PROCEDURAL FAIRNESS AND THE PRINCIPLE OF LEGALITY IN SOUTH AFRICAN ADMINISTRATIVE LAW

By

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DECLARATION

I, 672460,

declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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ABSTRACT

The principle of legality is an aspect of the rule of law which was intended only to review non-administrative action. It has been the subject of much development, and has now been developed into a gateway to review that closely resembles the PAJA. The introduction of rationality as an element of legality appears to have been the main protagonist in this development. The courts have, on a number of occasions, grappled with the question whether procedural fairness is a requirement under the principle of legality. Despite procedural fairness having been said to be a fundamental requirement of the rule of law, in Masetlha, the Constitutional Court held that procedural fairness is not a requirement under the principle of legality. Subsequent to that, in Albutt, the Constitutional Court found that rationality encompassed considerations of procedural fairness, and therefore that procedural fairness was in fact a requirement under the principle of legality. This caused an apparent tension between Masetlha and Albutt, which manifested in conflicting case law in relation to the requirement of procedural fairness under the principle of legality. However, the position has now been crystallized by the Constitutional Court, which found that there was no tension between Masetlha and Albutt but rather, that Masetlha was a case of procedural fairness and Albutt one of procedural rationality. This distinction reaffirmed the position in Masetlha that procedural fairness is not a requirement under the principle of legality, and also introduced a new orthodoxy of procedural rationality under the principle of legality. This Research Report illustrates how this distinction is based on a narrow interpretation of procedural fairness (in the form of audi alteram partem) which makes the new orthodoxy untenable. It argues that on a proper interpretation of audi alteram partem, procedural fairness may be a requirement under the principle of legality to the extent that it enhances rationality in decision-making (as was the case in Albutt). Furthermore, in contrast to the position in Masetlha, the Constitutional Court in Motau suggested that procedural fairness itself may be a requirement under the principle of legality. It would seem that procedural fairness may indeed be a requirement under the principle of legality.

1. INTRODUCTION

Section 33(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution or the 1996 Constitution) confers on every person the right to administrative action that is procedurally fair.[1] It is also a requirement under the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) that administrative action, as defined in s 1 of the PAJA, must be procedurally fair.[2] What is immediately apparent is that s 33(1) of the Constitution limits the requirement of procedural fairness to administrative action. This is equally the case under s 6(2)(*c*) of the PAJA, which lists procedural fairness as a ground of review. However, the exercise of executive power is not constrained by the requirement of procedural fairness under the PAJA, by virtue of its specific exclusion from the definition of administrative action under s 1(*aa*) and (*bb*) and (*cc*) of the PAJA. Naturally, this gives rise to the question whether the exercise of executive power is indeed constrained by the requirement of procedural fairness under the principle of legality. The Constitutional Court has found that it is not – although this was not without controversy.

In this Research Report I will discuss how *Masetlha*[3] and *Albutt*[4] differed in their findings as to whether procedural fairness is a requirement under the principle of legality. I will

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1 Constitution of the Republic of South Africa, 1996 (Constitution).

2 Promotion of Administrative Justice Act 3 of 2000 (PAJA).

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

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

also discuss how this tension prompted the Constitutional Court, in *Law Society*,[5] unconvincingly to attempt to reconcile the tension by categorising *Masetlha* as a case of procedural fairness and *Albutt* one of procedural rationality.[6] I will illustrate that at the heart of this tension between *Masetlha* and *Albutt* is the Constitutional Court's failure to recognise that procedural fairness (in the form of *audi alteram partem*) serves twin rationales: a hearing for the sake of the affected person (as was the case in *Masetlha*) and a hearing for the sake of rationality (as was the case in *Albutt*).[7] I will therefore argue that the distinction made in *Law Society* is artificial and is based on a narrow interpretation of procedural fairness that does not recognise that rationality is the second rationale traditionally associated with procedural fairness.[8]

Against this backdrop, I will argue that the Constitutional Court in *Masetlha* may have been too quick to find that procedural fairness is not a requirement under the principle of legality, as this finding fails to recognise the second rationale for procedural fairness. I will also argue that procedural fairness may be a requirement under the principle of legality to the extent that it serves the second rationale traditionally associated with procedural fairness.[9] I will further argue that the Constitutional Court's comments in *Motau*,[10] regarding the position in *Masetlha*, suggests that procedural fairness itself may also be a requirement under the principle of legality.

