

# **MINI-DISSERTATION**

## **PROPOSED TITLE**

**THE APPLICATION OF RATIONALITY REVIEW IN THE CONSTITUTIONAL COURT**

BY

**THOKA NGWAKO ALBERT**

**16384700**

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**SUPERVISOR:**

**PROFESSOR D. BRAND**

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## TABLE OF CONTENTS

Acknowledgements	5
Summary of the Mini-Dissertation	6
Declaration	8
Objectives of the Study	9
<b>Chapter 1</b>	
Historical Perspective	
1.1 A short synopsis of rationality review in the Pre-democratic era	11
1.2 Post Democratic era rationality review	14
1.3 Comparative study on rationality review in Australia	18
1.3.1 Australian approach to rationality review	18
<b>Chapter 2</b>	
2.1 What is rationality	20
<b>Chapter 3</b>	
3 The relationship between rationality and legality	29
3.1 Introduction	29

3.2	Legality as seen from the Court's perspective	31
<b>Chapter 4</b>		
4.	Constitutional court approach and judgements on rationality of administrative decisions and actions	37
4.1	Introduction	37
4.2	Rationality review of the Presidential legislative actions	38
4.2.1	President of the Republic of South Africa and Others v South African Dental Association of South Africa and Another	39
4.2.2	Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others	40
4.2.3	Democratic Alliance v President of the Republic of South Africa and Others	43
4.2.4	Masetlha v The President of South Africa	48
4.2.5	Albutt v Centre for the study of Violence and Reconciliation	51
4.3	Rationality review on the exercise of executive action or powers	52
4.3.1	Minister of Defence and Military Veterans v Motau and Others	53

4.3.2	Rationality review and specially constituted commissions of enquiry decisions	55
4.3.2.1	Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others	55

## **Chapter Five**

Conclusion	57
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## SUMMARY OF THE MINI-DISSERTATION

Although the Promotion of Administrative Justice Act (PAJA)<sup>1</sup> provides for instances where administrative decisions and actions are reviewable, decisions are most likely to be reviewed based on their irrationality. However, there is still uncertainties as to what exactly constitute an administrative action and when is an administrative decision irrational and therefore reviewable. In other words, what is the scope of rationality of administrative actions? There seems to be more questions than there are answers on this aspect, this is mostly caused by the fact that executive as another organ of state in the fore front of administrative decisions has not covered itself in glory in this regard due to a possible lack of understanding of the Constitution, or a simple insouciant, equanimous and lackadaisical interpretation of the Promotion of Administrative Justice Act. This warrants analysis to ascertain what exactly rationality is and where and when is it applicable.

I will in the main attempt to give well-reasoned and thought out response to the following questions in this study:

1. What is rationality?
2. How is rationality determined as it relates to the administrative actions and decisions?
3. When is an administrative action or decision irrational?
4. Does an irrational decision render it unlawful or whether there is a relationship between rationality and legality?

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<sup>1</sup> Act No.3 of 2000.

5. Does rationality also require procedural fairness, in other words can the process followed in arriving at a decision render that decision reviewable.



## DECLARATION

I declare that the mini-dissertation, which I hereby submit at the University of Pretoria, is my own work has not previously been submitted by me for a degree at another university. Acknowledgements and references in accordance with the University requirements have been used where I used secondary material.

I further declare that:

1. I understand what plagiarism entails and am aware of the University's policy in this regard.
2. I declare that this dissertation is my own original work. Where someone else's work was used (whether from a printed source, the Internet or any other source) due acknowledgement was given and reference was made according to departmental requirements.
3. I did not make use of another student's previous work and submitted it as my own.
4. I did not allow and will not allow anyone to copy my work with the intention of presenting it as his/her own work.

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Signature

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Date

## OBJECTIVES OF THE STUDY

This study looks at the Constitutional Court's approach to the question of rationality principle, it seeks to look at how the Court has approached this issue and how it continues to do so. In doing this it will be required therefore to look at the Constitutional Court's judgments in the past and recently. The Constitutional Court is the ultimate court on constitutional matters and the development of the law around constitutional matters with a view to ensuring the constitutional democracy and aspirations of the Constitutions are realised. The Constitution is the cornerstone of South Africa's constitutional democracy against which all legislation and action must be tested for constitutional compliance. It is thus important that judgments arising out of the court's jurisprudence are utilised as a guiding light in considering various aspects of our law. The mini-dissertation in the main answers the following salient questions:

1. What is rationality?
2. How is rationality determined as it relates to the administrative actions and decisions?
3. When is an administrative action or decision irrational?
4. Does an irrational decision render it unlawful or whether there is a relationship between rationality and legality?
5. Does rationality also require procedural fairness, in other words can the process followed in arriving at a decision render that decision reviewable.

The above-mentioned questions will be answered by looking at the following important items in chapters:

The first chapter will look at the historical perspective, this implies the origin of rationality within the context of the South African Administrative law, this is to say where did rationality originate and what informed its origin in the first place. The view I hold is that it is important to see how far rationality of administrative decisions have come in the pre-democratic era and juxtapose it with the era of constitutional supremacy where the Constitution reigns supreme of all other legislation to be able to have an overall comprehension of the current situation.

The second chapter will look at the question what is rationality? I will delve into this principle and accord a definition to rationality whereas the third chapter will look at the relationship between rationality and legality, is rationality and legality related and is it possible to look at rationality without touching on legality or lawfulness of administrative decisions. The fourth chapter will consider the constitutional court's approach and look at various judgments arising out of the constitutional court regarding rationality of administrative actions and decisions. The fifth chapter will be the conclusion which entails my conclusion.

# CHAPTER 1

## HISTORICAL PERSPECTIVE

### 1.1 A short synopsis of rationality review in the Pre-Democratic Era

In this chapter, I discuss the South African Pre-democratic era with a view to show how rationality of administrative actions was approached, I will seek to compare rationality review in the pre-democratic era with the democratic era. This I will do with an intention of showing the position of the pre-democratic rationality and rationality during the advent of democracy to see if it is achieving the purpose of ensuring that decisions are rational and legally sound supported by valid reasons.

According to Geo Quinot, rationality is not an integral part of the Bill of rights, but it is an important tenet of the rule of law in South Africa,<sup>2</sup> the fact that, the Bill of rights does not implicitly refer to rationality does not mean that it is not part of our legal system. It is as much part of our legal system and this will be shown in the forthcoming paragraphs where this principle is discussed in detail with reference to various constitutional court judgments on this issue.

Before the promulgation of PAJA,<sup>3</sup> the test for rationality in respect of administrative action was held to be whether there is a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the

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<sup>2</sup>Geo Quinot, Janice Bleazard, Steven Budlender, Hugh Corder, Michael Kidd, Petrus Maree, Melanie Murcot, Emma Webber: Administrative Justice in South Africa, an introduction, (Oxford University press Southern Africa,2015) (page 175).

<sup>3</sup> Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000).

conclusion he or she eventually arrived at.<sup>4</sup> During the operation of the common law review of administrative actions, and at a time just before the Interim Constitution could be passed into law, rationality review was not recognised to be a separate ground upon which the administrative actions could be reviewed. The Courts resorted to the principle of justifiability in terms of which it would be checked if there is a rational, objective basis for the decision made.<sup>5</sup> Long before PAJA could be promulgated and during the operation of the Interim Constitution, the Constitutional Court also dealt with a question of rationality in the matter of *State v Makwanyane*,<sup>6</sup> which is a matter concerning an appeal against the death penalty, the Court in that case held through Ackerman as follows:

“[w]e have moved from a past characterized by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution.”<sup>7</sup>

In the matter of *Trinity Broadcasting (Ciskei) v Icasa*,<sup>8</sup> the Court held that in the application of the test for rationality, the reviewing Court will ask if there is a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at.<sup>9</sup> In *Pharmaceutical Manufacturers* case,

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<sup>4</sup> *Carephone (Pty) Ltd v Marcus NO and Others* 1998 (11) BLLR 1093(LAC) para 37.

<sup>5</sup> Burns Y and Beukes M “Administrative law under the 1996 Constitution” 3<sup>rd</sup> edition, page 384.

<sup>6</sup> CCT/3/94.

<sup>7</sup> *Makwanyane* par 156.

<sup>8</sup> 2004(3) SA 346.

<sup>9</sup> *Trinity Broadcasting (Ciskei) v Icasa*, para 21.

rationality was held to be a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries.<sup>10</sup> The pharmaceutical Manufacturers case is therefore effectively the first judgment that precipitates rationality review of administrative actions and decisions and served as a catalyst for a transition from the common law review of administrative actions to the constitutionally and PAJA premised approach. It also firmly asserted the position of rationality review within the scope of the South African Administrative law review.

