

Power and constraints in the Constitution of the Republic of South Africa 1996

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Summary

This article starts with the trite proposition that a constitutional democracy functions optimally when adequate power is afforded to elected representatives on condition that the power is exercised in accordance with constitutional checks and balances. The article emphasises the importance of the constitutional constraints on the exercise of public power. Section 1 of the South African Constitution presents the fundamental premises of the Constitution and sets out a vision of the type of society that the Constitution seeks to attain. The meaning of the rule of law and notions of responsive, accountable and open governance are explored through case law dealing with PAJA and the concept of legality. The ultimate thrust of these judgments is to ensure rationality, propriety and respectful governance. While they constrain the exercise of power, they do so in a manner that accords with the vision set out in section 1 of the Constitution. The article examines the duty to give reasons and analyses some instances where there is cynical compliance with the constitutional obligation to provide reasons and how this detracts from broader constitutional objectives. The Public Protector plays a vital role in ensuring the proper exercise of public power. The article examines two investigations by the Office of the Public Protector. In the PetroSA investigation, the Public Protector simply capitulated and surrendered in the face of power by adopting an irrationally-narrow interpretation of its mandate. In the SAPS lease investigation, a different Public Protector

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properly investigated and two high-profile functionaries lost their jobs. The consequences for the office of the Public Protector and the effect that these investigations have on the project of realising the type of society promised in section 1 of the Constitution are examined. In the conclusion, questions are asked as to why the jurisprudence of the Constitutional Court and Supreme Court of Appeal are being scrutinised when they have sought, more than other institutions, to attain the objectives of section 1 of the Constitution.

1 Introduction

One of humankind's great endeavours is to try and establish a system of governance that allows us to regulate our public and private affairs in a manner that is fair and just, and that takes cognisance of our strengths and flaws. With all its imperfections, the best that we have been able to come up with is the notion of a constitutional democracy which, while affording power to elected and accountable rulers, simultaneously imposes a system of checks and balances to minimise the abuse of power. The various manifestations of this system are far from perfect, but from the perspective of ensuring proper governance, it is generally better than the alternatives.

Tribe and Landry describe constitution making as an opportunity to structure the future. It is about laying a framework for the creation of a new nation, and 'to compose the atmosphere in which the politics of the future is to be composed'.¹ That is precisely what the drafters of the South African Constitution² sought to do. It is no coincidence that, at an individual level, section 1 of the Constitution entrenches human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism. At a structural level, it emphasises the supremacy of the Constitution, the rule of law, regular elections, and a multi-party system of democratic government, as prerequisites to ensure accountable, responsive and open governance. The pact that we (the people) have made with the rulers – both present and future – is that they can govern in our name, provided they rule in a manner that respects individual human rights, and in accordance with the fundamental structural safeguards that ensure accountable, responsive and open governance. Both these individual rights-based facets and structural facets are interrelated and integral to the broader objective of proper governance. If either aspect is materially undermined, the constitutional order will ultimately eviscerate. Everyone who assumes public power acknowledges that he or she should exercise that power in a manner that respects fundamental human rights, and abides by the structural precepts of the Constitution. It is that demand of the Constitution

1 LH Tribe & TK Landry 'Reflecting on constitution making' (1993) 8 *American University Journal of International Law and Policy* 627 630.

2 Constitution of the Republic of South Africa, 1996.

that power be exercised within the constitutional constraints to which I will refer as appropriate checks and balances.

In short, section 1 is a *précis* of the fundamental premises of the Constitution, and represents the vision of the type of society we should become. We constantly need to ask whether we are journeying towards this vision. If we depart or digress significantly, we will endanger the entire constitutional project.

The drafters of the Constitution put in place a number of mechanisms to ensure that public power is exercised, both substantively and procedurally, in a manner that accords with the vision outlined in section 1. We have one of the most expansive bills of rights in the world. It operates, in part, to constrain government from unjustifiably violating our rights and, in part, it demands that government act so as to deliver us from our inegalitarian past by progressively realising the socio-economic rights that will ultimately free the potential of all. The principle of legality obliges government to act within its powers and, amongst other things, to act rationally. The principles of participatory, representative and direct democracy are entrenched in the text of the Constitution to ensure that there is an ongoing dialogue between the people and the rulers. An effective, efficient and independent judiciary, functional and independent institutions supporting democracy (these are known as 'chapter nine institutions'), free, independent and an able media, and a vibrant and alert civil society, are all indispensable to ensuring that there are appropriate checks and balances on the exercise of public power. It is only if these institutions function adequately that the required balance envisaged in the Constitution can be achieved. The corollary is that if any of these become dysfunctional, the balance is upset – often to the prejudice of society – as each is meant to pull its own weight and contribute to the strengthening of the constitutional democracy.

In a lecture that I delivered to commemorate the life of Dr Beyers Naude, I argued that both power and vulnerability are in equal measure transitory concepts.³ Institutional longevity is only guaranteed if legitimate, and if government is transparent, open, accountable and just. I digress briefly to talk about the circle of life – the challenge facing those exercising public power is to appreciate that, in terms of the circle of life, their current state of powerfulness is impermanent, and when exercising power they need to have an eye to the future: How would their successors handle the precedent that they have set when they, the current holders of power, are in a position of powerlessness? Equally, damaging institutional integrity to achieve personal or short-term political objectives will almost inevitably be counter-productive. Bending the will of an independent constitutional body to do the bidding of those in power is corrosive.

3 K Govender 'Appraising the constitutional commitments to accountable, responsive and open governance and to freeing the potential of all: A tribute to Dr Beyers Naude' (2011) 26 *South African Public Law* 343.

The best safeguard is to ensure institutional integrity and growth, and not to be dependent on the subjective good sense of the individual in power.

