.

¹³² *Masetlha supra*, para 9.

¹³³ *Masetlha supra*, para 10.

¹³⁴ *Masetlha supra*, para 11.

¹³⁵ *Masetlha supra*, para 18.

¹³⁶ Section 209(2) of the Constitution states: *The President as head of the national executive must appoint a woman or man as a head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services or designate a member of Cabinet to assume the responsibility.*

¹³⁷ *Masetlha supra*, para 23.

3 of 2000(PAJA), but observed that this did not mean that the President's decision was beyond the reach of judicial review on any basis. The President's decision to dismiss must conform to the principle of legality, therefore his power to dismiss may not be exercised in bad faith, arbitrarily or irrationally.¹³⁸

The Constitutional Court had to confirm the High Court's declaration of constitutional invalidity, with the main question being whether the president's unilateral decision to amend Masetlha's term of office was constitutionally permissible.¹³⁹ The dispute between the parties was not merely about a breach or wrongful termination of an employment contract, but rather about whether public authority has been exercised in a constitutionally valid manner.¹⁴⁰

The Court also stated that whether trust has irretrievably dissipated is a matter of fact, which falls to be decided on the facts of each case. In this specific case, the Constitutional Court found that in taking the decision, the President had not acted irrationally,¹⁴¹ because the absence of trust was mutually acknowledged on the versions presented by both parties and therefore the President had not acted irrationally.¹⁴²

5.3 Simelane

In *Democratic Alliance v President of the Republic of South Africa and Others* (the Simelane case), the question was whether the appointment of Menzi Simelane (Simelane), as the National Director of Public Prosecutions (NDPP) by former President Jacob Zuma was within the bounds of the Constitution. The Minister for Justice and Constitutional Development (Minister of Justice) and Simelane appealed against an earlier judgment of the SCA, which had concluded that Simelane's appointment was constitutionally deficient in that the process for appointment, and consequently, the appointment itself was irrational and invalid.¹⁴³

The facts were that Simelane, in his previous capacity as the Director-General of the Department for Justice and Constitutional Development (DG), was intimately involved in a dispute concerning differing views on the independence of the NDPP Advocate Pikoli (Pikoli) from the Ministry of Justice, where prosecutorial decision-making was concerned. Pikoli had been suspended by former President Mbeki on 23 September 2007, who subsequently appointed a commission of enquiry headed by a former Speaker of Parliament, Dr Frene Ginwala (the Commission) to inquire into Pikoli's fitness to hold office.¹⁴⁴

¹³⁸ *Masetlha supra*, para 23.

¹³⁹ *Masetlha supra*, para 25.

¹⁴⁰ *Masetlha supra*, para 63.

¹⁴¹ *Masetlha supra*, para 90.

¹⁴² *Masetlha supra*, para 90.

¹⁴³ *Democratic Alliance v President of the Republic of South Africa and Others 2013(1) SA 248 (CC)*, para 1 (*Simelane*).

¹⁴⁴ *Simelane supra*, para 4.

Simelane presented the government's submissions by giving evidence under oath before the Commission and was severely criticised for the credibility of his evidence, as a result the Minister of Justice requested the Public Service Commission (PSC) to investigate Simelane's conduct during the Commission.¹⁴⁵ The PSC in a detailed report recommended that disciplinary proceedings be instituted against Simelane for his conduct before the Commission. The Minister of Justice considered and rejected the recommendation and subsequently advised the President to appoint Simelane as the new NDPP.¹⁴⁶

The SCA noted that the President erred in four respects and that these errors of judgment rendered the process by which the decision to appoint Simelane as the NDPP irrational and invalid. First, according to the President, he had firm views about Simelane being the right person to be appointed the NDPP, even before he had considered whether or not he was a fit and proper person for the job. Second, the President incorrectly reasoned that the absence of evidence contradicting the idea that Simelane was a fit and proper person, justified the conclusion that he was indeed a fit and proper person. The correct approach according to the SCA, was for the President to further investigate whether Simelane was a fit and proper person. This he failed to do.¹⁴⁷

Third, the President disregarded the criticisms about Simelane made by the Commission, on the basis that the Commission had not been appointed to investigate Simelane, but Pikoli. Lastly, the recommendations of the PSC that the Commission's criticisms merited a disciplinary enquiry against Simelane were too lightly brushed aside.¹⁴⁸ The SCA was of the view that ignoring the Commission's comments was in itself enough to set aside the appointment as irrational.¹⁴⁹

The decision had to be confirmed by the Constitutional Court and when the matter reached that court, the question to be decided by it was whether the President's failure to take into account the findings relating to Simelane at the Commission, was rationally related to the purpose for which the power was conferred?¹⁵⁰

Yacoob ADCJ, writing on behalf of the majority of the Court, delivered an exposition of the requirements of the rationality review, by declaring that such an enquiry is really concerned with the evaluation of a relationship between means and ends. The aim is not to determine whether some other means will achieve the purpose better than others, but only whether the means employed are rationally related to the purpose for