Under the apartheid regime before the democratic dispensation, the legislature, which is Parliament, enjoyed supremacy, which gave them powers to dictate several laws that were meant to further entrench a system of institutionalised racial discrimination. Parliamentary supremacy conferred on government officials' discretionary powers, those powers were in turn abused with a view to push the policies of the then government. If a person felt his or her rights were unduly invaded, the best way to defend and vindicate their rights would be to challenge the invasion through administrative law review.<sup>11</sup>

Before the constitutional democracy era, and the promulgation of PAJA, courts would interfere with the administrative decisions of government officials, but the only inlet was the doctrine of *ultra vires* in terms of which officials were expected to only exercise the functions or perform only those duties they are allowed to exercise by the law.<sup>12</sup> In *Fedsure Life Assurance v Greater Johannesburg*,<sup>13</sup> The Court summarized the position of the review of administrative actions before the democratic era by correctly holding, through Justice O'Regan that:

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<sup>10</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 para 90.

<sup>11</sup> Hoexter C, *The principle of legality in South African Administrative law* (2004) 4 *MqJlaw* 8; (2004) 4 *Maquirie law journal* 165.

<sup>12</sup> Hoexter C, "Administrative law in South Africa" 2<sup>nd</sup> edition, page 115.

<sup>13</sup> 1999(1) SA 374 (CC).

“Prior to the enactment of the Interim Constitution, our superior Courts asserted a power to review subordinate legislation as well as administrative and executive action. The jurisdiction to do so was said to lie in the inherent jurisdiction of the Courts. The legal principles and the body of law developed by the Courts in the application of this power were often referred to as ‘administrative law’. At one time the Courts sought to distinguish between rules applicable to different types of action subject to review by giving them labels such as legislative, administrative, quasi-judicial and judicial.”<sup>14</sup>

It is my view therefore, regard being had to the above-mentioned judgments that even though rationality and the review of administrative action was not implicitly stated anywhere in the statutes, Courts always recognised that administrative actions and decisions were still required to be rationally arrived at and consequently in accordance and compliance with the rule of law.

## **1.2 Post Democratic era rationality review**

In 1994, South Africa attained Constitutional democracy after the very first general elections were held. The first general elections and the dawn of constitutional supremacy necessitated an introduction of various statutory promulgations intended to give support to the newly found constitutional order. The Promotion of Administrative Justice Act (PAJA)<sup>15</sup> introduced the right to just administrative action as necessitated by the provisions of section 33 of the Constitution.<sup>16</sup>

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<sup>14</sup> Fedsure Life Assurance v Greater Johannesburg Metropolitan Council, Para 23.

<sup>15</sup> See note 2 above.

<sup>16</sup> The Constitution of the Republic of South Africa, 1996.

The Constitution championed a whole new paradigm shift in as far as the review of administrative action is concerned, it provided for and entrenched the right to just administrative action which was conspicuously absent within the previous constitutional provisions. In entrenching the right to administrative action, Section 33 of the Constitution importantly provides as follows:

- “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons
- (3) National legislation must be enacted to give effect to these rights, and must—
  - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
  - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  - (c) promote an efficient administration.”

National legislation which is envisaged in the above mentioned legislative provision is the basis and informing legislation for the review of all administrative actions or decisions, the Constitution is therefore the overarching informing source of law which made it possible for the recognition of the right to administrative action. That everyone has the right to administrative action that is lawful, reasonable and procedurally fair is an important departure point and premise. Another important facet of this constitutional provision is that it categorically requires for national legislation that must provide for the review of administrative action by a court or where appropriate, an independent and impartial



tribunal, impose a duty on the state to give effect to the rights in subsection (1) and (2) and promote an efficient administration.<sup>17</sup>

With the dawn of the new democratic dispensation, the practice under parliamentary democracy of according very wide discretionary powers to government officials came to an end. In its place came constitutional democracy where the constitution is now the supreme law of the republic, and the right to challenge arbitrary decisions or unfair actions of the state are now in terms of the Promotion of Administrative Justice Act expressly provided for. The enactment of the 1993 and 1996 Constitution together with the actual promulgation of the Promotion of Administrative Justice Act signified an important era and a turning point in the South African legal system because the review of administrative actions or decisions was now expressly provided for.<sup>18</sup>

With the advent of constitutional democracy in South Africa, various important statutes were promulgated with the intention of giving effect to the constitutional provisions. These statutes are central towards achieving the objectives of the Constitution such as the advancement of free and open democratic society based on human dignity, the achievement of equality and the advancement of human rights and freedoms and the supremacy of the Constitution.<sup>19</sup>

The Promotion of Administrative Justice Act provides for instances where an administrative action is judicially reviewable. The Act provides that a court or tribunal has the power to judicially review an administrative action if the action was amongst others

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<sup>17</sup> Section 33 (1), (2) and (3) of the Constitution.

<sup>18</sup> De Ville J.R" Judicial Review of Administrative Action in South Africa,2003 page 1.

<sup>19</sup> Section 1 of the Constitution.

procedurally unfair and not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator.<sup>20</sup>

The absence of rationality in an administrative action or decision is sure to precipitate its review under the new constitutional dispensation and it is important that there must always be a connection between the decision and the purpose for which the decision was taken. Furthermore, the decision must be connected to the purpose of the empowering provision, the information before the administrator and the reasons for which it was taken. An administrative action or decision which is not rationally connected to all the above-mentioned requirements will never escape constitutional scrutiny upon judicial review.<sup>21</sup>

Every administrative action or decision is in terms of PAJA required to be firmly rooted on a rational legal basis. If found to be irrational, it falls to be judicially reviewed in accordance with the statutory provisions as mentioned above. Rationality review is now the standard of review for administrative actions or decisions as opposed to the pre-democratic era where the review standard was purely based on amongst others ultra vires where the official was found to have acted beyond the scope of his or her own powers. And, this position remains irrespective of whether the action is an administrative action or not. Post the promulgation of PAJA, the South African legal fraternity within the field of Administrative action has drastically changed, such that any person who feels aggrieved by the action or decision taken no longer resort to the common law process but is now restricted to follow the PAJA review process.

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<sup>20</sup> Section 6 of the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000).

<sup>21</sup> Burns Y and Beukes M "Administrative law under the 1996 Constitution" 3<sup>rd</sup> edition, page 382.

In the matter of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,<sup>22</sup> the Constitutional Court in affirming the new position post PAJA held that:

“The courts power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter.”<sup>23</sup>

### **1.3 Comparative study on rationality review in Australia**

#### **1.3.1 Australian approach to rationality review**

The Australian administrative law, much like its South African counterpart does provide for the judicial review of administrative decisions. It is however divided into judicial review and merits review. Judicial review is mainly concerned with the legality of the administrative decision. Judicial review is resorted to as the last resort when the administrative decision-making process has failed. Merits review on the other hand is concerned with the substance of a decision and it is carried out by various administrative review bodies. In other words, it is concerned with whether a legally sound decision was a correct and preferable one. Merits review is the functionality of the Administrative Appeals Tribunal, whereas judicial review just as the name suggests is the competency of the courts.<sup>24</sup>

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<sup>22</sup> 2004(4) SA 490 (CC).

<sup>23</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*, para 22.

<sup>24</sup> Justice Peter Mc McLellan “Australian Administrative Law”, A paper presented to the International Symposium Hangzhou, People’s republic of China, 31 October to 4 November 2006.

Section 5 of the Australian Administrative Decisions (Judicial Review) Act,<sup>25</sup> makes provision for the aggrieved person to apply to the Federal Court or the Federal Circuit Court for an order of review of decisions because the decision was otherwise contrary to law and that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made. This implies that the power was exercised for a purpose other than a purpose for which the power is conferred. Just as in South African jurisprudence, rationality is also a standard of good administrative decision review in other countries such as Australia. This view indeed finds favour in the words of Vincenzo Salvatore Paparo who writes that:

“It is arguable that rationality is a universal legal requirement of good decision making. The requirement for rationality in administrative decision-making is generally seen to derive from the implied limits set by the legislature in granting the powers to the decision maker. This concept requires rationality in the exercise of statutory powers based on findings of fact and the application of legal principles to those facts”.<sup>26</sup>

There is an inescapable requirement for rationality in the exercise of statutory powers based upon findings of fact and the application of legal principle to those facts. A serious failure of rationality in the decision-making process may stigmatise the resultant decision as so unreasonable that it is beyond power. Administrative decisions in the exercise of statutory powers should be rationally based.<sup>27</sup>

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<sup>25</sup> Act No.59 of 1977.

<sup>26</sup> Vincenzo Salvatore Paparo “Review of collegiate decisions: Judicial Protection for Pissants” page 80.

<sup>27</sup> Airo-Farulla, Geoff ‘Rationality and Judicial Review of Administrative action’ [2000] MelbUlaw Rw 23;(2000) 24(3) Melbourne University Law Review 543.

## CHAPTER 2

### 2.1 WHAT IS RATIONALITY

In this chapter, I will concentrate on rationality and attempt to answer a question as to what is rationality, how important is it to our South African administrative law. This will be done by looking at some of the constitutional court cases which I believe are central to unravelling this conundrum. Rationality refers to a legal term derived from the provisions of section 6 of the Promotion of Administrative Justice Act (PAJA),<sup>28</sup> in terms of this Act, a court or tribunal has the power to judicially review an administrative action if amongst others, the action itself is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator.<sup>29</sup> It is important to note that in terms of PAJA, the courts enjoy a peremptory power of review of administrative actions where such actions are not in compliance with the elements that have been listed thereon. I deliberately use the word peremptory because the provision itself provides that the court has a power to review such actions. It affirms that indeed the court or tribunal holds the power of review of administrative actions that are not in compliance with the requirements set therein.