2 Jurisprudence on responsive governance

This article will assess the jurisprudence on responsive and accountable governance, and then assess how the obligation to supply adequate reasons is being discharged.⁴ Finally, two separate investigations by the Office of the Public Protector, a constitutional body tasked with investigating maladministration,⁵ will be assessed. The objective is to learn lessons about accountable, responsive and proper governance, from these instances, keeping in mind that, to date, the judiciary has held the government to the constitutional promise of responsive, accountable and proper governance and that the latter has struggled more than it should to meet this obligation.

Section 1 of the Constitution identifies accountable, responsive and open governance as one of the founding values of the South African state. It also entrenches the supremacy of the Constitution and the rule of law. In an intriguing argument, Mureinik submitted in 1993 that the Constitution⁶ required responsive government which implied participation by the governed and accountability to the governed.⁷ Participatory democracy and accountable governance will, at the very least, require that persons are afforded the opportunity to participate in the decision-making process, prior to the decision being made and for reasons to be provided by the decision maker in justification of the decision. The development of the concept of legality, which stems from the rule of law, has provided additional safeguards for the review of decisions which fall beyond the reach of administrative action, as narrowly defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Section 33(2) of the Constitution entrenches the right of everyone whose rights have been adversely affected by administrative action to be given written reasons for the action. PAJA, the national legislation enacted to give effect and activate section 33, was meant to balance the right to lawful, reasonable and procedural fair administrative action and the right to reasons, on the one hand, and an efficient administration, on the other. Section 5 of PAJA enables persons, within 90 days of becoming aware of the administrative action, to request reasons for the action. Unusually, it is a right activated upon

4 This section was added at the recommendation of one of the reviewers.

5 Sec 182(1) Constitution.

6 He was in fact referring to the Constitution of the Republic of South Africa 200 of 1993 (interim Constitution), but his observations apply with equal force to the final Constitution.

7 E Mureinik 'Reconsidering review: Participation and accountability' in TW Bennet *et al* (eds) *Administrative law review* (1993) 18.

request. In the quest to ensure responsive and accountable governance, the palisade of qualifications⁸ that have to be met before the rights in PAJA can be claimed have been systematically lowered by the courts.

A good illustration of this is the reasoning of the Constitutional Court in *Joseph v City of Johannesburg*,⁹ where various aspects of the definition of administrative action in section 1 of PAJA had to be considered. The applicants were tenants of a block of flats, Ennerdale Mansions, owned by Mr Nel, and they received their electricity supply from City Power, an organ of state. City Power disconnected their electricity supply without providing any prior notice of the disconnection to the tenants. The applicants argued that their rights had been materially and adversely affected by the termination and as a consequence, they contended that City Power was required to treat them procedurally fairly in terms of section 3 of PAJA. In order to access this right to procedural fairness under PAJA, the applicants had to first establish that the termination was administrative action. City Power contended that the tenants had no contractual relationship with it and, as no rights of the applicants were affected by the termination, they were not entitled to the right to procedural fairness as contained in section 3 of PAJA.¹⁰

It is correct that there was no formal contractual arrangement between City Power and the tenants (which could give rise to a right), while a contract existed between City Power and the property owner, Mr Nel. The tenants were therefore unable to rely on any private law contractual rights. They accordingly had to prove that they had a public law right to the electricity supply which had been disconnected, which required that they had to contend with the convoluted definition of administrative action in PAJA. In other words, the tenants were required to demonstrate that a decision of an administrative nature had been taken by an organ of state exercising a public power or performing a public function in terms of legislation, and that such a decision adversely affected their rights, and had a direct external legal effect. In addition, the action could not fall within the list of exclusions.¹¹

The Court endorsed earlier comments to the effect that the term 'direct, external legal effect' that appears in the definition of administrative action must be given a broad interpretation and 'serves to emphasise that the administrative action impacts directly and immediately on individuals'.¹² The Court went on to hold that a

8 This description of the jurisdictional facts that need to be satisfied before the rights can be claimed comes from Nugent JA in *Greys Marine Hout Bay v Minister of Public Works* 2005 10 BCLR 931 (SCA) para 21.

9 2010 3 BCLR 212 (CC).

10 *Joseph* (n 9 above) para 28.

11 See subsecs (aa) to (hh) of the definition of 'administrative action' under sec 1 of PAJA.

12 *Joseph* (n 9 above) para 26.

finding that a right had been materially and adversely affected would, of necessity, imply that there had been a direct, external legal effect.

The Court clarified that the term 'materially and adversely affected' means exactly that – it does not mean that a right need necessarily have been breached. It does, however, mean that the decision must have had a significant and not trivial effect on the right. In this case, disconnecting the tenants' electricity supply undoubtedly had a significant impact on the tenants and thus *they* were materially and adversely affected by the decision to terminate.

Although it is now clear that *the tenants were affected*, the main issue was whether any *rights* of the tenants were adversely affected. The tenants relied on the right of access to adequate housing,¹³ the right to human dignity,¹⁴ and asserted certain contractual rights.¹⁵ The Court could quite credibly have concluded that the disconnection of the electricity supply materially and adversely impacted on the negative aspect of the right to housing, thus requiring notification to have been given to the tenants.¹⁶

However, the Court took a broader view of the relationship that exists between a public service provider and members of a community. One of the key functions of local government is to meet the core needs of its inhabitants and to provide the necessary services such as water and electricity. This function or obligation is derived from the Constitution¹⁷ and from legislation. One such law is section 73 of the Municipal Systems Act 32 of 2000 (Systems Act), which requires that the municipality gives priority to the basic needs of the local community and ensures that all members have access to at least the minimum level of basic municipal services.¹⁸ Thus, the Court concluded that there was a constitutional and statutory obligation to provide basic services, including electricity, to the tenants.