¹⁴⁵ *Simelane supra, para 4.*

¹⁴⁶ *Simelane supra, para 4.*

¹⁴⁷ *Simelane supra, para 6.*

¹⁴⁸ *Simelane supra, para 6.*

¹⁴⁹ *Simelane supra, para 7.*

¹⁵⁰ *Simelane supra, para 45.*

which the power was conferred. Once there is a rational relationship, the executive decision we are concerned with is constitutional.¹⁵¹

To factually prove the irrationality of the decision, the DA relied mainly on the findings of the Commission and Simelane's evidence at that enquiry. The evidence by Simelane raised questions that threw so much doubt on his credibility and integrity, that it rendered his subsequent appointment as NDPP irrational.¹⁵² The President in his own defence relied on his knowledge of Simelane's personal and professional qualities, as well as the advice of the Minister of Justice that Simelane was a fit and proper person to be appointed as NDPP.¹⁵³

The Constitutional Court rejected the President's reasoning by pointing out that the effect of his argument was illogical, as it suggested that while decisions by the President as Head of State must be rational in process and outcome, decisions of the President as head of the National Executive should be rational only in outcome and not in so far as they relate to the process.¹⁵⁴ According to the Court, if the purpose for the power conferred is to be properly considered, it was crucial for the report of Simelane's evidence at the Commission to be interrogated, in order to determine that the President was right in ignoring its findings.¹⁵⁵

Yacoob further stressed that failure to take into account relevant material was inconsistent with the purpose for which the power was conferred, therefore no rational relationship existed between the means employed and the purpose of the power.¹⁵⁶ The Constitutional Court highlighted that any decision by any person who was aware of this evidence and ignored such evidence in the absence of any explanation from that person was irrational, because ignoring such information was not, on the face of it, rationally related to the purpose of appointing a NDPP.¹⁵⁷ The absence of a rational relationship between means and ends in this case was a significant factor. Ignoring prima facie indications of dishonesty was wholly inconsistent with the end sought to be achieved, which was the appointment of a credible NDPP that is sufficiently conscientious to do this job effectively.¹⁵⁸

The Court concluded that the President had acted irrationally and that his failure to take into account the findings on Simelane from the Commission was not rationally related to the purpose for which the power was conferred, because the President also should have initiated a further investigation, to determine whether real and important questions that had been raised about Simelane's honesty and conscientiousness.¹⁵⁹

¹⁵¹ *Simelane supra, para 32.*

¹⁵² *Simelane supra, para 45.*

¹⁵³ *Simelane supra, para 47.*

¹⁵⁴ *Simelane supra, para 35.*

¹⁵⁵ *Simelane supra, para 48.*

¹⁵⁶ *Simelane supra, paras 40 & 44.*

¹⁵⁷ *Simelane supra, para 62.*

¹⁵⁸ *Simelane supra, para 89.*

¹⁵⁹ *Simelane supra, para 88.*

The Court confirmed the SCA's order of invalidity of the decision to appoint Simelane as the NDPP.¹⁶⁰

5.4 Assessing the impact of the *Masetlha and Simelane* judgments

The application of the principles in these two cases can assist in determining the true meaning of section 91(2) of the Constitution. The possible distinguishing arguments against the review of the exercise of the power to appoint Cabinet is: that none of both cases did not venture into the terrain of the President's high policy making powers (high in the sense of wide discretion to choose), such as the appointment of his Cabinet, because *Masetlha and Simelane* dealt with the appointments sourced from Acts of Parliament. Those Acts prescribed the requirements and processes that had to be followed in the appointment of such functionaries and the courts in this instance had clear guidelines on what had to be done in the event of non-compliance with the statutory provisions. This is different to the position with Cabinet appointments, because these positions are filled at the discretion of the President.

A further point of distinction between Cabinet posts and the NDPP and DG of the Agency, is that the latter are senior civil servants, whose jobs are to implement legislation, whilst section 91(2) deals with political appointments of Cabinet members, whose duty is the political supervision and accountability for the management of state departments. These are reasons that are generally advanced against the Courts from usurping the President's powers in section 91(2). These argument could make it more difficult to review such a decision, but certainly do not mean that it is inappropriate or undesirable to assess the legality thereof. It must be reiterated that all public power is subject to the control of the Constitution and any enquiry into the rationality of an executive decision does not offend the principle of separation of powers.¹⁶¹

Both *Masetlha and Simelane* recognised that the executive enjoys a wide discretion to select the means to achieve constitutionally permissible policy objectives, interference with these choices, simply because they do not like them is not permitted.¹⁶² Although these two matters did not deal directly with the appointment of Cabinet members, they expounded on the applicable principles dealing with how senior management appointments should be made, such as those of Cabinet members, in that the formal qualifications or experience (suitability) and integrity of the cabinet member (fitness to hold office) must be capable of being objectively established.

Furthermore, the authority to compose Cabinet is a constitutional power and should be exercised in a manner that is compatible with the objectives of the Constitution as a whole. These principles are binding and the President must be able to satisfy them.