The provisions of PAJA requires that for an administrative action or decision not to be reviewed, it must be rational and not arbitrary, rationality refers to the fact that it must amongst others be rationally connected to the purpose for which it was taken. The first point of enquiry is whether an action or decision in question is classified as an administrative action, if the answer is in the affirmative, the second step is to enquire if the action or decision in question is rationally connected to the purpose for which it was taken,

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<sup>28</sup> See note 1 and 2 above.

<sup>29</sup> Section 6(2)(f)(ii).

the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator.

Quinot and company, when dissecting the requirement of a rational connection between the administrative action or decision and the purpose for which the action or decision was taken states that:

“The purpose for which the decision was taken would usually be evident from the reasons given for the decision. The purpose would have to be consistent with the purpose of the legislation, or it could be set aside on the basis of ulterior purpose.”<sup>30</sup>

The requirement in terms of section 6(2)(f)(ii) that the action must be rationally connected to the purpose for which it was taken is derived from the fact that the source of the power which includes legislation, the Constitution and common law practice may not be prescriptive as to the purpose for which it has to be exercised. Where the source does not prescribe a specific purpose, the exercise would still be required to be internally coherent, this implies that the action must be rational in relation to the professed or actual purpose for which it was taken.

Simply put, there must be a rational connection between the means and the ends which requires an objective determination.<sup>31</sup> What this implies is that the manner of achieving the end must be rationally connected to the end itself. An irrational decision is one which obviously cannot be based on reason, or which lacks substance from a legal point of view.

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<sup>30</sup> Geo Quinot, Janice Bleazard, Steven Budlender, Hugh Corder, Michael Kidd, Petrus Maree, Melanie Murcot, Emma Webber: Administrative Justice in South Africa, an introduction, (Oxford University press Southern Africa,2015) (page 175).

<sup>31</sup> De Ville, J.R, “Judicial Review of Administrative Action in South Africa, revised edition” (Lexis Nexis, Butterworths Durban,2003(page 201).

This is premised from the fact that, every action or decision that is taken by those in government institutions or public offices tasked with the administration of governmental institutions and departments should be based on a sound, material and purposeful reason which is clearly comprehensible.

These type of decisions would include arbitrary decisions and decisions unsupported by evidence, a decision in which there is no connection between the evidence and the reasons provided for the decision, or where the reasons themselves are incomprehensible and not easily discernible.<sup>32</sup> When it comes to rationality, the principle which has come to be accepted in South Africa under the newly found constitutional order in which the rule of law is expected to be respected and adhered to, government should not be found to have acted beyond its powers as conferred upon it by the law. Its decisions must always be rationally related to the purpose for which the power is conferred.

Rationality is one of the salient requirements for the reviewability of administrative actions, prosaically, if actions or decisions are not rationally connected amongst others to the reason for which the power is given, it falls to be reviewed in terms of the Constitution, but an interesting question is when is a decision not rationally connected to the reason for which the power was given and thus reviewable. With the transition from parliamentary sovereignty to constitutional sovereignty, rationality has been incorporated as a principle of the rule of law and it is compulsory that all actions of the state or any exercise of a public power must be in total compliance to this important principle.<sup>33</sup>

Geo Quinot, writing on this important principle, clearly encapsulates rationality as follows:

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<sup>32</sup>Prof Burns Y, "Administrative Law under the 1996 Constitution" (1999) Butterworths, page 185.

<sup>33</sup> De Ville, J.R, "Judicial Review of Administrative Action in South Africa, revised edition" (Lexis Nexis, Butterworths Durban,2003(page 200)).

“Even though rationality is not explicitly provided for in the Bill of Rights, it is however central to the rule of law, prior to PAJA, the test for rationality in respect of administrative action was held to be whether there is a ‘rational objective basis justifying the connection made by the administrative decision –maker between the material properly available to him and the conclusion he or she eventually arrived at.’”<sup>34</sup>

The Constitutional Court has also since the dawn of constitutional democracy and the promulgation of PAJA, been approached regarding the rationality of administrative actions. This study asks two questions being whether an action or decision amounts to administrative action and if so if it is rationally related to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator, or the reasons given for it by the administrator. For instance in the case of Pharmaceutical Manufacturers Association of South Africa<sup>35</sup>, which is concerned with the presidential legislative making powers and queries whether a court has a power to review and set aside a decision by the President of this country to bring an Act of Parliament into force, the President had issued a proclamation which purports to bring into operation the South African Medicines and Medical Devices Regulatory Authority Act.<sup>36</sup> Government Notice R567 was also issued by the Minister of Health and purported to provide schedules to the Act in terms of section 31 read with section 54 of the Act. The Act in question provides for the manufacture, sale and possession of medicines for human and animal use to be controlled through a system of scheduling substances and regulating the manufacture, sale and possession of substances in the various schedules.

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<sup>34</sup> Geo Quinot, Janice Bleazard, Steven Budlender, Hugh Corder, Michael Kidd, Petrus Maree, Melanie Murcot, Emma Webber: *Administrative Justice in South Africa, an introduction*, (Oxford University press Southern Africa, 2015) (page 175).

<sup>35</sup> Pharmaceutical Manufacturers Association of SA: *In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

<sup>36</sup> Act No.132 of 1998.



The scheduling of medicines for human and animal use and the making of other regulations is an essential component of the regulatory system established by the Act. The Act further makes provision for the determination of new schedules and the making of regulations by the Minister whilst also establishing the South African Medicines and Medical Devices Regulatory Authority governed by a board appointed by the Minister in accordance with the provisions of the Act.

The court in this matter held that the President's decision to bring a statute into operation did not constitute administrative action. The Exercise of this power was closer to the law-making process than the administrative process, and it required a political judgment as to when the statute should come into force. The court held that the power to promulgate is derived from legislation and is close to the administrative process.<sup>37</sup> On the question of rationality of the presidential action of proclaiming an Act into force before the actual regulations were brought into force, the court also held as follows:

“It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”<sup>38</sup>

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<sup>37</sup> Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa, Para 79.

<sup>38</sup> Pharmaceutical Manufacturers Association par 85.

Rationality was in this case held also to be the minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The purpose sought to be achieved by the exercise of public power should be within the authority of the functionary, on the other hand, the functionary's decision should when viewed objectively, be rational. A court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately.<sup>39</sup> In the matter of Prinsloo and Van der Linde and Another<sup>40</sup>, the court also emphasises this factor that:

“In regard to the first misconception, a person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the State objective could have been achieved in a better way. As long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way. In any civil case, one of the parties will have to bear the onus on each of the factual matters material to the adjudication of the dispute. So, in the case of an aquilian claim for damages arising from a veld fire, one of the parties will bear the onus concerning negligence. As long as the imposition of the onus is not arbitrary, there will be no breach of section 8(1). In rare circumstances, it may be that the allocation of onus will impair other constitutional rights and a challenge will then arise. That is not the case here<sup>41</sup>”

In the matter of Bell Porto School Governing Body and Others v Premier, Western Cape, and Another,<sup>42</sup> The Appellants complained that the scheme for the allocation of posts to the various schools in the (WCED) Western Cape Education Department makes provision

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<sup>39</sup> Pharmaceutical Manufacturers Association par 90.

<sup>40</sup> 1997(3) SA 1012 (CC).

<sup>41</sup> Prinsloo v Van der Linde and Another par 36.

<sup>42</sup> 2002 (3) SA 265 (CC).

for the new posts created at the appellant schools to be filled by general assistants employed by the WCED, rather than the general assistants employed by the appellants. Their further complaint was that this will impose a financial burden on them because they will have to retrench their employees and carry the cost of the retrenchment, and that the scheme is also prejudicial to the learners at their schools who will have to adjust to new and possibly inferior assistants.

The Court firstly considered whether the scheme is rational and held that it indeed was rational.<sup>43</sup> The Court further held as follows:

“The scheme as finalised gives preference to existing employees of the WCED. Where new posts are created, existing WCED employees who will be redeployed in terms of the plan will be appointed to the posts, in preference to persons who are not employees of the WCED. This is a perfectly rational scheme. It is not arbitrary to refuse to take on new employees where existing employees have to be retrenched. Nor is it arbitrary to give preference to your own employees over others.”<sup>44</sup>

The fact that the other Province’s Education Department, i.e. Eastern Cape, had treated the employees of the schools on the same basis as it had treated its own employees was held to be irrelevant to the rationality. The fact that there may be more than one rational way of dealing with a problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, because they consider that a different decision would have been preferable.<sup>45</sup>

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<sup>43</sup> Bell Porto par 41.

<sup>44</sup> Bell Porto par 44.

<sup>45</sup> Bell Porto par 45.