Taking a purposive approach, the Court held that the notion of 'rights' includes not only vested private law rights, but also legal entitlements that have their basis in the constitutional and statutory obligations of government.¹⁹ The Court concluded that when City Power supplied electricity to Ennerdale Mansions, it was fulfilling a constitutional and statutory obligation and, when the tenants received the electricity, they had a public law right to it. As the termination of

13 Sec 26 Constitution.

14 Sec 10 Constitution.

15 *Joseph* (n 9 above) para 12.

16 See *Jaftha v Schoeman* 2005 2 SA 140 (CC), referred to in *Joseph* (n 9 above) para 32.

17 Sec 152(1)(b) Constitution.

18 'Basic municipal services' means 'a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment' (sec 1 of the Systems Act).

19 *Joseph* (n 9 above) para 42.

the service materially and adversely affected this right, City Power was obliged to act procedurally fairly prior to terminating the service.

The tenor of the judgment is unequivocal: PAJA must be interpreted in a manner that achieves the broader objectives of open, respectful and good governance and gives effect to the spirit and purport of section 33 of the Constitution.²⁰ The Court specifically noted that the Preamble to PAJA refers to the need to create a culture of accountability, openness and transparency, sentiments which are rooted in section 1 of the Constitution. This translates into a duty on government to be responsive, respectful and fair when discharging its statutory obligations. Interpreting the jurisdictional facts narrowly would not be conducive to these objectives, hence the decision to broadly interpret the various jurisdictional facts. In *Joseph*, the Constitutional Court signalled that PAJA, despite the unnecessary and excessive caution displayed by the drafters, must be interpreted in a manner that advances the constitutional objective of responsive and open governance. These messages, and not just the immediate outcome or result of the cases, must be appreciated and understood by organs of state as they interpret the constraints on their jurisdiction and the scope and ambit of their powers.

Further, PAJA requires that adequate reasons be given for administrative action that materially and adversely affect the rights of any person.²¹ Administrative action may be set aside if the action itself is not rationally connected to the purpose for which it is taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator.²² Supplying reasons enables this assessment to be made. Both the tests for rationality and adequacy require that there be a logical coherence between the findings of law and fact, the objectives and purposes of the empowering legislation and the final conclusion arrived at by the functionary.²³

In *Wessels*,²⁴ which is discussed in greater detail later in this article, the High Court appeared to accept the view that, if the obligation to give reasons was restricted to instances where rights were being diminished or deprived as opposed to being determined (application cases), PAJA would probably be unconstitutional. This must be correct, given the broad interpretation of the jurisdictional facts in the *Joseph* judgment and the necessity to be responsive, respectful and fair. It seems that the judicial interpretation of PAJA has dragged the Act closer to the vision and spirit of section 33 read with section 1 of the Constitution, despite the efforts of the legislature to superimpose

20 As above.

21 Sec 5 PAJA.

22 Sec 6(2)(f)(ii) PAJA.

23 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 4 SA 490 (CC).

24 *Wessels v Minister of Justice and Constitutional Development* 2010 1 SA 128 (GNP).

a spate of qualifications which have to be satisfied before the right to lawful, reasonable and procedural administrative action can be claimed. However, neither section 33 of the Constitution nor PAJA extends beyond actions that can be classified as administrative.

While the right to just administrative action in section 33 of the Constitution was meant to be the principal vehicle to ensure responsive and accountable governance, the concept of legality was pressed into service to ensure oversight over the exercise of public power that fell outside the purview of section 33. Our law has travelled a most remarkable journey since 2000 to remedy this *lacuna* and, through the principle of legality, it has effectively considerably extended the reach of review for rationality. In *Fedsure*,²⁵ the Constitutional Court noted that the principle of legality, so far as it related to administrative action, was contained in the right to just administrative action. The principle of legality is also implicit in the Constitution, insofar as it relates to the rule of law,²⁶ and this principle of legality, which is implicit in the Constitution, applies to legislation and to executive acts that do not constitute administrative action.²⁷ In *Pharmaceutical Manufacturers*, the same court found that, as part of the rule of law, executive or legislative decisions must be 'rationally related to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement'.²⁸ Even though this review for rationality was meant to be a fairly deferential standard and one which the legislature or executive should quite easily satisfy, it has developed into a generic category which now includes many of the grounds of review that are contained in PAJA, provided that the test laid down by the Constitutional Court in the *Democratic Alliance* case is met.²⁹

In *Ryan Albutt*,³⁰ Ngcobo CJ commenced his analysis of the argument that the President had acted irrationally in processing amnesty applications and by not affording the victims an opportunity to be heard, by stating that it is now axiomatic that all exercises of

25 *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 1 SA 374 (CC) 45.

26 *Fedsure* (n 25 above) para 58. The Constitutional Court was referring to the interim Constitution, but its comments apply with equal force to the final Constitution.

27 *Fedsure* (n 25 above) para 59.

28 *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of SA* 2000 2 SA 674 (CC) 85.

29 See C Hoexter 'The rule of law and the principle of legality in South African administrative law today' in M Carnelley & S Hoctor (eds) *Law, order and liberty: Essays in honour of Tony Mathews* (2011) 55. The Constitutional Court judgment in *Democratic Alliance v President RSA* is discussed below (see n 37).

30 *Ryan Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC).

public power must comply with the Constitution and with the concept of legality which is inherent in the rule of law.³¹

President Mbeki appointed a multi-party pardon reference group to advise him on whether to grant special pardons to persons who had committed offences with a political motive or objective and who had not participated in the Truth and Reconciliation Commission (TRC) process. The President made it clear that, while he would be guided by the recommendations of the reference group, he would be exercising an independent opinion as to whether or not pardons should be granted. In doing so, he undertook to have regard to the objectives of the Constitution, including those dealing with reconciliation and nation building and to take cognisance specifically of the criteria and principles that underpinned the TRC process.