¹⁶⁰ *Simelane supra, para 95.*

¹⁶¹ *Pharmaceutical Manufacturers supra, para 85 and Simelane supra, para 44.*

¹⁶² *Simelane supra, para 32.*

Objective factual evidence played an important part in both *Masetlha* and *Simelane*, because the Constitutional Court stressed that whether trust has irretrievably dissipated is a matter of fact, which falls to be decided on the facts of each case.¹⁶³ In *Simelane*, the evidence from the Commission about Simelane's conduct was accepted as objective proof that he was dishonest and this convinced the Court that a rational link between his appointment as the NDPP; and the required faithful execution of the obligations of that office was lacking. This in my view means that the President must be able to objectively prove a particular fact that he relies upon as the basis of his decision to appoint a Cabinet member e.g. proof of competence through experience or qualifications or facts that indicate the incompetence of a Minister to support a dismissal.

This factual proof should be presented when a legal challenge against the President's exercise of his or her section 91(2) power arises, because if the President cannot provide factual proof in a review application, such failure could be indicative of arbitrariness and render the decision invalid and contrary to the legality principle. However, if such objective evidence is produced and it is clear that a rational link exists, then all the courts dealing with the legal challenge will be forced to take a deferential posture, because courts are not entitled to interrogate whether a better decision could have been made, but rather to pronounce only on the rationality of the decision.

As stated earlier these two matters did not deal with Cabinet appointments, but in my view they contain relevant principles that support the conclusion that other constitutional values apply to section 91(2) and this gives content to how such power should be exercised by the President. It can therefore be concluded that this is a very strong indication that the President cannot rely on prerogative power as the basis of appointing any functionary. This also shows that the President's pleasure is not a legal requirement, on the contrary, relevant and applicable constitutional values must be given effect to, when such appointments are made.

5.5 Motau

In *Minister of Defence and Military Veterans v Motau and Others*, 2013 (Motau), the Minister of Defence's (Minister) decision to remove General Motau and Ms Mokoena (jointly referred to as board leadership) as the Chairperson and Deputy Chairperson of the Board of Directors (Board) of the Armaments Corporation of South Africa (SOC) Limited (Armscor) was considered by the Constitutional Court.¹⁶⁴

The Court framed the issues relating to what standard of performance may a Minister, as the responsible member of the Executive, hold the board leadership of a state owned entity that falls under her supervisory control? And to what standard should a court of law hold that Minister to, when she exercises her powers of oversight in

¹⁶³ *Masetlha supra, para 90.*

¹⁶⁴ *Motau supra, para 3.*

relation to that state-owned entity? The Court indicated that these were important questions for any democracy that takes seriously the values of accountability and good governance.¹⁶⁵

To address various governance challenges at Armscor, the Minister convened three meetings with the board in a two month period, none of which was attended by Motau. Mokoena failed to attend the meeting held on 4 June 2013 and the Minister expressed her displeasure in a letter dated 11 June 2013. In reply the next day, Motau bemoaned the late notice which the Minister had given of the meetings and explained that he had been away when the meetings were held.¹⁶⁶ On 8 August 2013, by letter the Minister terminated Motau and Mokoena's membership of the Board in terms of section 8(c) of the Armscor Act.¹⁶⁷

The Minister justified her decision on three bases, first that she cited various procurement projects which had failed to progress timeously, allegedly due to the Board's decisions or inaction.¹⁶⁸ Second, the Minister was unhappy that Armscor failed to conclude a service level agreement with her Department as required by section 5 of the Armscor Act, and she partially ascribed this failure to the board leadership at Armscor.¹⁶⁹ Lastly, the Minister's decision was premised on complaints she had received about Armscor from members of the Defence industry and from these she inferred that the Armscor's relationship with the industry had had broken down.¹⁷⁰

The board leadership approached the High Court for urgent relief, seeking to set aside the Minister's decision on the basis that it was unlawful, unconstitutional and invalid. Legodi J granted judgment in favour of the board leadership, concluding that the Minister's decision was administrative rather than executive action, because the decision met the positive requirements of the definition of an administrative action and was also not expressly excluded from the ambit of the PAJA.¹⁷¹

The High Court's decision was based on the following: first the Minister committed an error of law in terminating the services of the board leadership, insofar as she acted under the misapprehension that her conduct was executive rather than administrative in nature, and acted unfairly in failing to give the board leadership an opportunity to explain why their appointments should not be terminated. The High Court found that the Minister acted on the basis of an ulterior motive, in that she expressly acknowledged that the removal of the board leadership, was a "political" rather than a legal matter.