In the matter of *Democratic Alliance v The President of the Republic of South Africa and Others*,<sup>46</sup> which for the purposes of this study I shall refer to it as the Simelane case, the Constitutional Court had to consider the following questions:

- i. Whether, the question whether the requirement that the National Director of Public Prosecutions must be a fit and proper person to be appointed to that position is an objective jurisdictional fact antecedent to appointment;
- ii. The requirements of rationality concerned with—
  - i. the distinction between reasonableness and rationality and the relationship between means and ends;
  - ii. whether the process as well as the ultimate decision must be rational;
  - iii. the consequences for rationality if relevant factors are ignored; and
  - iv. rationality and the separation of powers.<sup>47</sup>

The Court in this matter held per Justice Yacoob ADCJ that:

“The Minister and Mr Simelane accept that the executive is constrained by the principle that it may exercise no power and perform no function beyond that conferred by.... law” and that the power must not be misconstrued. It is also accepted that the decision must be rationally related to the purpose for which the power was conferred. Otherwise the exercise of the power would be arbitrary and at odds with the Constitution. I agree”.<sup>48</sup>

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<sup>46</sup> CCT 122/11[2012] ZACC 24.

<sup>47</sup> Simelane par 12.

<sup>48</sup> Simelane par 27.

Rationality review is concerned with the evaluation of a relationship between means and ends, further that the relationship, connection or link between the means employed to achieve a purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred, the presence of such a rational relationship signifies constitutionality of the decision in question.<sup>49</sup>

The decision to ignore the findings of the Ginwala Commission is inconsistent with the purpose for which the power was given,<sup>50</sup> and the absence of a rational relationship between the means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved being the appointment of a National Director of Public Prosecutions who is sufficiently conscientious and has enough credibility to effectively do the job.<sup>51</sup>

The rationality review legal basis is derived from the provisions of Section 6(2)(f)(ii) of the Promotion of Administrative Justice Act (PAJA) which articulates clearly circumstances under which an action or decision is reviewable.

According to Professor Burns, “an irrational decision is generally viewed as an abuse of a discretionary power, or the failure on the part of the body or official to apply its mind to the matter, an official who misconceives the nature of the discretionary power conferred on him/her, or where irrelevant considerations are taken into account or relevant ones ignored, would be found to have

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<sup>49</sup> Simelane par 32.

<sup>50</sup> Simelane par 88.

<sup>51</sup> Simelane par 89.

acted irrationally. Irrationality may also be linked to the unreasonableness of the administrative act".<sup>52</sup>

## CHAPTER THREE

### 3 THE RELATIONSHIP BETWEEN RATIONALITY AND LEGALITY

#### 3.1 Introduction

In this chapter, I will look at the question whether rationality is related to legality, a pertinent question which I seek to respond to is whether it is possible to achieve rationality without legality, or whether an irrational action or decision can be legal. There is in my view a very close and symbiotic relationship between the principle of rationality and legality. Such a relationship cannot be severed because an attempt to separate the two carries an inescapable risk of any decision taken under those circumstances being declared illegal. For an administrative action or decision to be legal it is required that it must be rational or rationally be connected to amongst others the purpose for which it is taken. This view is also confirmed by Geo Quinot who writes that:

"It is well-established that the principle of legality requires decisions of public authorities, even if not administrative action under PAJA, to be rational. Although this was the case, it is clear that there is some inconsistency in the way in which this has been applied and, consequently some concerns have been expressed about the possible erosion of the separation of powers doctrine by some of these judgments"<sup>53</sup>.

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<sup>52</sup> Prof Burns Y, "Administrative Law under the 1996 Constitution" (1999) Butterworths, page 185.

<sup>53</sup> Geo Quinot, Janice Bleazard, Steven Budlender, Hugh Corder, Michael Kidd, Petrus Maree, Melanie Murcot, Emma Webber: Administrative Justice in South Africa, an introduction, (Oxford University press Southern Africa,2015) at page 179.

The scope of legality extends far beyond administrative actions, even the exercise of public power that do not constitute administrative actions are still reviewable in terms of the principle of legality. The Court held in the matter of *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*,<sup>54</sup> that, the principle of legality is an aspect of the rule of law, a value on which the democratic state is explicitly founded in terms of section 1 (c) of the 1996 Constitution, this principle implies that those who exercise public power must act within their powers, or lawfully. The Court affirmed the fact that the principle of legality is an integral part of the Constitution, the Court held as follows:

“It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality”<sup>55</sup>

The Court further held that, the common law principles of *ultra vires* remain under the new constitutional order and they are underpinned by a constitutional principle of legality. In relation to administrative action the principle of legality is enshrined in section 24(a). In relation to legislation and to executive acts that do not constitute administrative action, the principle of legality is necessarily implicit in the Constitution. Therefore, the question whether the various local governments acted *intra vires* in this case remains a constitutional question.<sup>56</sup>

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<sup>54</sup> See note 13 above.

<sup>55</sup> *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*, par 58.

<sup>56</sup> *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*, par 59.

According to Kruger, “the most basic form of the formal conception of the rule of law requires that governmental action should be backed by law or, stated differently, that government should only act through laws and that any action which is not based from a fundamental principle of compliance to the law will fall short of constitutional muster if tested in a court of law”.<sup>57</sup>

### **3.2 Legality as seen from the Court’s perspective**

The principle of legality has since the dawn of the South African constitutional dispensation found expression in both the Interim Constitution<sup>58</sup> and final Constitution,<sup>59</sup> Section 24 of the interim Constitution provides as follows:

“Every person shall have the right to-

- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.”<sup>60</sup>

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<sup>57</sup> Kruger R, “The South African Constitutional Court and the Rule of Law: The Masetlha Judgment, A cause for concern” at page 475/508”.

<sup>58</sup> Interim Constitution of the Republic of South Africa Act 200 of 1993.

<sup>59</sup> See note 2 above.

<sup>60</sup> Section 24 of the Interim Constitution of the Republic of South Africa Act 200 of 1993.



Whereas section 33 of the final Constitution is slightly differently worded, it nevertheless retained the right to administrative action that is lawful, reasonable and procedurally fair and accorded everyone whose rights have been adversely affected by administrative action a peremptory right to be given written reasons, it went further to require the enactment of a national legislation with the intention of giving effect to these rights and the right to review administrative actions by the court.

Boulle, Harries and Hoexter, states that:

“the most fundamental requirement of legality is that statutory powers must always be exercised strictly in accordance with the terms on which they were conferred by Parliament to the executive”.<sup>61</sup>

It is my view that an irrational decision cannot be lawful or legal, this I hold because once a decision is irrational it means that it is tainted by the non-compliance with either of the standards set by the provisions of section 6(2)(f) of PAJA. It is either the decision is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator. Once the answer to an enquiry into whether the action satisfies the grounds as enunciated is not affirmative, then the whole process is flawed *ab initio* and thus not legal. This view is indeed supported by Quinot as mentioned above. Malan, also confirms the position that decisions must be made based on rationality for them to be legally sound, he states that:

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<sup>61</sup> Laurence Boulle, Bede Harries, Cora Hoexter: “Constitutional and Administrative Law Basic Principles”, (Juta&Co, Ltd),1989 (page 256).

“the rule of law requires rational decision-making and that it prohibits arbitrary decision making and vague legislative provisions, the doctrine of legality lies at the heart of the rule of law. All spheres of governmental power are constraint by the principle that they may exercise no power and perform no function beyond that conferred upon them by law; Public power can therefore only be validly exercised if it is clearly sourced in law. Hence, public governance must be conducted on a consistent basis in terms of predetermined, properly promulgated general legal rules (and principles). Arbitrary, unpredictable public conduct is the arch-enemy of the rule of law”<sup>62</sup>

In a more very recent judgment, the High Court in asserting the view that decisions and actions must comply with the principle of legality held in the matter of Democratic Alliance v President of the Republic of South Africa,<sup>63</sup>that:

“The President’s concession that the present executive decisions have to be rational and therefore subject to judicial scrutiny is well made. It is now settled law that these decisions must comply with the “doctrine of legality”. The doctrine is fundamental to our constitutional order. Should an executive decision not comply with this doctrine it would be unlawful. Thus, if it is to be lawful it must not be irrational or arbitrary.”<sup>64</sup>

It is clearly discernible that the principle of legality requires that for administrative actions or decisions to be unreviewable, they need to be lawful. The principle of legality was

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<sup>62</sup> Malan, J” The rule of law versus decisionism in the South African constitutional discourse “45 Volume 2 2012 De jure 272 at page 275.

<sup>63</sup> Democratic Alliance v President of South Africa, In re the application between Democratic Alliance v The President of the Republic of South Africa and Others (24396/2017).

<sup>64</sup> Democratic Alliance v President of South Africa, In re the application between Democratic Alliance v The President of the Republic of South Africa and Others, par 19.

according to Hoexter, first identified in 1998 by the Constitutional Court and described it as an aspect of the rule of law'.<sup>65</sup>

As it has been shown, section 6 of Promotion of Administrative Justice Act (PAJA) provides persons with the prerogative to have legal proceedings instituted for judicial review of administrative actions. The legal principle is that administrative actions can be reviewed if amongst others the administrative action is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator.<sup>66</sup> This is an important standard of review because it sets parameters and puts guidelines within which actions can be reviewed and set aside.