A request by the victims to be heard by the reference group before decisions were made was refused and the victims subsequently sought to interdict the process from continuing without the participation of the victims. The non-governmental organisations (NGOs) (the respondents) acting on behalf of the victims argued, inter alia, that the decision not to hear the victims was irrational. The Constitutional Court agreed with the respondents that the rationality of the decision was in question: It was not within the constitutional jurisdiction of the Court to determine whether the means chosen were the most appropriate or reasonable in the circumstances. It had to restrict itself to determining whether there is a rational link between a constitutionally-permitted objective and the means chosen to achieve that objective.³² In this case, the professed objectives in pardoning certain 'political prisoners' were national reconciliation and national unity which were to be achieved after having taken cognisance of the spirit and objectives of the TRC process. Shutting the victims out of such a process was irrational because their exclusion meant that the professed objectives of national unity and national reconciliation could not rationally be achieved by the method of only hearing the version of the offenders, as it was firmly established that the participation of the victims was crucial to the TRC process and truth telling and acknowledgment of the sacrifices made by the victims were central facets of the process. From a factual and practical perspective, not hearing the victims would make it difficult to determine whether the crimes had been committed with a political objective, which was in fact the first hurdle in pardoning in terms of this specific process.³³

While the majority judgment expressly left open the issue of whether the victims in other categories of pardon should also be heard before a decision is made,³⁴ it will be a high-risk strategy not to

31 See *Affordable Medicines Trust & Others v Minister of Health & Others* 2006 3 SA 247 (CC) para 49; *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 2 SA 674 (CC) para 20.

32 *Ryan Albutt* (n 30 above) para 51.

33 *Ryan Albutt* (n 30 above) para 70.

do so. The principles of participatory democracy, responsive and respectful governance will rarely be satisfied if someone who has a vital interest or right in the outcome of the proceedings is shut out. The concurring judgment of Froneman J, building on earlier judgments,³⁵ emphasised that our Constitution requires our democracy to be both representative and participatory. However, Froneman J noted that the mere fact that the pardon reference group consisted of members of various political parties did not, in this case, adequately satisfy requirements relating to a representative democracy.³⁶

Subsequent to the *Ryan Albutt* case, the differences between reviews of administrative action under PAJA and reviews of executive action under the principle of legality have narrowed considerably. The decision opened the door to more creative approaches to the review of executive action in terms of the principle of legality.

In *Democratic Alliance v President RSA*,³⁷ the Supreme Court of Appeal (SCA) had to consider whether President Zuma's decision to appoint Mr Simelane as National Director of Public Prosecutions (NDPP) was in accordance with the principle of legality and with the requirements of the National Prosecuting Authority Act 32 of 1998 (NPA Act). In terms of the NPA Act, the NDPP must be appropriately qualified, and be a fit and proper person having regard to his experience, conscientiousness and integrity. Prior to his appointment, the Ginwala Commission of Inquiry had made adverse comments about the integrity of Mr Simelane. There were other instances of courts also calling Mr Simelane's integrity into question.³⁸ The Public Service Commission also recommended that disciplinary proceedings be instituted against Mr Simelane. President Zuma indicated that he had firm views about the suitability of Mr Simelane's appointment and stated that he did not engage fully with the Ginwala Commission report as he was of the view that it was a fact-finding enquiry that was primarily concerned with the suitability of the previous NDPP, Adv Pikoli, for office. The President formed the view that the comments made about Mr Simelane could not be construed as intended to disqualify him from holding public office in future.

Navsa JA reflected on the duty to act openly, responsively and accountably and specifically endorsed the view that under the constitutional order, those that exercise public power must justify their decisions as opposed to simply exercising the power. That is what is required in a constitutional democracy.³⁹ In Mureinik's

34 *Ryan Albutt* (n 30 above) para 75.

35 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) para 121; *Matatiele Municipality & Others v President of the RSA & Others* (No 2) 2007 6 SA 477 (CC) para 40.

36 *Ryan Albutt* (n 30 above) para 90.

37 2012 1 SA 417 (SCA).

38 *Democratic Alliance* (n 37 above) para 10.

39 *Democratic Alliance* (n 37 above) para 67.

memorable phrase, the interim Constitution and, by implication, the Constitution, signalled a departure from a culture of authoritarianism to a culture of justification.⁴⁰ The Constitutional Court⁴¹ subsequently confirmed the decision of the SCA and found that the failure to fully engage with the concerns about Mr Simelane's integrity was irrational. It stressed that the rationality review was an evaluation of the relationship between means and ends.⁴² It accepted that both the process by which the decision was made and the decision itself must be rational.⁴³ Although the mere fact that relevant considerations were not taken cognisance of would not in and of itself be sufficient to set aside the exercise of executive power, the failure to take relevant considerations into account would be part of the means to achieve the objectives of the empowering statute. If the failure impacted on the rationality of the entire process, then the decision may be rendered irrational.⁴⁴ On the facts of this case, the Court took the view that there was no rational relationship between the means and the ends: The NPA Act demands that the appointee be a fit and proper person who is experienced, conscientious and of integrity. The Ginwala Commission made adverse comments about the integrity and honesty of Mr Simelane. The President's decision to ignore these 'red flags' coloured the rationality of the entire process and rendered the final decision irrational.

In the light of the courts' increasingly robust approach to the review of executive action, and its expansion of the concept of rationality, concerns regarding the separation of powers have arisen. There is concern (largely in political circles) as to whether courts are overstepping the bounds of judicial authority. In an effort to deal with concerns about the separation of powers, the Court suggested a threefold enquiry when it was alleged that the executive had ignored relevant factors. Firstly, it must be determined whether the facts not taken account of were relevant. If the answer is in the positive, then the second enquiry is whether the failure to consider the material, which amounts to the means, is rationally related to the purpose of the empowering provision. Thirdly, if it is not, then the issue is whether not taking the relevant consideration into account taints the entire process with irrationality and renders the final decision irrational.⁴⁵

These developments in the judicial review of executive action culminated in the incorporation of a 'reasons' requirement in non-administrative decision making. This latest development is apt, given the importance of adequate reasons in ensuring responsible

40 E Mureinik 'A bridge to where? Introducing the Bill of Rights' (1994) 10 *South African Journal on Human Rights* 32.

41 *Democratic Alliance v President of the RSA* 2012 12 BCLR 1297 (CC).