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5 *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC) (*Law Society*).

6 Ibid para 64.

7 Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021) at 574–7.

8 Ibid at 574–5.

9 Ibid.

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

Nevertheless, I also acknowledge that out of the fallacious reasoning in *Law Society*, a new orthodoxy has been introduced. This orthodoxy delineates cases in respect of which a hearing is required for the sake of rationality (like *Albutt*) as cases of procedural rationality, and not procedural fairness. It has been applied in subsequent cases, and it seems the Constitutional Court has somewhat conveniently moved past the tension that existed between *Masetlha* and *Albutt*.

Before doing so, I provide an overview of the evolution, development and application of the principle of legality in South African administrative law.

2. THE DEVELOPMENT OF THE PRINCIPLE OF LEGALITY

2.1. The formulation of the principle of legality in *Fedsure*

The principle of legality was formulated in 1999 in *Fedsure*, where the Constitutional Court described it as an aspect of the rule of law[11] – separate from the administrative justice clause in the Constitution. The principle of legality, although not expressly mentioned as a constitutional value in the Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution),[12] was nevertheless found to be implied within

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11 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (*Fedsure*) paras 58–9.

12 Constitution of the Republic of South Africa Act 200 of 1993. See also Cora Hoexter 'The principle of legality in South African administrative law' (2004) 4 *Macquarie Law Journal* 165 at 181 and *Fedsure* Ibid para 58.

the terms of that Constitution. In contrast, the rule of law is expressly mentioned as a constitutional value in the 1996 Constitution.[13] According to *Fedsure*, in relation to administrative action, legality exists in the form of the right to lawful administrative action, whereas in 'relation to legislation and to executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution'.[14] The principle of legality required that those exercising public power must do so within the confines of the powers conferred upon them by law.[15] The principle of legality is therefore concerned with the legitimacy of the exercise of public power. It is a fundamental principle of the rule of law that recognises that the exercise of public power is only legitimate where it is exercised lawfully.[16]

In contrast to the interim Constitution, the rule of law is expressly mentioned as a constitutional value in the 1996 Constitution.[17] As the Constitutional Court has confirmed, legality can therefore be described as a constitutional control of the exercise of public power.[18]

2.2. The development of the principle of legality in *SARFU*

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13 Section 1(c) of the Constitution.

14 *Fedsure* supra note 11 para 59.

15 Ibid paras 56–9.

16 Ibid para 56.

17 Section 1(c) of the Constitution.

18 *e.tv (Pty) Limited v Minister of Communications and Digital Technologies and Others; Media Monitoring Africa and Another v e.tv (Pty) Limited and Others* 2022 (9) BCLR 1055 (CC) (*e.tv*) para 40. See also *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 49.

Clearly unsatisfied with the simple meaning ascribed to the principle of legality, the court in *SARFU*[19] developed the principle of legality by adding two further elements to its meaning. At issue in this case was the lawfulness of the President's decision to appoint a commission of inquiry under s 84(2)(f) of the Constitution. The court found that the President's decision was subject to the principle of legality, as it was not administrative action. In doing so, the court stated that the President was nevertheless subject to constraints under the principle of legality and the Constitution, which require that those who exercise public power, must do so in good faith and must not misconstrue their powers.[20]

2.3. The introduction of rationality as a component of the principle of legality in *Pharmaceutical Manufacturers*

Not too long after *SARFU*, in the seminal case of *Pharmaceutical Manufacturers*,[21] the principle of legality was developed further. Concerned with the President's decision to bring an Act of Parliament into operation, the court introduced a further constraint on the exercise of public power, by introducing the element of rationality.[22] The court stated that the exercise of public power must be rationally related to the purpose for which the power was given.[23]

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

20 Ibid paras 148–9.

21 *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers*).

22 Ibid para 90.

23 Ibid para 85.

Having recognised that rationality is the minimum threshold requirement that applies to the exercise of public power by the executive and other functionaries,[24] the court further indicated that when conducting a rationality enquiry, the court does not have the discretion to substitute its opinion as to what would be appropriate.[25] The primary focus is whether 'the purpose sought to be achieved by the exercise of public power is within the authority of the functionary', and whether 'the functionary's decision, viewed objectively, is rational'.[26] As soon as this threshold is satisfied, a court cannot interfere with the decision, notwithstanding any contrary views in relation to the decision or the appropriateness of the exercise of the power.[27]

The above discussion provides an indication of how the content of the principle of legality has been developed over the years. I now discuss the purpose of the principle of legality and when the principle of legality would apply.