As previously argued, rationality requires that administrative decisions should not be arbitrary, and the powers given must not be misconstrued, actions must be rational for them to be legal. This position was affirmed by the Constitutional Court in the matter of *Masetlha v The President of South Africa*.<sup>67</sup> Legality is an important principle in our constitutional law and it generally requires that administrative actions must as a matter of fact comply with the rule of law and not be found in direct confrontation with the Constitution. The affinity to avoid taking arbitrary decisions is an important element of adherence to the rule of law, efforts need to be made to desist from taking arbitrary decisions and have regard to the rule of law. Krygier states as follows on the rule of law and ensuring that no arbitrary actions are avoided:

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<sup>65</sup> Hoexter C, "The rule of law and the principle of legality in South African administrative law today" in M Carnelley & S Hoctor, law, order and liberty (2011) University of KwaZulu-Natal Press, at page 56.

<sup>66</sup> Section 6 (2)(f)(ii).

<sup>67</sup> CCT 01/07[2007] ZACC 20.

“The rule of law is in relatively good order in so far as some possible behaviours, central among them the exercise of political, social, and economic power is effectively constrained and channeled, so that non-arbitrary exercises of such powers are relatively routine, while lawless, capricious, willful exercises of power routinely occur less.”<sup>68</sup>

South Africa, has since the dawn of constitutional supremacy become a fully constitutional state which subscribes to the rule of law and protection of the rule of law which includes upholding constitutional imperatives to ensure that constitutional values enshrined in our constitution are realised. This important principle binds the state including the President himself as the ultimate head of the executive branch of the state and all members of the executive both in the national, provincial and local sphere of government.

Their decisions, much as the decisions of anybody who exercises public powers, be it under his or her delegation, are required to be rationally made and always compliant with the principle of legality. The principle of legality as it relates to administrative decisions and actions requires that those decisions or actions must comply with the rule of law including the Constitution, otherwise they fall to be reviewed and set aside based on their being inconsistent with the Constitution as the supreme law of the Republic of South Africa.

In certain instances, there are actions that are taken, or decisions that are made which do not necessarily qualify as administrative actions or decisions in the true sense of the provisions of the PAJA, which would however still fall to be reviewed purely based on the principle of legality. This statement is also supported by the Supreme Court of Appeal judgment in the matter of DA v Acting National Director of Public Prosecutions and

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<sup>68</sup> Krygier, M “What about the rule of law” page 88.

Another,<sup>69</sup> The court dealt with the review of actions or decisions which do not fall within the ambit of administrative actions. This matter, concerned the decision of the National Director of Public Prosecutions not to prosecute, the Court held correctly so that the decision to discontinue the prosecution was subject to a rule of law review.<sup>70</sup> Furthermore, in the matter of National Director of Public Prosecutions v Freedom Under Law,<sup>71</sup>the Supreme Court of Appeal further entrenched the view that decisions would often be susceptible to review in circumstances where the discretion is improperly exercised and thus illegal and irrational or used for ulterior purposes. Further that, decisions not to prosecute is subjected to legality and rationality review. The Court held through Brand J in this matter as follows:

“Although decisions not to prosecute are-in the same way as decisions to prosecute-subject to judicial review, it does not extend to a review on the wider basis of PAJA, but is limited to grounds of legality and rationality.”<sup>72</sup>

The Court further asserted the position of legality within the scope of South African administrative Justice law, further clarifying the reviewability of decisions to prosecute. whereas detractors and naysayers may like to at a first glance condemn prosecutorial decisions to the doldrums as falling outside the scope of the PAJA, the Courts have not shied away from making pronouncements on the judicial reviewability of these decisions. The constitutional principle of legality requires that a decision-maker exercises the powers conferred on him lawfully, rationally and in good faith.

The principle of legality is an integral part of our law and it is a sure way of guaranteeing an alternative pathway to judicial review in a terrain where PAJA does not find

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<sup>69</sup> 2012 (3) SA 486(SCA).

<sup>70</sup> DA v Acting National Director of Public Prosecutions and Another, para 27.

<sup>71</sup> 2014(4) SA 298.

<sup>72</sup> National Director of Public Prosecutions v Freedom Under Law. Para 25(e).

application”<sup>73</sup>. It therefore acts as a safety net to give the court some degree of control over actions that do not qualify as administrative under PAJA, but nonetheless involves the exercise of public power. This confirms the analogy that public power must be promptly authorised by the constitution and the rule of law, lest it falls to be reviewed indeed based on legality and ulterior motive.<sup>74</sup>

As it has been shown above, nothing escapes the scrutinising eye of legality and the rule of law itself. In fact, in a country where the rule of law is accorded the respect it deserves, which sadly is currently not the case in South Africa under the current political and executive leadership, courts should idyllically not be saddled with clear cut cases where it is clearly discernible that there is a serious or even a slightest violation of the rule of law and legality because this will lead to an untenable and perilous situation where lawlessness and disrespect for the rule of law reigns supreme.

## **CHAPTER FOUR**

### **4. CONSTITUTIONAL COURT APPROACH AND JUDGEMENTS ON RATIONALITY OF ADMINISTRATIVE DECISIONS AND ACTIONS**

#### **4.1 Introduction**

In this chapter, I will look at the Court’s judgments on rationality review with an intention in mind of showing the Court’s approach on these important yet intricate subject within our administrative law jurisprudence. It is important to unravel this subject matter by looking at

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<sup>73</sup> National Director of Public Prosecutions v Freedom Under Law. Para 28.

<sup>74</sup> National Director of Public Prosecutions v Freedom Under Law. Para 29.

what trends has our courts set on rationality. Our Courts have always been an important part of the development of law in South Africa. Their judgments serve as precedents for future reference and usage by the courts and other law practitioners. The judgments derived from our courts in the land are one of the sources of law. The Constitutional Court has on many occasions been called upon to intervene and provide judicial intervention and direction on rationality of certain actions and decisions of the executive branch of government. Often functionaries are caught in compromising positions where one decision must be made, or an administrative action has to be taken. It then becomes essential that in the process of making decisions rationality of those decisions is always considered.

Over the course of our constitutional jurisprudence, the Court has had matters referred before them for various rationality review reasons, there are of course instances where the courts would have dealt with situations where presidential actions or decisions became the subject matter of the Court's review. Presidential decisions would range from the appointment of executive personnel to state owned entities and instances where the president sought to exercise his legislative powers in terms of section 84 of the Constitution.

#### **4.2 Rationality review of the Presidential legislative actions, a look at the review of presidential actions and decisions and whether they are reviewable based on Rationality**

Section 84 of the Constitution gives to the President the power to amongst others assent to and sign the Bills, refer Bills back to the National Assembly for reconsideration of the Bill's constitutionality as well as making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive.

Rationality is the standard of review of all administrative actions and decisions within our Constitutional Court jurisprudence. The review of administrative actions is informed by the provisions of the Promotion of Administrative Justice Act, which provides in section 6(2)(f)(ii) for the right to judicially review administrative actions. Executive actions and decisions, even though may not necessarily be administrative in nature, they may be reviewed and set aside based on legality. It has also been shown that legality and rationality have a symbiotic relationship because it is not easy to separate the two.

#### ***4.2.1 President of the Republic of South Africa and Others v South African Dental Association of South Africa and Another<sup>75</sup>***

In this matter, the Constitutional Court had to deal with the rationality of the President's action of proclaiming certain sections (i.e. sections 36, 37, 38, 39 and 40) of the National Health Act.<sup>76</sup> The proclamation prematurely brought into force the aforementioned sections of the Act on the 1 April 2014 without the requisite regulations in terms of the Act, the National Health Act authorises the Minister of Health to prescribe regulations regarding applications for, and the granting of certificates of need.<sup>77</sup> This resulted in an untenable situation with a legal risk of health service providers in South Africa engaging in criminal conduct since none of the service providers were able to obtain the requisite certificate of need owing to the regulations not yet being in force.<sup>78</sup>

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<sup>75</sup> [2015] ZACC 2.

<sup>76</sup> Act No.61 of 2003.

<sup>77</sup> President of the Republic of South Africa and Others v South African Dental Association of South Africa and Another par 3.

<sup>78</sup> President of the Republic of South Africa and Others v South African Dental Association of South Africa and Another par 4.



In considering whether the President's decision is rationally related to the purpose for which the power was given, the court used an objective enquiry and looked at the purpose of the President's power to bring portions of the National Health Act into operation.<sup>79</sup> The purpose according to the Court was to achieve an orderly and expeditious implementation of a national regulatory scheme for health services. Having said that, the Court held that clearly the decision to issue the proclamation before there was any mechanism in place to address applications for certificates of need, thereby rendering the provision of health services a criminal offence was not rationally connected to this purpose or any other governmental objective, further that the President's decision was irrational and invalid.<sup>80</sup>

#### **4.2.2 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*<sup>81</sup>**

In pharmaceutical manufacturers, the Constitutional Court considered whether the Court has a power to review and set aside the decision of the President to bring an Act of Parliament into force. The standard that was used by the Court was the principle of rationality, the Principle of rationality has been discussed within the auspices and jurisdiction of the Constitutional Court in various cases where the court dealt with matters ranging from rationality and legality including provision of reasons in the performance of administrative actions. The principle of rationality requires in simple terms that a decision taken by the executive should be in line with the purpose for which the power was given, if there is not that requisite synergy, then the decision cannot be held to be rational and thus falls to be reviewed by the Court of law as is required by PAJA.