42 *Democratic Alliance* (n 41 above) para 36.

43 *Democratic Alliance* (n 41 above) para 34.

44 *Democratic Alliance* (n 41 above) para 39.

45 *Democratic Alliance* (n 41 above) para 39.

governance. Mureinik argued that responsive government means 'fostering (a) participation and (b) accountability, which is to say, the responsibility of government to justify its decisions to those whom it governs'.⁴⁶ By supplying reasons, government justifies its decisions and opens its thinking process to those affected by the decision – thus enabling them to understand why the decision was taken. Reasons serve to counteract the 'nepotism and unfair discrimination which lurks in every corner'⁴⁷ of the administration.

In the light of these comments, it is important in this context to consider the case of the *Judicial Service Commission v Cape Bar Council*, which considered the duty to give reasons for action other than administrative action.⁴⁸ This issue had been raised in the earlier High Court decision of *Wessels*,⁴⁹ where the Court held that the duty to provide reasons formed part of the concept of legality. Providing explanations for decisions opens up the process and enables an appropriate assessment to be made as to whether the decision is rational or not. In *Judicial Service Commission v Cape Bar Council*, there were three vacancies in the Western Cape and the Judicial Service Commission (JSC) deemed it appropriate to make one appointment only and did not fill the other two vacancies despite there being applicants who were eminently suited for appointment. It was accepted that the non-appointment of the judges did not amount to administrative action and therefore the decision could not be reviewed under PAJA.⁵⁰ However, the non-appointment could be assessed under the principle of legality.

Section 178 of the Constitution regulates the composition of the JSC and requires that either the President or the Deputy President of the JSC be present when appointments are made. As section 178(7) of the Constitution provides, firstly, for the President of the SCA to be present or, if he is unable, that the Deputy President appear as his alternate, it was clear that because neither was present when these decisions were taken, and there was no justification therefor, the JSC was not properly constituted. This meant that an invalidly-constituted JSC could not take valid decisions. The Cape Bar Council also argued that the failure to make appointments and leave the posts unfilled when there were eminently suitable candidates was irrational. The only reason provided by the JSC for not filling the posts was that none of the other candidates received a majority of votes. The JSC argued that it was not obliged to give reasons and, as the voting was done through a secret ballot, it was not in a position to supply a justification for its decision.

46 E Mureinik 'Reconsidering review: Participation and accountability' (1993) *Acta Juridica* 35 46.

47 Olivier JA in *Transnet Ltd v Goodman Bothers (Pty) Ltd* 2001 1 SA 853 (SCA) 42.

48 *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115 (14 September 2012).

49 *Wessels* (n 24 above).

50 *Judicial Service Commission* (n 48 above) para 20.

The Court held that, while there was no express statutory or constitutional obligation on the JSC to provide reasons for its decision, if regard is had to the broader objectives and visions of the Constitution, such an obligation can clearly be implied. The JSC had to act rationally and, as an organ of state, it had to act in accordance with the values of transparency and accountability contained in section 195 of the Constitution.⁵¹ According to the Court, it would be entirely cynical to say to an applicant that he or she could demand that a body exercising public power does so rationally, but that there is no obligation on that body to provide reasons. A person would in those circumstances have to accept the say-so of the public body that it acted rationally. On the facts of this case, the Court held that there was an obligation to provide reasons and that the reasons provided in this case were not sufficient.⁵² In terms of this judgment, the principle of legality and rationality now requires that adequate reasons be provided. While the Court made it clear that this does not necessarily mean that all decisions of the JSC have to be supported by reasons,⁵³ the obligation on the JSC to act rationally would, in most instances, require some justification being provided for decisions taken.

The scope of government's responsibility has been clearly demarcated and organs of state need to acquire the discipline to meet the standard set by the Constitution as this standard has been interpreted by the courts.

3 Organs of state falling well short of the standard required

Section 217 of the Constitution makes it imperative for an organ of state in the national, provincial or local sphere to contract for goods and services in a manner that is fair, equitable, transparent, competitive and cost-effective. However, organs of state are not prevented from implementing a procurement policy providing for categories of preferences in the allocation of contracts, and the protection or advancement of persons or categories of persons previously disadvantaged by unfair discrimination.⁵⁴ The section requires the enactment of national legislation prescribing a framework to implement the policy of preference to previously-disadvantaged persons. The Preferential Procurement Policy Framework Act of 2000 (PPPFA) has therefore been enacted.

Section 2 of the PPPFA draws a distinction between contracts above the prescribed amount and contracts below the prescribed amount. In respect of contracts above the prescribed amount, a maximum of ten

51 *Judicial Service Commission* (n 48 above) para 43.

52 *Judicial Service Commission* (n 48 above) para 45.

53 *Judicial Service Commission* (n 48 above) para 51.

54 Sec 217(2) Constitution.

points may be allocated for the specific goals identified in the PPPFA, while in respect of contracts below the prescribed amount, a maximum of 20 points may be allocated for the specific goals. The specific goals relate to contracting with people who were historically disadvantaged by unfair discrimination on the basis of race, gender, sex or disability, or for the purposes of implementing the Reconstruction and Development Programme. The points allocated must be out of a total of 100, and the person scoring the highest points must be allocated the tender. In tenders for contracts above the prescribed amount, a maximum of ten points may be assigned to historically-disadvantaged individuals, while a maximum of 90 points must be assigned for price.⁵⁵ In tenders for smaller contracts (those below the prescribed amount), a maximum of 20 points may be allocated to historically-disadvantaged individuals, and a maximum of 80 points may be assigned for price. Thus, the PPPFA and the regulations adopt a fairly rigid system, in order to ensure that price is allocated the overwhelming segment of the points, but also that equity issues are not ignored.