¹⁶⁵ *Motau supra, para 1.*

¹⁶⁶ *Motau supra, para 7.*

¹⁶⁷ *Motau supra, para 8.*

¹⁶⁸ *Motau supra, para 8.*

¹⁶⁹ *Motau supra, para 12.*

¹⁷⁰ *Motau supra, para 13.*

¹⁷¹ *Motau supra, para 18.*

The Constitutional Court was required to decide whether the Minister had shown good cause for her decision to terminate the services of the board leadership, as required by section 8(c) of the Armscor Act and if the Minister was bound by any procedural constraints in exercising her section 8(c) power?¹⁷²

A number of pointers were extracted from previous decisions which were helpful in assessing the true nature of a particular power. First, it may be useful to consider the source of the power. Where a power flows directly from the Constitution, this could indicate that it is executive, rather than administrative in nature, as administrative powers are ordinarily sourced in legislation. Khampepe J noted that in *Masetlha, Moseneke DCJ* held that the President's power to dismiss the DG of the Agency, was sourced in section 209(2) of the Constitution and was contemplated in section 85(2)(e) of the Constitution, despite the fact that section 209(2) had an analogue in national legislation.¹⁷³ Secondly, the constraints imposed on the power should be considered, the fact that the scope of a functionary's power is closely circumscribed by legislation might be indicative of the fact that a power is administrative in nature.¹⁷⁴

Third, it should be considered whether or not it is appropriate to subject the exercise of the power to the higher level of scrutiny under administrative-law review, because it may be that this level of scrutiny is not appropriate given that the power bears on particularly sensitive subject matter or policy matters for which courts should show the Executive a greater level of deference. In order to determine the nature of the Minister's section 8(c) power, the Court had to consider the legal framework imposed by the Armscor Act, which granted the Minister fairly broad powers, for example, she exercises ownership control on behalf of the State, imposes such conditions on Armscor's interactions with foreign states in the national interest, appoints the non-executive members of the Board and designates the Chairperson and the Deputy from their number; is consulted by the Board in its selection of the CEO.¹⁷⁵

The Constitutional Court ultimately found that the Minister's decision was executive rather than administrative in nature; and further ruled that the Minister's section 8(c) power was an adjunct of her power to formulate defence policy. In terms of this power, the Minister formulates policy in the broad sense: overarching and direction-giving, with the minutiae of individual procurement decisions left to Armscor.¹⁷⁶ It stated that the Minister does not provide direction through interventions in individual projects or by prescribing particular procurement policies, rather, she discharges her political responsibility by ensuring that the Department's procurement agency meets its statutory obligations by appointing leaders who have the "knowledge and experience which should enable them to attain the objectives of the Corporation".¹⁷⁷

¹⁷² *Motau supra, para 25.*

¹⁷³ *Motau supra, para 39.*

¹⁷⁴ *Motau supra, para 41.*

¹⁷⁵ *Motau supra, para 45.*

¹⁷⁶ *Motau supra, para 47.*

¹⁷⁷ *Motau supra, para 48.*

The Minister must have in mind the Department's policy aims when selecting Board members, including the Chairperson and Deputy Chairperson and she must select people who are capable of carrying out those aims and who share the Department's policy vision.¹⁷⁸

As a result the formulation of defence procurement policy and the appointment and dismissal of people who will supervise the implementation of that policy are thus closely linked. While the appointment and dismissal of Board members is not the formulation of policy as such, it is the means by which the Minister gives direction in the vital area of military procurement, and is therefore an adjunct to her executive policy formulation function.¹⁷⁹

It is the function rather than the functionary that is important in assessing the nature of the action in question. The mere fact that a power is exercised by a member of the Executive is not in itself determinative.¹⁸⁰ It is helpful to have regard to how closely the decision is related to the formulation of policy, on the one hand, or its application, on the other. A power that is more closely related to the formulation of policy is likely to be executive in nature and, conversely, one closely related to its application is likely to be administrative.¹⁸¹ The Minister thus has a level of discretion in determining when directors should be removed, which points to the fact that her power under section 8(c) is executive in nature. The fact that the power is sourced in legislation is, as noted above, not in itself determinative, and thus does not dilute the force of the other considerations canvassed.¹⁸²

The exercise by the Minister of her section 8(c) power is not a low-level bureaucratic power which merely involves the application of policy in the discharge of the daily functions of the state, which is the ordinary remit of administrative law. Rather, it operates at a different level, for the section is a constitutive part of the Minister's power to supervise high-level public office-bearers in the performance of their official duties. This she does by means of the corporate relationship she has with the Board members. They are the directors she has selected, in accordance with her policy dictates, to manage the Corporation, and thereby determine defence procurement policy.¹⁸³

Khampepe J writing on behalf of the Court, indicated that she was persuaded that the impugned decisions were not subject to review under PAJA, as they were executive in nature. Armscor's failure under the board leadership to ensure that the SANDF was adequately equipped was a dereliction of its cardinal duty, which precipitated the

¹⁷⁸ *Motau supra, para 48.*

¹⁷⁹ *Motau supra, para 48.*

¹⁸⁰ *Motau supra, para 36.*

¹⁸¹ *Motau supra, para 38.*

¹⁸² *Motau supra, para 50.*

¹⁸³ *Motau supra, para 49.*

breakdown in their relationship and was sufficient reason for her to have lost all trust in the Armscor's leadership.¹⁸⁴

Secondly, the Minister dismissed only Motau and Mokoena and not the entire Board, as this would have left Armscor unable to fulfil crucial obligations and completely rudderless. The dismissal was based on the continued failings of the Board leadership.¹⁸⁵ The Minister's conduct exhibited the required rational link between the need to address the failures of Armscor and the termination of the services of General Motau and Ms Mokoena: with them at the helm, Armscor was not operating in an efficient or effective manner and was failing in its statutory mandate. As a result the authority was properly used by the Minister, in the exercise of her executive oversight, to abate the problems at Armscor. Given this, the Court held that the Minister's decision was rational.¹⁸⁶

It was evident that the relationship between the Minister, on the one hand, and the board leadership on the other, had disintegrated irreparably. The order of the High Court reinstating Motau and Mokoena was set aside.¹⁸⁷ It was replaced with a declaration that the Minister acted unlawfully only in so far as she terminated the services of Motau and Mokoena on the Armscor Board without following the procedure set out in section 71(1) and (2) of the Companies Act,¹⁸⁸ but her reasons for dismissing the board leadership were rational.