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<sup>79</sup> President of the Republic of South Africa and Others v South African Dental Association of South Africa and Another par 14.

<sup>80</sup> President of the Republic of South Africa and Others v South African Dental Association of South Africa and Another par 15 and 16.

<sup>81</sup> 2000 (2) SA 674 (CC).

In this case the President had also issued a proclamation which purports to bring into operation the South African Medicines and Medical Devices Regulatory Authority Act,<sup>82</sup> Government Notice R567 was also issued by the Minister of Health and purported to provide schedules to the Act in terms of section 31 read with section 54 of the Act. Section 31(2)(a) and (b) provided as follows:

- “(1) Subject to this section, no person may sell, have in his or her possession or manufacture any orthodox medicine, complementary medicine, veterinary medicine, device, or scheduled substance, except in accordance with the prescribed conditions.
- (1) The Minister may on the recommendation of the Authority–
  - (a) Prescribe the Scheduled substances referred to in this section; and
  - (b) Prescribe such Schedules as the Minister deems necessary.”

In addition to the above-mentioned provision, section 54 provides that:

“The Minister may, on the recommendation of the Authority, by notice in the Gazette amend the Schedules referred to in section 53, by the inclusion therein or the deletion therefrom of any medicine or other substance, or in any other manner.”

On the 18 December 1998, the Act was promulgated with a provision that it will come into force on a date to be determined by the President. On the 30 April 1999, a presidential proclamation R49 which purported to bring the Act into force was published with the effect that it will repeal the old Act, (i.e. the 1965 Act and schedules 1 to 9). As at the time of the

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<sup>82</sup> Act No. 132 of 1998.

proclamation R49, the regulations that are central to the operationalisation of this Act were not yet made, this then created a void in the implementation of the Act.

On the 7 May 1999, the Minister of Health issued Government Notice R567 which sought to make schedules in the schedule on recommendation of the South African Medicines and Medical Devices Regulatory Authority. This was to comply with the provisions of sections 31 and 54 respectively. Although Chaskalson P, felt that the power to make legislation is derived from legislation and is close to the administrative process, the decision to bring the law into operation did not constitute administrative action. However, it was the exercise of public power which had to be carried out lawfully and consistently with the provisions of the Constitution in so far as they may be applicable to the exercise of such power.<sup>83</sup>

On the question whether the President's action was rationally related to the purpose for which the power was given, the Court held that no rational basis for the presidential decision was suggested, it further held that:

“it is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action”.<sup>84</sup>

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<sup>83</sup> Pharmaceutical Manufacturers par 79.

<sup>84</sup> Pharmaceutical Manufacturers par 85.

As shown above in the court's ruling, all functionaries that are in the cold face of administrative decisions and actions are constrained by that very important principle that they should at all material times desist from making arbitrary decisions which have absolutely no basis at law and devoid of any justifiable reasoning.

#### **4.2.3 *Democratic Alliance v President of the Republic of South Africa and Others*<sup>85</sup>**

In this matter, the central focal point was the President's powers to appoint an official to the top echelons of an important government institution responsible for the administration of Justice in the Republic, i.e. NPA (National Prosecuting Authority). The Court investigated whether the appointment of Menzi Simelane as the National Director of Public Prosecutions by the President of the Republic of South Africa was within the bounds of the Constitution. The Minister for Justice and Constitutional Development and Mr Simelane lodged an appeal against a Judgment and order of the Supreme Court of Appeal which concluded that the appointment of Mr Simelane as the National Director of Public Prosecutions was constitutionally wrong in that the process for appointment and consequently, the appointment itself was irrational and invalid.

On the other hand, the Democratic Alliance, being an opposition party within the South African political spectrum applied for the confirmation of the order of the Supreme Court of Appeal. Mr. Simelane was in his capacity as the Director-General of the Department for Justice and Constitutional Development involved in a dispute concerning the proper role of the then National Director of Public Prosecutions, Mr. Vusi Pikoli. This dispute related to the powers and Duties of the Minister for Justice and Constitutional Development and the National Director.

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<sup>85</sup> CCT 122/11[2012] ZACC 24.

On the 23 September 2007, the then President suspended Mr. Vusi Pikoli from his position as the National Director of Public Prosecutions. Subsequently thereafter, the President appointed a commission of enquiry which was headed by the former Speaker of Parliament, Doctor Frene Ginwala referred to as the Ginwala Commission with a mandate to inquire into Mr. Pikoli's fitness to hold office as the National Director. The Ginwala Commission's report severely criticized Mr. Simelane and questioned the credibility of his evidence.<sup>86</sup>The Minister of Justice and Constitutional Development at that time, Mr. Enver Surty, requested the Public Service Commission to investigate Mr. Simelane's conduct during the Ginwala Commission, the Public Service Commission recommended in its report that disciplinary proceedings against Mr. Simelane should be held arising out of his conduct and evidence before the Ginwala Commission, the Minister at that time, Mr. Jeff Radebe rejected the recommendations of the Public Service Commission and went ahead to appoint Mr. Simelane as the National Director of Public Prosecutions two days after rejecting the Public Service Commission recommendations, the appointment of Mr. Simelane took place immediately after Mr. Pikoli's dismissal.

The Supreme Court of Appeal considered that the President erred in four respects and that these mistakes rendered the process by which the decision to appoint Mr. Simelane had been taken and consequently, the decision itself irrational and invalid. The Court considered that according to the President, he had firm view about Mr. Simelane being the right person to be appointed the National Director even before he had considered whether Mr. Simelane was a fit and proper person for the job. Secondly, that the President incorrectly reasoned that the absence of evidence contradicting the idea that Mr. Simelane

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<sup>86</sup> Democratic Alliance v President of the Republic of South Africa and Others par 4.

was a fit and proper person for appointment justified the conclusion that he was indeed a fit and proper person.

The proper approach according to the Court would have been for the President to determine positively whether Mr. Simelane was indeed fit and proper, which the President did not do. The Court further considered that the President disregarded the criticisms of Mr. Simelane made by the Ginwala Commission on the tenuous basis that the Commission had not been appointed to investigate Mr. Simelane, but Mr. Pikoli. Lastly, that the recommendations of the Public Service Commission that the Ginwala Commission's criticisms merited a disciplinary enquiry against Mr. Simelane were too lightly brushed aside.<sup>87</sup> The Supreme Court of Appeal, held that the fact that the Ginwala Commission's comments were not considered was itself enough to set aside the appointment as irrational.<sup>88</sup>

The Constitutional Court had to consider the question whether the National Director must be a fit and proper person to be appointed to that position is an objective jurisdictional fact antecedent to appointment, the requirements of rationality concerned in particular with the distinction between reasonableness and rationality and the relationship between means and ends, whether the process as well as the ultimate decision must be rational and the consequences for rationality if relevant factors are ignored and rationality and the separation of powers. The Court further had to consider whether the decision of the President to appoint Mr. Simelane was rational and whether the President's failure to consider the finding in relation to and evidence of Mr. Simelane in the Ginwala Commission was rationally related to the purpose for which the power to appoint a

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<sup>87</sup> Democratic Alliance v President of the Republic of South Africa and Others par 6.

<sup>88</sup> Democratic Alliance v President of the Republic of South Africa and Others par 7.

National Director was conferred. The Court held in this matter that both the process by which the decision is made and the decision itself must be rational.<sup>89</sup>

It is important to state that even though Mr. Simelane argued that this case was not concerned with pardons and that pardons are distinguishable from the present case, the Court noted that this matter concerned the decision of the President as the head of the National Executive. There was no basis for the suggestion that the proposition in Albutt that decisions by the President as head of state should be rational both in process and in the final decision should not apply here. The Court further held that it is illogical to suggest 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.<sup>90</sup>

The Court on the question whether the process must also be rationally related to the achievement of the purpose for which the power is conferred held that it is indeed an inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision constitute means towards the attainment of the purpose for which the power was conferred.<sup>91</sup>

On the question of the President having ignored the recommendations of the Public Service Commission and the Ginwala Commission on the basis that the Commission was

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<sup>89</sup> Democratic Alliance v President of the Republic of South Africa and Others par 34.

<sup>90</sup> Democratic Alliance v President of the Republic of South Africa and Others par 35.

<sup>91</sup> Democratic Alliance v President of the Republic of South Africa and Others par 36.

not constituted with the mandate to investigate Mr. Simelane but to investigate Mr. Pikoli, the Court adopted a three pronged approach, namely, whether the factors ignored are relevant, whether the failure to consider the material concerned is rationally related to the purpose for which the power was conferred and whether ignoring relevant facts is of a kind that taints the entire process with irrationality and thus renders the final decision irrational. The Court held that failure to consider relevant material is inconsistent with the purpose for which the power was conferred and that there can be no rational relationship between the means employed and the purpose.<sup>92</sup>

On the question as to whether, the decision of the Supreme Court of Appeal that the decision of the President was irrational would amount to a violation of the principle of the separation of powers, the Court held that the rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect.<sup>93</sup> The Court further held that it is really difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry, that the only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise.