The legal norms regulating procurement are thus contained in the Constitution, and are re-emphasised in legislation passed by Parliament. Given the pressure on the fiscus to respond to the numerous challenges facing us in our pursuit to improve the quality of life of all, the logic unpinning the constitutional provisions and the law is that it is against the nation's interests for the country to be paying much more for goods and services than that which is fair and equitable. Parliament prescribed the balance to be achieved between advancing previously-disadvantaged communities, and ensuring that we receive value for our rand, with the balance still weighing heavily in favour of economic concerns.

In *Minister of Social Development and Others v Phoenix Cash and Carry-PMB CC*,⁵⁶ the SCA re-iterated that the five principles of fairness, equitable treatment, transparency, competitiveness and cost-effectiveness must inform all aspects of the tender process. In a frank judgment, the Court directly questioned the legitimacy of the process that led to the appellants being denied the tender and, in a damning indictment, indicated that from its experience drawn from matters before the Court, the values of section 217 are more honoured in the breach than in the observance.

Bids were invited to supply food hampers to indigent families in KwaZulu-Natal and in the Eastern Cape. The price of the service offered in the bid submitted by the appellant, Phoenix Cash and Carry, was approximately 40 per cent less than that submitted by the successful tenderer. Despite offering the lowest price by a large margin, the appellant was unsuccessful. In response to the appellant's

⁵⁵ Preferential Procurement Regulations GN R725, GG 22549, 10 August 2001.

⁵⁶ 2007 9 BCLR 982 (SCA).

request for reasons, the Department indicated that it had evaluated the bids and that the appellant was unsuccessful.⁵⁷

- 1 Your client is not entitled as of right to be awarded the tender.
- 2 The Department evaluated all bids and awarded to the entities listed in annexure A.
- 3 The bids of the entities listed in annexure A satisfied the requirements of the tender.
- 4 The Department exercised its prerogative in awarding the tender to the entities in annexure A. In other words, the Department exercised its discretion not to award the tender to your client and did so after consideration of all bids that were submitted.

Subsequently, the Department attempted to supplement its so-called reasons by stating that the appellant had not complied with certain prerequisites, including the submission of audit statements. The Court found that the Department, in excluding the appellant's bid, had elevated form above substance. Had it properly appraised the documents submitted, it would have concluded that the material issues dealing with financial viability had been dealt with, even though no audit statements had been submitted. Accordingly, the Court held that the process was fundamentally flawed, and set aside the decision. A process that emphasises form over substance could have the effect of facilitating corrupt practices, by providing an excuse not to consider meritorious tenders, and by excluding them on technicalities. This is often inimical to fairness, competitiveness and cost-effectiveness.

Subsequently, when the litigation commenced, further reasons were submitted. The reasons submitted can hardly be classified as reasons. Reference to exercising its prerogative is irrational, as the Department does not possess prerogative power. The hint of arrogance inherent in the statement is unbecoming. No mention is made of why this particular decision was reached. This is particularly jarring when the context is considered: The successful tenderer charged the Department a bid price that was 40 per cent more than the appellant's bid price. The Department has a constitutional and statutory duty to ensure that the procurement process is fair, equitable, transparent, competitive and cost-effective. The purpose of supplying reasons is to properly explain why a particular decision was arrived at, and not to re-state the conclusion reached. The reasons submitted are not just inadequate, but border on being contemptuous of the applicant. It is almost as if the legal advisors of the Department are saying: 'We are dispensing a largess to which you have no right and we therefore do not have to explain our actions.' Rather than getting an explanation for the decision, the Court found that after receiving the reasons, Phoenix Cash and Carry was

⁵⁷ *Echoes of JSC v Cape Bar Council.*

'understandably perplexed at not having succeeded in its bid'.⁵⁸ The response further, according to the Court, betrayed a 'fundamental misconception of the function to be performed by the adjudicator of the tender'.⁵⁹ The reasons supplied manifest an attitude that can accurately be referred to as cynical compliance with constitutional and legislative obligations to provide reasons.

The case in question was, however, decided on the basis that the appellant in *Phoenix Cash and Carry* had been wrongfully excluded from the evaluation process, and had not been treated procedurally fairly. The Department was ordered to set aside the tender and to commence the process afresh. If lessons are being learnt from cases of this nature and behavioural changes occur, then administrative morality may in fact change. This is less likely to occur if the determining criterion, as far as the administrator is concerned, is whether the unsuccessful applicant is going to challenge the decision in court. Administrative morality is more likely to occur if there is genuine engagement and a commitment to uphold the values of the Constitution during the administrative process. The lessons that cases like *Phoenix Cash and Carry* teach are that the decision-making process has to be procedurally fair, substance must not be sacrificed for form, the enabling Acts and the relevant provisions of the Constitution must be applied, a lawful and proper decision must be made timeously, and adequate reasons must be supplied at the end of the process, upon request. It is a process that starts with receiving the applications, and which ends with the supply of reasons. The administrators must be capacitated to appreciate this and to act accordingly. To make the decision and not to provide adequate reasons is tantamount to exercising the power, but not abiding by the legal and constitutional constraints attendant upon the exercise of the power. This is the very antithesis of the proper and accountable exercise of public power required in the Constitution as interpreted by the courts. The courts have spoken clearly about their concerns, and both the executive and legislative branches need to engage with this issue in a more meaningful and committed manner. It is not solely about the rights of the single applicant, but much more about fostering a culture that would enhance and strengthen the democracy. The establishment of an advisory council, as envisaged in section 10(2) of PAJA, by the Minister of Justice and Constitutional Development, would be a useful starting point, and would allow for members of the public and administrators to be informed of how constitutional and statutory obligations are to be discharged. It would allow for the lessons taught by cases like *Phoenix Cash and Carry* to be learnt by all, and would hopefully decrease the likelihood of similar improper conduct occurring.