5.6 Assessing the impact of the Motau judgment

The *Motau* decision is very instructive on many levels. At a factual level, the Court found that: as the board leadership, the Chairperson and his deputy must bear a special responsibility for the board's failures, by voluntarily acceding to the Minister's decision to appoint them to lead the Board; they must also take responsibility for its successes and failures.¹⁸⁹ This special relationship in my view can also be applied to the Minister and the state department under his or her leadership. The relevance of *Motau* to section 91(2) is the fact that the power of a Minister to appoint a board of directors is similar to the power of a President when appointing Cabinet members, as the objectives of their appointments are similar in that they deal with a corporate relationship between the President, (political principal) and a Cabinet member (executive authority of a national government department), with fiduciary duties imposed on them to oversee the effective management of the resources that state departments are entrusted to manage.

Another crucial determination was that the executive power to appoint board members was described as the supervision of high level public officers in the performance of

¹⁸⁴ *Motau supra*, para 52.

¹⁸⁵ *Motau supra*, para 68.

¹⁸⁶ *Motau supra*, para 71.

¹⁸⁷ *Motau supra*, para 90.

¹⁸⁸ *Motau supra*, para 94.

¹⁸⁹ *Motau supra*, para 63.

their official duties and this happens by means of a corporate relationship.¹⁹⁰ *Motau* affirmed yet again, that the Court was not concerned with determining whether the Minister's executive decision was the best that could have been made, or if a different decision could have been made; but rather if the Minister responded rationally to the indications of dysfunction in Armscor and whether her response was rationally connected to her executive oversight function.¹⁹¹

The Constitutional Court also gave further guidance in *Motau* on how the appointment or dismissal of high level public office bearers should take place. In terms of the Armscor Act, the Minister of Defence needed to only demonstrate good cause in order to justify the termination of the services of a member of the board of directors, it goes without saying that what constitutes good cause must be understood in the context of the Armscor Act as a whole, with particular focus on the objectives and functions of Armscor and the important role played by the members of the board.¹⁹² Although the Minister was constrained to act in accordance with the requirement of good cause which was stipulated by the Armscor Act, an argument can be made that a similar standard, that is rationality, also binds the President when acting in terms of section 91(2) of the Constitution.

In *Motau*, Khampepe J also took the opportunity to clarify the Constitutional Court's earlier decision of *Masetlha*, where that Court addressed the fact that the *Masetlha* judgment was subsequently relied on by the Minister in her submissions, as authority for the proposition that failure to observe the requirements of procedural fairness in the exercise of an executive power was valid, despite this requirement being a stand-alone requirement under the principle of legality. Khampepe J clarified that *Masetlha* does not stand for that unequivocal proposition, but rather that *Masetlha* was limited to the specific context of that case and the power under consideration—the distinguishing feature which rendered the observance of procedural fairness inapposite in that case, was “the special legal relationship that obtains between the President as head of the National Executive, on the one hand, and the DG of an intelligence agency, on the other”.¹⁹³

I understand this to mean that observance of procedural fairness was inappropriate in *Masetlha* as a matter of rationality, when looking at the specific facts of that case. The sensitive nature of the special relationship between the President and the head of the intelligence service, lying as it did in the heartland of “the effective pursuit of national security”, meant that *Masetlha*, the spymaster-in-chief, could continue to occupy his position only as long as he enjoyed the trust of the President, his principal. Moreover, the power to appoint and dismiss in *Masetlha* was “conferred specially upon the President for the effective business of government and for the effective pursuit of

¹⁹⁰ *Motau supra*, para 49.

¹⁹¹ *Motau supra*, para 69 and 70.

¹⁹² *Motau supra*, page 32, para 54.

¹⁹³ *Motau supra*, para 81.

national security.”¹⁹⁴ If the President did not trust the DG of the Agency, this would hinder the effective pursuit of national security, therefore the non-observance of procedural fairness in that specific case did not offend the rationality principle.