The question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to the same decision involving the same process in the administrative context. Further that it cannot be suggested that a decision that would be irrational in an administrative law setting might

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<sup>92</sup>Democratic Alliance v President of the Republic of South Africa and Others par 40.

<sup>93</sup>Democratic Alliance v President of the Republic of South Africa and Others par 41.



mutate into a rational decision if the decision being evaluated was an executive one, it is either a decision is rational, or it is not, the separation of powers has nothing to do with whether a decision is rational and that the principle of separation of powers is of no importance in this case<sup>94</sup>

The Court further held that the decision by the President to ignore in the process of appointing Mr. Simelane as the National Director of Public Prosecutions the fact that he (Mr. Simelane) chose to withhold an important letter which he drafted for the Minister of Justice and Constitutional Development's signature to Mr. Pikoli which constituted an unconstitutional instruction was not rationally related to the purpose of appointing a National Director who is sufficiently conscientious and credible to resist interference with his office.<sup>95</sup>

#### **4.2.4 *Masetlha v The President of South Africa*<sup>96</sup>**

In this matter, the President first suspended and later terminated Mr. Masetlha's employment as head and Director-General of the National Intelligence Agency. The President then unilaterally amended Mr. Masetlha's term of office to make it expire within two days of the notice and 21 months earlier than the original term.<sup>97</sup> This the President did on the basis that the trust relationship between himself as the President and Mr. Masetlha as the Director-General of the National Intelligence Agency had disintegrated irreparably. Mr. Masetlha then impugned the decisions as constitutionally impermissible, declined the

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<sup>94</sup>Democratic Alliance v President of the Republic of South Africa and Others par 44.

<sup>95</sup>Democratic Alliance v President of the Republic of South Africa and Others par 62.

<sup>96</sup> See note 69 above.

<sup>97</sup> Masetlha par 1.

financial pay out offer and insisted on being reinstated to his post as the Director-General of the National Intelligence Agency.<sup>98</sup>

He approached the Constitutional Court seeking leave to appeal directly to the Court against the decision of Du Plessies J which dismissed his two review applications on the basis that his dismissal from employment constituted lawful executive action and that the dispute over the suspension had been rendered moot by the dismissal.<sup>99</sup> On the question whether it is appropriate to constrain executive power to requirements of procedural fairness and whether the President's decision is reviewable or not, the Constitutional Court held that although section 1 of PAJA excludes from the purview of administrative action, executive powers or functions of the President, it did not mean that there are no constitutional constraints on the exercise of executive authority, the authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. Further that the authority in section 85(2)(e) of the Constitution is conferred to provide room for the President to fulfil executive functions and should not be constrained any more than the principle of legality and rationality.<sup>100</sup>

The Court, in considering the President's decision in first suspending and later terminating Mr. Masetlha's employment as head of and Director-General of the National Intelligence Agency and whether the President has the power to unilaterally alter the terms of the office of the Head of the National Intelligence Agency (NIA) held as follows:

"It is therefore clear that the exercise of the power to dismiss by the President is constrained by the principle of legality, which is implicit in our constitutional ordering. Firstly,

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<sup>98</sup> Masetlha par 2.

<sup>99</sup> Masetlha par 3.

<sup>100</sup> Masetlha par 78.

the President must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law<sup>101</sup>

The Court in this matter agreed with the High Court that the President's dismissal of the Head of an intelligence service based on irretrievable loss of trust on the part of his principal, would not be arbitrary or irrational although facts in a case may demonstrate irrationality, arbitrariness or bad faith on the part of the person who makes the dismissal decision.<sup>102</sup>

Ngcobo J, agreeing with Moseneke DCJ in this matter, and affirming the stance regarding compliance of administrative actions with the principle of legality and the rule of law held that the exercise of public power is constrained by the rule of law which is one of the foundational values of our constitutional democracy. The rule of law requires that the actions of all those who exercise public power must comply with the law, including the Constitution. It is central to the conception of our constitutional order that those who exercise public power including the President, are constrained by the principle that they may exercise only those powers and perform only those functions which are conferred upon them by the law.<sup>103</sup>

The Court also showed that the requirement of the rule of law, that the exercise of public power should not be arbitrary comprises of both a procedural and substantive element which further affirms the provisions of section 6 of the Promotion of Administrative Justice

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<sup>101</sup> Masetlha par 81.

<sup>102</sup> Masetlha par 82.

<sup>103</sup> Masetlha par 173.

Act. Ngcobo J held that rationality deals with the substantive component, the requirement that the decision must be rationally related to the purpose for which the power was given and the existence of lawful reason for the action taken. The procedural element concerns itself with the way the decision was taken.<sup>104</sup>

#### **4.2.5 *Albutt v Centre for the study of Violence and Reconciliation*,<sup>105</sup>**

The Court has also had to deal with issues of procedural fairness as it relates to rationality, The Constitutional Court has also had the opportunity to establish procedural fairness or natural justice into the principle of rationality.<sup>106</sup> For instance in *Albutt*, the Court in deciding whether in the process of granting presidential pardon for the offenders who claims to have been convicted of offences which they claim to have committed with a political motive should afford the victims of these offences a hearing held as follows:

“It is now axiomatic 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 the rule of law. More recently, and in the context of section (84) (2)(j), we held that although there is no right to be pardoned, an applicant seeking pardon has a right to have his application “considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality. It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose of sought to be achieved by the exercise of it”.<sup>107</sup>

The Court further held that:

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<sup>104</sup> Masetlha par 184.

<sup>105</sup> 2010(3) SA 293 (CC).

<sup>106</sup> Hoexter C, “The rule of law and the principle of legality in South African administrative law today” in M Carnelley & S Hoctor, law, order and liberty (2011) University of KwaZulu-Natal Press, at page 62.

<sup>107</sup> *Albutt v Centre for the study of Violence and Reconciliation* par 49.

“The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the powers it grants. To pass constitutional muster therefore, the President’s decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution”.<sup>108</sup>

In short, the Constitutional Court affirmed that for the exercise of all public power to be legally compliant and unreviewable, such an exercise must be in total compliance with the Constitution, which is the supreme law, PAJA and the doctrine of legality, which is part of the rule of law. Further that, decisions which are not rationally made can seldom be found to be legal. In other words, it will be arduous for the two to be separated because there is an incontrovertible and irrefragable symbiotic relationship between rationality and legality such that any attempt to achieve one without the other will be futile and lead to a legal review. Further that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved thereof. The Court also illustrated that it is important that there is a relationship between the actual means employed to achieve a certain purpose on the one end and the purpose itself. Further that, while the executive had a wide discretion in selecting the means to achieve its objectives, those means had to be rationally related to the objective sought to be achieved.<sup>109</sup>

### **4.3 Rationality review on the exercise of executive action or powers**

The basic principle of the South African legal system requires that all executive decisions, meaning decisions exercised by either the head of the executive being the President, the

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<sup>108</sup> Albutt v Centre for the study of Violence and Reconciliation par 50.

<sup>109</sup> Albutt v Centre for the study of Violence and Reconciliation par 51.

Minister, Premier or MEC must all be in total compliance with the doctrine of rationality and legality. It must therefore not be found to be irrational or arbitrary lest it is found then to be in contradiction with the Constitution of the land. The doctrine of rationality and legality is a very essential tenet of the South Africa Constitution. Below, is a look at some of the Court's decisions where the executive decisions were considered for rationality.

#### **4.3.1 *Minister of Defence and Military Veterans v Motau and Others*<sup>110</sup>**

In this case, the Constitutional Court was approached for a review of the Minister of Defence and Military Veterans decision to remove General Motau and Ms. Mokoena from the Board of Directors of Amscor (Armaments Corporation of South Africa) which is an agency of the Department of Defence. The two served on the board as chairperson and deputy chairperson respectively.

The Minister,<sup>111</sup>having convened three meetings with the board, none of which was attended by General Motau as the chairperson, and Ms. Mokoena having attended only two of the scheduled meetings,<sup>112</sup> sought to terminate their board membership citing General Motau's and decisions taken as reasons why Amscor was not able to meet the Defence materiel requirements of the Department of Defence effectively, efficiently and economically.<sup>113</sup> General Motau and Ms. Mokoena then challenged the decision of the Minister and sought to have it reviewed and set aside on the basis that it was unlawful, unconstitutional and invalid.

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<sup>110</sup> 2014[2014] ZACC18.

<sup>111</sup> Nosiviwe Maphisa Ncgakula is the current Minister of Defence and Military Veterans.

<sup>112</sup> Minister of Defence and Military Veterans v Motau and Others, para7.

<sup>113</sup> Minister of Defence and Military Veterans v Motau and Others, para8.