⁵⁸ *Phoenix Cash & Carry* (n 56 above) para 10.

⁵⁹ *Phoenix Cash & Carry* (n 56 above) para 23.

4 Investigations by the Office of the Public Protector

I turn now to consider decisions made by the Office of the Public Protector (OPP),⁶⁰ and the impact that these decisions may have on ensuring accountable and responsive government. OPP is an institution that is constitutionally empowered to investigate any improper conduct in state affairs or in public administration.⁶¹ Given its mandate, an effective and competent OPP is central to the objective of achieving accountable and responsive government.

In about 2005, the *Mail & Guardian* published a series of articles dealing with transactions between PetroSA, a public body, and Imvume Holdings, a South African oil company.⁶² These transactions were subsequently dubbed 'Oilgate'. The essence of the allegations by the *Mail & Guardian* was that millions of rands of public money had been diverted from PetroSA to the African National Congress (ANC) through Imvume Holdings.

An arrangement was reached that PetroSA would provide an advance payment of \$2,3 million (R15 million) to Imvume Holdings, which in turn was meant to be used to pay a supplier, Glencore, for a consignment of oil. This amount was accordingly transferred from PetroSA to Imvume Holdings. According to bank records, Imvume Holdings transferred R11 million to the ANC a few days later. Significantly, Imvume Holdings did not transfer the money to Glencore, as had been agreed, and PetroSA was then obliged to pay the sum of R15 million directly to Glencore. PetroSA denied any knowledge of the subsequent transfer from Imvume to the ANC, and the ANC denied any wrongdoing. The net result was that PetroSA paid \$13 million for a cargo that was originally priced at \$10,2 million. The allegation was that within a few days of the R15 million advance being made to Imvume Holdings, it paid R11 million to the ANC. Imvume subsequently defaulted on repaying the R15 million to PetroSA. Certain non-ANC members of parliament referred these allegations to the Public Protector.

In his report, the then Public Protector reasoned that when the money reached the account of Imvume Holdings, it ceased to be 'public money', and became 'private money'. As the jurisdiction of the Public Protector is restricted to public money, the report concluded that its investigatory mandate stopped when the money reached Imvume Holdings. Hence, it concluded that it could not investigate

60 The Office of the Public Protector is one of the institutions established in terms of ch 9 of the Constitution, to support constitutional democracy. Its powers are enumerated in sec 182 of the Constitution, and in terms of the Public Protector Act 23 of 1994.

61 Sec 182(1) Constitution.

62 These facts are obtained from the judgment of the SCA in this matter; *The Public Protector v Mail & Guardian Ltd* 2011 4 SA 420 (SCA).

the relationship between Imvume Holdings and the ANC, and the subsequent transfer of funds from Imvume to the ANC.

The *Mail & Guardian* challenged the legality of the Public Protector's report. The SCA was scathing in its rejection of the reasoning of the Public Protector.⁶³ The substance of the complaint, according to the Court, was the propriety of the initial conversion of public funds into private money, and not the propriety of the payment of private money from Imvume Holdings to the ANC. This simple proposition appeared to elude the then Public Protector. The mandate of the Public Protector is to investigate any alleged 'improper or dishonest act, or omission ... with respect to public money'.⁶⁴ The conversion of public money into private money, according to the Court, occurs through bilateral transactions of payment and receipt.

Both the improper payment and improper receipt of public money was quintessentially an improper act with respect to public money. By misunderstanding this, the Public Protector misdirected himself and concluded that he could not investigate the transaction between Imvume Holdings and the ANC. Key questions were not asked of PetroSA, such as the purpose of the advance payment, and why PetroSA did not make the payment directly to Glencore in the first place. The damning conclusion of the Court was that 'the investigation was so scant as not to have been an investigation, and there was no proper basis for any of the findings that were made'.⁶⁵ In an interesting preamble to the judgment, the Court reflects on the importance of the OPP. It describes it as the last defence against bureaucratic oppression, and against corruption and malfeasance. Importantly, it states that 'if that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee'.⁶⁶ The Court reminds the OPP that the office is declared to be independent and impartial, and these words mean what they say and 'fulfilling their demands will call for courage at times'.⁶⁷ The subtext appears to be that this quality was lacking in this instance. The Court's denunciation was as stark as it could possibly be. Reports and reasoning of this nature by chapter 9 institutions must be of concern. It communicates to those exercising power that the oversight over them will be non-exacting and weak. It is self-constraining in that the chapter 9 institutions themselves internally limit the scope and ambit of their investigatory and adjudicatory jurisdiction, and finally it communicates to the public that these institutions lack the independence and robustness required to assert

63 *Mail & Guardian Ltd* (n 62 above) para 101.

64 Sec 6(4)(a)(iii) Public Protector Act 1994.

65 *Mail & Guardian* (n 62 above) para 116.

66 *Mail & Guardian* (n 62 above) para 6.

67 *Mail & Guardian* (n 62 above) para 8.

their mandate. These perceptions could fundamentally impair the effectiveness of these institutions.

Ultimately, the constitutional structures – the courts in this case – corrected the flawed reasoning of the OPP in *Mail & Guardian Ltd*.