In considering the applicable law in *Motau*, the Constitutional Court assessed the principle laid down in *Albutt*, where it had earlier decided that procedural fairness obligations may attach independently of a statutory obligation, by virtue of the principle of legality. In that case, the President was required, as a matter of rationality, to allow some form of participation by interested persons when issuing pardons to prisoners under a special dispensation.¹⁹⁵ The key issue in *Albutt* was the question of whether the President is required, prior to exercising the power to pardon a group of convicted prisoners, to afford the victims of those offences a hearing.¹⁹⁶

In *Albutt*, former President Mbeki had announced a special dispensation for applicants for pardon who were convicted for committing offences that were politically motivated. Non-governmental organisations representing the victims had initially made numerous attempts to secure participation of the victims of those crimes included in the special dispensation process, but these attempts were rejected by the President, when he stated that neither the terms of reference, nor any law compelled that input from the public or victims to be called.¹⁹⁷

In this case, the President was required, as a matter of rationality, to allow some form of participation by interested persons when issuing pardons to prisoners whose crimes were politically motivated under a special dispensation. The invalidity of this decision did not arise on procedural fairness grounds, but as a matter of the rationality requirement demanded by the context-specific nature of the special dispensation process.¹⁹⁸ Its aim was reconciliation and this could not be achieved without the participation of the victims of the crimes.

As a result, one cannot have a narrow conception of the President’s powers in terms of section 91(2), because even in the instance of appointing or dismissing a member of Cabinet, it is conceivable that procedural fairness may as a matter of rationality, require that reasons be disclosed by the President to those Cabinet members, who will be affected by his or her decision, for them to comment prior to a final decision being validly taken.

If this is properly understood, then this should forever banish the idea that section 91(2) is exercised only on the basis of the personal preference of the President, because constitutional values must always permeate all presidential conduct, even when appointing or dismissing Cabinet members. The aim of the institution of the special dispensation was reconciliation and this could not be achieved without the

¹⁹⁴ *Motau supra*, para 81.

¹⁹⁵ *Motau supra*, para 82.

¹⁹⁶ *Albutt v Centre for the Study of Violence and Reconciliation and Others 2010(3) SA 293(CC) para 1.*

¹⁹⁷ *Albutt supra*, para 8.

¹⁹⁸ *Murcott in ‘Procedural Fairness as a component of legality’, page 265, para 3.*

participation of the victims of the crimes committed by the beneficiaries of the special dispensation.

Murcott noted that in *Albutt*, the President was exercising an executive power in terms of section 84(2) (j), which is not expressly excluded from PAJA; and yet the President's decision not to allow participation by the families of the victims was still found to be unlawful. It was important for the Court to clarify its earlier decision in *Masetlha*, because the effect of that judgment seemed to have been misinterpreted as authority to negate the observance of a constitutional right to procedural fairness. Murcott drew attention to Ngcobo J's dissenting minority judgment, which in my view is the more constitutionally valid exposition of the extent of the applicability of the right to procedural fairness in Section 33 of the Constitution.¹⁹⁹

Ngcobo J (as he then was) stated that the *audi alteram partem* maxim would entail 'at a bare minimum' that Masetlha be informed of the proposed action against him and the reasons for it by the President, and also be permitted an opportunity to comment thereon. When the President unilaterally altered Masetlha's term of office without consulting him, he acted contrary to this maxim, and was in breach of legality.²⁰⁰

I agree with Murcott's position, because indeed if the President did not have a duty to act fairly at all times, then he or she would be in breach of the legality doctrine when he or she appoints or dismisses a Cabinet member without giving reasons and following a fair procedure to reach such a decision. The ability by former President Mbeki to act unilaterally in reducing the term of Masetlha's employment contract, was in all honesty, incompatible with the Constitution. The fact that the legality principle requires the President at a minimum to inform those against whom he or she intends to act, and to further grant them an opportunity to comment prior to a final decision being taken against them, squarely places the President within the four corners of constitutional conduct.

The minute the President enjoys a power that shields him or her from accountability for the exercise thereof, then an invalid compromise of a number of constitutional values has taken place and such a situation is untenable in a constitutional dispensation. This in essence means that the President cannot act without a lawful reason and therefore is obliged to observe and promote constitutionally compliant conduct. Khampepe J did well to clarify the special context of how *Masetlha* was decided, because my understanding of that decision is that *Masetlha* is an exception to the rule and not a general norm, since it does not stand for the incorrect position that procedural fairness is inapposite in all instances of the exercise of executive power.

If the Court did not clarify the special circumstances relating to *Masetlha* in the *Motau* matter, *Masetlha* may have continued being incorrectly relied on, as authority for the

¹⁹⁹ *Masetlha supra, paras 197 & 207.*

²⁰⁰ *Masetlha supra, paras 197 & 207.*

argument that the President is not required to act fairly in all instances. Failure to afford Masetlha an opportunity to comment on his impending suspension, would perpetually render the President's decision open to judicial review, on the basis that he acted in breach of section 33 of the Constitution, which is broader in its application than what is encapsulated in PAJA, as that Act only applies to executive action).

5.7 Conclusion

The three judgments discussed in this chapter clearly indicate that the President's decision to appoint any functionary is subject to the principle of legality, in particular rationality. If the President cannot prove the rationality of his appointments to Cabinet, then such appointments if challenged, can successfully be set aside. This is proof that any power exercised by the President, is a public power that may be challenged, if it can be proven that it was not exercised in a manner that promotes lawful objectives.