In the high court, the judgment was granted in their favour on the basis that the Minister's decision was administrative rather than executive action as it met the positive requirements of the administrative-action definition and because it was not expressly excluded from the ambit of PAJA.<sup>114</sup> Further that the Minister acted unfairly in failing to give them an opportunity with a notice of indicating why their appointments should not be terminated. The Minister's contention in this matter was that the power to appoint and dismiss members of the Board conferred especially on her for the effective pursuit of government business, particularly the national and territorial security of South Africa, further that her decision to terminate General Motau and Ms. Mokoena's services constituted executive action as contemplated in the Constitution and thus excluded from administrative-law review under PAJA.<sup>115</sup>

The Constitutional Court, held that the impugned ministerial decisions to terminate the services of General Motau and Ms. Mokoena were not subject to review under PAJA because section 8(c) of the Armscor Act is an adjunct of the Minister's power to make defence policy, and thus more closely related to the formulation of policy than it is to its application. Therefore, the termination of services of board members amounts to performance of an executive function rather than the implementation of national legislation.<sup>116</sup>

On the question of rationality of the Minister's decision to dismiss General Motau and Ms. Mokoena, the Court asked a pertinent question as to whether the Minister responded rationally to the indications of dysfunction in Armscor and whether her response was rationally connected to her executive oversight function. The Court then held that there

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<sup>114</sup> Minister of Defence and Military Veterans v Motau and Others, para 18.

<sup>115</sup> Minister of Defence and Military Veterans v Motau and Others, para 26.

<sup>116</sup> Minister of Defence and Military Veterans v Motau and Others, para 47.

was a rational link between the need to address the failures of Armscor and the termination of General Motau and Ms. Mokoena's because their being at the helm of the Corporation contributed to it not operating in an efficient or effective manner.<sup>117</sup> Further that, the provisions of section 8(c) of the Armscor Act<sup>118</sup> was properly used by the Minister, in the exercise of her executive oversight, to abate the problems that had set in at Armscor, therefore the Minister's decision was based on that rational.

#### **4.3.2 Rationality review and specially constituted Commissions of enquiry decisions**

Our Courts do not only intervene to constitutionally scrutinise and review administrative actions or decisions of Presidents, Ministers or other government employees. As it will be shown in the case below, a decision of a properly constituted Commission of inquiry complete with its set tasks, terms of reference and powers can also be reviewed and set aside in line with the provisions of section 6 of PAJA. What is required is the existence of possible grounds of review and the possibility that certain decisions that were made by such commission require scrutiny, intervention and direction from the Court. This is the quintessence of the provisions of section 6 of the Promotion of Administrative Justice Act.

##### **4.3.2.1 *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others*<sup>119</sup>**

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<sup>117</sup>Minister of Defence and Military Veterans v Motau and Others, para 71.

<sup>118</sup>Section 8(c) of the Armscor Act provides that "a member of the Board must vacate office if his or her services are terminated by the Minister on good cause shown".

<sup>119</sup> [2014] ZACC 36.



In this matter, the Constitutional Court considered the rationality of the decision of the Commission on Traditional Leadership Disputes and Claims that the kingship of the Bapedi Traditional community resorted under the lineage of Kgosi Sekhukhune I. The applicant in this matter was Bapedi Marota Mamone which is a traditional community in Limpopo province in the area known as Ga-Sekhukhune. This Constitutional Court litigation arose from the dispute of the paramount kingship of the Bapedi tribe which started in the pre-colonial times when Kgosi Mampuru fled the Sekhukhune area after being challenged to a fight by Kgosi Sekhukhune, thus resulting in Sekhukhune becoming the paramount king of the Bapedi tribe until he was incarcerated by the British government having defeated the government of the Boer Republic. With Sekhukhune's incarceration, Kgosi Mampuru II then became paramount king of the Pedi tribe. Without necessarily, prolonging the facts of this matter for lack of time, Kgosi Sekhukhune was then killed by Mampuru II which led to Mampuru's capture, trial, conviction and ultimately execution.<sup>120</sup>

The Court held that the Commission failed to consider and apply the Bapedi customary law of succession in deciding the lineage in which the Bapedi kingship resorted. The Commission omitted to apply the relevant customary law despite being obliged to do so by section 25(3) of the Framework Act. Based on this the Court then held that the Commission's decision was not rationally connected to the purpose of applying the relevant customary law when determining a dispute.<sup>121</sup> Further that, based on the undisputed facts on succession from Kgosi Malekutu to Mampuru II, the Commission's decision was not rationally connected to the information submitted to it, and in the context of the facts there was no link between Kgosi Sekhukhune's ascension to the throne and

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<sup>120</sup> Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others, para 28.

<sup>121</sup> Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others, para 28, para 64.

the question about lineage which was essentially an issue of succession, following the death of Kgosi Sekhukhune.<sup>122</sup>

## **CHAPTER FIVE**

### **5. CONCLUSION**

In this chapter, I will summarise the findings premised from various Court judgments on the issue of rationality of administrative actions and rationality review jurisprudence of the Constitutional Court in South Africa. From various Court judgments, what is beyond any doubt is that rationality requires that administrators should desist from making arbitrary decisions. Decisions that have got no basis in law and generally lacks legality and not in compliance with the rule of law are discouraged by the Constitutional Court. Any such decision would ultimately fall short of the Constitutional muster and thus fall to be reviewed.<sup>123</sup> In short, the Constitution serves as the yardstick to ensure that the exercise of all public powers must comply with the Constitution, which is the supreme law of the republic and with the doctrine of legality, which is part of the rule of law, an important foundational value of our constitutional democracy and dispensation.<sup>124</sup> This is also affirmed by section 1 of the Constitution which reads as follows:

“(1) The Republic of South Africa is one, sovereign, democratic state founded on the following values:

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<sup>122</sup> Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and others, Para 28, para 65.

<sup>123</sup> See Pharmaceutical Manufacturers, para 85.

<sup>124</sup> See Pharmaceutical Manufacturers, para 20.

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

The other section of the Constitution which is central towards the establishment of South Africa’s constitutional supremacy and asserting its constitutional values is section 2 of the Constitution which provides that:

“This 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.”

As it has been shown in this study, administrative actions and decisions are generally required to have a legally sound basis in law and it is seldom impossible that an illegal action or decisions can be rational, much as an irrational action or decision cannot be legal. The Constitutional Court has also through their judgments provided much needed guidance and shown their respect for the rule of law and affinity to respect, apply and uphold the basis for review of administrative actions as provided for in terms of section 6 (2)(f)(ii) of the Promotion of Administrative Justice Act. It is beyond doubt that our Courts are the constitutionally enabled gate keepers who are meant to viciously ensure respect to the rule of law and eliminate a disturbing trend in government of making arbitrary decisions that are devoid of any legal sense.

The basis in question that is referred to herein is that if the action is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator, such action clearly falls to be reviewed by the Court or the tribunal. Rationality review has as already shown above, been discussed at length in the Constitutional Court even at the time when PAJA was not yet in force.

For instance, the matter of Pharmaceutical Manufacturers was decided at the time when PAJA was still in the process of being proclaimed for it to come into effect. That judgment was for the record delivered at a time when the final Constitution was not yet in force. But the Court did not disavow its responsibilities to make important pronouncements and provide the much-needed judicial direction, thereby providing such an important watershed moment in the history of South Africa's constitutional jurisprudence.

By then the Court declared that the question whether the President acted rationally in proclaiming the Act before the regulations were in force or whether the decision was rationally related to the purpose for which the power was given had to be an objective enquiry because otherwise a decision that is irrational may pass constitutional muster simply because a person who actually took it mistook it for a rational decision if a subjective enquiry was to be used.<sup>125</sup> The Court also declared rationality to be a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries.<sup>126</sup>

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<sup>125</sup>See Pharmaceutical manufacturers, para 86.

<sup>126</sup> See Pharmaceutical manufacturers, para 90.

With these kind of quality judgments, such as the pharmaceutical manufacturers judgment which was delivered at a time when South Africa was transitioning from an era of common law approach to administrative action, it will only be foolhardy for any functionary to deviate from the requirement of rationality of administrative actions and decisions when confronted with administrative action situations. This I hold because we have already seen that any action that is in contravention of the Constitutional imperatives and outside the parameters of the Promotion of Administrative Justice Act and the rule of law is reviewable.

We have also seen that in the past, South Africa was a country synonymous with a lot of arbitrary, oppressive actions which were mostly meant to stoke the fires of segregation and unequal distribution of the country's resources. However, with constitutional transition and the advent of democracy, out went both the administrative and judicial arbitrariness. Within a constitutional state where the respect of the law and legality is not optional but compulsory, any government action or decision should then be able to be justified both procedurally and substantively, it must also be rationally justifiable.<sup>127</sup>

Rationality review is also concerned with the evaluation of a relationship between the means and ends. In other words, there must be a relationship between the means used to achieve a purpose and the purpose itself.<sup>128</sup> It is thus clearly discernible that rationality requires both substantive and procedural fairness, if a decision is arrived at without following the correct procedure, and if the decision is devoid of any validly comprehensible and justifiable reason it falls short of the standard required by rationality.

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<sup>127</sup> State v Makwanyane supra, para 7.

<sup>128</sup> See para 110 above.



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