Juxtapose the outcome just discussed with a report by the present Public Protector, Adv T Madonsela. In 2011,⁶⁸ a resurgent and confident OPP found that the South African Police Service (SAPS) under General Bheki Cele and the Department of Public Works had acted unlawfully in entering into a long-term R500 million lease agreement with Roux Shabangu. The Public Protector found the process that preceded the signing of the agreement to be fatally flawed, and that both the SAPS and the Department of Public Works had failed to comply with the Constitution, the Public Finance Management Act 1 of 1999, the Treasury Regulations, and various supply chain management rules and policies. She concluded that the parties had engaged in maladministration, and had dealt with public funds in a reckless manner. This is a stinging indictment of the SAPS and of the Department of Public Works by an office that was set up to support the constitutional democracy. Various findings and recommendations were made, including the setting aside of the lease agreement. The report has practical and symbolic significance. At a practical level, public officials should not unlawfully and unjustifiably enrich others at taxpayers' expense, and at the expense of the most marginalised in society. At a symbolic level, the manner in which government deals with these findings would be an indication of whether there is the discipline to govern within the confines of the Constitution and the rule of law. A board of inquiry under Judge Jakes Moloi set up to investigate the allegations against General Cele concluded that he was unfit to hold office, and questioned the propriety of the relationship between General Cele and Mr Shabangu.⁶⁹ On 12 June 2012, President Zuma, citing the findings of the inquiry, dismissed General Cele.⁷⁰ President Zuma's actions in dismissing the Minister of Public Works, and by suspending the National Commissioner of Police and setting up a disciplinary hearing, are probably amongst the most significant acts that the executive has taken to contribute to the legitimacy and importance of chapter 9 institutions. It sent out an unequivocal message that these reports will have consequences.

An independent adjudicator, competent counsel, the requirement to answer relevant questions, effective cross-examination, an objective evaluation of the evidence, and an application of the law and logic all contribute to a process geared to ferreting out the truth. General Cele

68 Govender (n 3 above) 352-353.

69 <http://ewn.co.za/en/2012/05/25/Reports-arise-about-the-axing-of-Cele> (accessed 31 March 2013).

70 <http://www.news24.com/SouthAfrica/News/Bheki-Cele-fired-20120612> (accessed 31 March 2013).

discovered that the judicial process is not susceptible to political sloganeering, obfuscation, and vague and empty answers. When he was called to account in a judicial process, he was found wanting. The Board of Inquiry validated the Public Protector's findings, and after giving General Cele his day in court, found against him decisively. General Cele has rejected the report, and is seeking to have it set aside.⁷¹

Suddenly, the message that is now being communicated to those exercising public power is that the OPP will conduct proper and competent investigations, and that the reports will have consequence and officials will be held accountable. The OPP is now playing the role that the court in *PetroSA* urged it to. Adv Madonsela reported that in the 2011/2012 year, the OPP had received 2 290 complaints.⁷² Public confidence in this institution appears to have grown considerably, and so has the confidence of the OPP to tackle misconduct in the public sector. A buoyant and confident OPP is exactly what the Constitution envisages as a counterweight to the exercise of public power. This will serve to re-invigorate, not just the Office of the Public Protector, but also all chapter 9 institutions. Unequivocally, the report on the police lease agreements has raised the bar for all chapter 9 institutions, and we are entitled to expect a similar standard from all of them – in the discharge of their mandate. If they function optimally, they have the capacity to ensure the proper exercise of public power. If they do not, they fail to justify the reason for their existence.

5 Conclusion

It remains a matter of concern that the efficacy of some constitutional institutions depends so heavily on the individuals leading them. It is vital that the institutions themselves command respect, irrespective of who the incumbents are at any given time. The Constitutional Court has acquired institutional and reputational respect, and is highly regarded for its measured and generally consistent jurisprudence that is relevant to our context.

After losing a number of high profile cases, the government has in fact announced that it wanted to conduct a review of the judgments handed down by the Constitutional Court. According to the formal terms of reference, published by the Department of Justice on 26 March 2012,⁷³ the review was to undertake a comprehensive analysis of all the decisions published by the Constitutional Court and the Supreme Court of Appeal since the advent of democracy in South Africa. A key concern is whether the jurisprudence emanating from

71 <http://www.iol.co.za/dailynews/news/sack-cele-says-inquiry-1.1304795> (accessed 31 March 2013).

72 *The Mercury* 28 August 2012 4.

73 http://www.justice.gov.za/m_statements/2012/20120326 (accessed 31 March 2013).

these courts advances the values and principles embodied in the Constitution. The terms of reference direct that specific attention be paid to the manner in which socio-economic rights have been enforced, and the extent to which the principles contained in section 1 of the Constitution have been developed and promoted. In addition, the review will assess the extent to which these decisions have been properly implemented by the executive and administration, as well as other factors that have impeded access to justice, such as costs and delays. This all appears to be perfectly innocuous.

In the context of statements made by senior members of the ruling party, however, the review may be cause for concern.⁷⁴ In an opinion piece written by the Deputy Minister of Correctional Services, Ngoako Ramathlodi, it is argued that the ANC had made fatal concessions in the 1994 negotiations leading up to the democratic constitutional dispensation. He stated that the consequence of these fatal concessions is that while the black majority may enjoy political power, they are denied economic power. He argued that the economy is still controlled by the white minority, which is protected by a judiciary, which he identified as one of the forces against transformation. The premise of his argument is that 'the black majority enjoys empty political power while forces against change reign supreme in the economy, judiciary, public opinion and civil society'.

Deputy Minister Ramathlodi's opinion piece is short on specificity, and there is very little reference to supporting evidence to back the sweeping denunciation of the judiciary. It is unclear whether the 'fatal concessions' refer to the carefully-constructed founding values contained in section 1 of the Constitution. The major concern with the argument is that it appears to be advocating a fundamental abrogation of the core principle that power is granted subject to it being exercised in accordance with the substantive and procedural constraints contained in a supreme Constitution enforced by independent courts. It appears that the Deputy Minister is arguing for some other system, which does not constrain government as much. It is the premise of this article that South Africa's constitutional democracy achieves the appropriate balance between power and constraints. It is the task of those exercising public power to act in accordance with the checks and balances such as the imperative of responsive and respectful governance, as opposed to fundamentally altering the Constitution so as to make the exercise of public power easier and less responsive and accountable. It is hoped that the views of the Deputy Minister do not prevail in this regard.

74 <http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions> (accessed 31 March 2013).