In conclusion, it can be agreed that in some instances, the requirement of procedural fairness, which is a part of the doctrine of legality, may require a party affected by the President's decision to either appoint or dismiss them; as a matter of rationality, be informed of the impending action against them. This would have the effect of limiting arbitrariness and further promote accountability. As a result thereof, the appointment and dismissal of Cabinet members by the President is subject to the principle of accountability and the rule of law, this proves that the President cannot rely on 'prerogative' as the reason for reshuffling cabinet, as this exercise of power must also satisfy the requirements of legality.

CHAPTER 6

CONCLUSION ON POSSIBLE LEGAL MEANING OF SECTION 92(1) OF THE CONSTITUTION

6.1 Introduction

It should be undisputed that when the President appoints or dismisses members of cabinet, he is undoubtedly exercising executive powers in terms of Section 85(1) of the South African Constitution. When concluding on the possible legal meaning of section 91(2) of the Constitution, one should always be guided by principles promoting constitutional conduct and the best interest of the citizens and the Republic. This has been borne out by the various judgments of the Constitutional Court that were discussed in previous chapters, and a proper analysis of the principles enunciated therein, should lead us to a concrete understanding of the applicable legal standard and the requirement that legality should form the basis of the reason for the President to appoint or dismiss a member of Cabinet.

6.2 All public power is subject to the supremacy of the Constitution

The power to appoint or dismiss Cabinet members is not a simple matter of an employment contract, but rather concerns the weighty question of whether public authority has been exercised in a constitutionally valid manner. It is my contention that in light of this understanding, the President would be legally mistaken to assume that he or she can exercise any power, including the powers in terms of Section 91(2) of the Constitution, without due regard to the limitations placed on such powers by the entire scheme of the Constitution.

It is a fundamental feature of South Africa's constitutional design to give effect to the supremacy of the Constitution, therefore courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is subject to constitutional control. As a result, when the President wants to exercise the power to appoint or dismiss a member of Cabinet, he must have valid reasons in law for doing so, because the exercise of this power should never be at odds with the broader constitutional scheme and its values.

This position originates from the contextual interpretation of why the President is empowered to appoint Cabinet members, as this interpretative method requires that the purpose for empowering the President to compose a Cabinet be determined, if a clear understanding of how this power should be lawfully exercised is to emerge. The reason the President is empowered to compose Cabinet is to facilitate effective and lawful governance of the state in pursuit of the national interest, which mainly consist of managing the resources of the country for the benefit of all citizens, as its elected head of the National Executive. It is my contention that this will only be achieved when the President makes justifiable appointments to Cabinet based on the promotion of

constitutional values such as the rule of law, advancement of the interests of the republic, accountability, efficient and economic use of resources, accountability and openness.

This therefore highlights the misconception which the ANC and former President Zuma were labouring under when they constantly affirmed that the President of the Republic has a prerogative to hire and dismiss members of Cabinet without justification. The use of the term 'prerogative' or 'constitutional prerogative' is rather unfortunate, because at best it is outdated, and at worst, legally invalid in our current constitutional framework.

The continued reliance on 'prerogative powers' as a justification for the exercise of public power by former President Zuma was inappropriate, misleading and constitutionally invalid. If this misconception is left unchallenged, it means that a President of the Republic has been allowed to morph into an unaccountable super-functionary that is above the law and can do as he pleases on the basis of 'prerogative'. Clearly such a situation is untenable, because the exercise of all public power is subject to constitutional control, as there is a legal standard that applies to the exercise of this power.

To lawfully exercise this power, the President must provide objective proof that the exercise thereof is rationally linked to the achievement of the purpose for which the power was conferred on him or her. In other words, the standard of legality applies directly to the exercise of executive power. It is my contention that a sustainable legal argument can be made that the principle of legality logically requires that the President objectively considers how his appointments or dismissal to Cabinet promote the public interest and the rule of law. In my view, this is what the rationality requirement aims to promote, by preserving the supremacy of the Constitution in all spheres of public power. Since the President's decision to appoint or dismiss a Cabinet member must conform to the principle of legality, he or she may not perform this function in bad faith, arbitrarily or irrationally because the exercise of this power is a constitutional matter.

It is therefore essential for this right to challenge the exercise of public power to exist, because all public power must be subject to the supremacy of the Constitution. As a result, if it can be objectively proven that these values and objectives were not considered by the President when he or she made an appointment or dismissal decision in terms of section 91(2), then such conduct may give rise to a court challenge, as it would be possible to argue that the President acted contrary to his constitutional duty to act in good faith and not to misconstrue his or her power.

In seeking to ensure that such a right can be exercised by members of the public, the Constitution has empowered the Constitutional Court to be the final arbiter of whether or not the President has acted in a constitutionally compliant manner. This in my view is the correct interpretation of the limits that are applicable to the exercise of this power,

because the Constitution as a whole militates against any power being exercised in an unfettered manner.

6.3 Section 91(2) must contain a two-stage enquiry aimed at promoting rationality

As a consequence of the guidance from the Constitutional Court, we now know that as a matter of law, such a process consists of two-stages. First, the actual proof of the existence of the facts relied upon as the basis of a decision must be objectively established. In other words, the existence of the facts supporting a decision to appoint or dismiss a Cabinet member must be objectively proven. If at a factual level, a particular fact relied upon as the basis of a decision by the President cannot be proven, then the President's decision will lack one of two essential elements that is required by legality principle, and will be susceptible to a successful review by a court that has the appropriate jurisdiction.

After the factual stage enquiry, the second stage that follows should be a substantive decision that satisfies the rationality test, this entails an evaluation of the underlying reasons for taking a particular course of action. The reasons for the appointment or dismissal must show at a substantive level, a rational link between the appointment or dismissal on one hand, and the eventual or prospective promotion of a legitimate government purpose on the other hand. In other words, the reasons relied upon by the President to act either positively or negatively, must be show a link with the eventual promotion of a legitimate government purpose. In the absence of these requirements, the President's decision will be tainted by arbitrariness and bad faith, resulting in the misconstruing of section 91(2), which will clearly be unconstitutional.

It has now become clear that when making Cabinet appointments or dismissals, the President must be guided by the need to ensure that the executive authority (Cabinet member) of the government department, is sufficiently suitable in order to provide accountable leadership that will attain efficient and economic use of resources, underpinned by high standards of professional ethics and transparency, as required by section 195 of the Constitution.

For the President to satisfy these requirements, he or she must act in good faith, apply his own mind and not attempt to misconstrue the nature of his powers. This legal duty is placed on the President in terms of section 91(2) and he must exercise great care to ensure the achievement of the objectives enumerated in sections 1(c), 2, 83 (b) & (c), 92(3)(a) and 195(a)(b)(f)&(g) of the Constitution. If the President in the exercise of his or her section 91(2) power fails to consider the values prescribed by sections 1,2,83 and 195 of the Constitution, he or she will be failing in his constitutional duty to effectively and lawfully administer South Africa's democratic state and its resources.

6.4 Application of the principles of legality to Nenegate

In light of what is stated above, I will conclude by applying the aforementioned principles to the dismissal of Nhlanhla Nene as the Minister of Finance. It is obvious that former President Zuma indeed had the authority to dismiss Mr Nene, as section 91(2) expressly provided him with the powers to appoint or dismiss members of Cabinet. However, it would not be lawful for a President of the Republic to simply reshuffle Ministers of Finance without a lawful reason for doing so. The reasons offered for the dismissal of Mr Nene are insufficient and unsatisfactory, because it is no longer viable for the President to rely on 'prerogative' in this regard.

The exercise of appointing or dismissing members of Cabinet is an official function and a legal standard applies to this exercise of public power. The standard applicable to the reasons behind Mr Nene's dismissal, must satisfy the requirements of the doctrine of legality, in particular the rationality aspect of this principle. In order to assess the legality of that decision, former President Zuma was obliged to have a lawful reason for acting in the manner he did and my contention is that in dismissing Mr Nene, former President Zuma's decision was supposed to satisfy the required two-stage enquiry.

He primarily had a legal duty to establish at a factual level that Mr Nene was involved in some acts of misconduct or non-performance, or incapacity to fulfil his official duties. This is an objective test and if no impropriety could be established, then the President's decision would lack an essential element required by the legality principle. Secondly, in order to lawfully dismiss Mr Nene, the former President would have had to be satisfied that in light of the seriousness of the nature of Mr Nene's incapacity or misconduct, and in order to promote the interests of our constitutional democracy, a decision of dismissal was warranted, then the former President would have passed the rationality test for his decision. This two-stage enquiry must precede a decision to dismiss. If this two stage enquiry was not complied with, then the decision was susceptible to a successful legal challenge, on the basis that it was irrational.

If on the other hand, it was objectively established factually that Mr Nene was indeed incapable of carrying out his official duties or had committed some act of misconduct, or his continued presence in Cabinet would not promote legitimate government purpose, then the President would have been entitled to take any action that he deemed necessary to remedy the situation, such as dismissal.

Due to the fact that no further explanation for the dismissal of Mr Nene was offered by former President Zuma, except a half-hearted reference to an impending 'deployment to another position'; and since this 'deployment' never materialised after Nene was dismissed, it can be reasonably concluded that no such reasons existed and therefore the decision was irrational and invalid, because it lacked the factual and substantive basis that is required by law to make it valid (i.e two-stage enquiry revealing the facts and reasons for the decision which display a rational link).

6.5 Conclusion

It is essentially my contention in conclusion, that section 91(2) has its own implied constitutional requirements for its lawful exercise; therefore every President exercising this power, must observe the inherent limitations applicable to such public power, which is the promotion of legitimate government purposes and the achievement with the best interests of the Republic and her people. The purpose of this power is therefore not for the promotion of the narrow personal preferences of the head of Cabinet, but rather the constitutional imperatives of effective and lawful governance, that is in the best interests of citizens.

At all times, rationality must be in attendance when this power is being exercised, it is therefore necessary that it be understood that the President is enjoined to exercise his powers to appoint or dismiss Cabinet members in a manner that promotes the achievement of other relevant constitutional values. This means that the exercise of this power is subject to all the applicable limitations mandated by the Constitution.

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