3. THE APPLICATION OF THE PRINCIPLE OF LEGALITY

As Quinot argues,[28] the principle of legality has served two distinct purposes since its formulation in *Fedsure*. First, it is viewed as an overarching value that informs the interpretation and application of law, in that it is closely related to the rule of law, which

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24 Ibid para 90.

25 Ibid.

26 Ibid.

27 Ibid 90.

28 Geo Quinot 'The conundrum of self-review – sanctioning parallel systems of administrative law' (2022) 66 *Loyola Law Review* 523 at 531.

is a founding value of the Constitution.[29] Secondly, legality is used as a basis to scrutinize public conduct.[30] It is the latter purpose that is of particular relevance in this paper. The principle of legality was intended to be a residual pathway to judicial review.[31] Its purpose was to operate as a safety net for any exercise of public power that does not constitute administrative action.[32] Given its purpose, the principle of legality ensures that the exercise of public power does not escape judicial scrutiny on the basis that it does not constitute administrative action.[33] In essence, where the PAJA is not applicable, the principle of legality would ordinarily operate as a safety net.[34] Indeed, I use the word 'ordinarily' deliberately, so as to acknowledge that in the ordinary course of judicial review in South Africa, non-administrative action is reviewable under the principle of legality and not the PAJA, whilst also recognising the disconcerting reality that, due to its continuous expansion, the principle of legality may in certain circumstances be relied upon to seek review of administrative action as well.[35]

As it has so often been the case, the principle of legality was again expanded in *Gijima*.[36] Only this time, it was not its content but its reach that was controversially

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29 Ibid at 532. See also *Phaahla v Minister of Justice and Correctional Services* 2019 (7) BCLR 795 (CC) at paras 49 and 56; *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) at para 26.

30 Quinot op cit note 28.

31 Hoexter & Penfold op cit note 7 at 157.

32 Ibid at 152.

33 See also *Hunter v Financial Sector Conduct Authority and Others* 2018 (6) SA 348 (CC) para 38, and see also *Notyawa v Makana Municipality* 2020 (2) BCLR 136 (CC) para 38.

34 Melanie Murcott & Werner van der Westhuizen 'The ebb and flow of the application of the principle of subsidiarity – critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *CCR* 43 at 44.

35 Hoexter & Penfold op cit note 7 at 157.

36 *State Information Technology Agency SOC Limited v Gijima Holdings (Pty)* 2018 (2) SA 23 (CC).

expanded by the Constitutional Court. In this case, the State Information Technology Agency SOC Limited (SITA) sought to review and set aside its decision to award an agreement to Gijima Holdings (Pty) Limited (Gijima), in respect of which Gijima would provide services to the KwaZulu-Natal Department of Health and the Department of Defence. This matter came before the Constitutional Court on appeal from the Supreme Court of Appeal (SCA) (which had confirmed the High Court's decision) that the award of the agreement to Gijima constituted administrative action in terms of the PAJA.[37]

The issue before the Constitutional Court was whether an organ of state seeking to review its own decision (which was administrative action) should do so under the PAJA or the principle of legality.[38] Madlanga J and Pretorius AJ, writing for a unanimous court, held that the state cannot be a bearer of the obligation to give effect to the right in terms of s 33 of the Constitution and also a beneficiary of such right. As consequence it took the view that only private persons enjoy rights under s 33.[39] Remarkably, the court held that organs of state seeking to review their own administrative actions had to do so in terms of the principle of legality.[40] It concluded that the PAJA was 'simply not available'.[41] This was premised on the Court's interpretation that 'everyone' in s 33 of the Constitution did not include organs of state.[42] As a consequence, given that the PAJA gives effect to s 33 of the Constitution, the court's view was that it is not available to organs of state seeking

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37 Ibid paras 10 – 16.

38 Ibid para 17.

39 Ibid para 27.

40 Ibid para 37 – 40.

41 Ibid para 37.

42 Mitchell Nold de Beer 'A new role for the principle of legality in administrative law: *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*' 2018 (4) *SALJ* 613 at 615–6.

to review their own decisions. In light of *Gijima*, the principle of legality can now also be relied on to seek review of some administrative actions.[43]

The discussion that follows focuses on what procedural fairness (in the form of *audi alteram partem*) entails. In doing so, I refer to a number of cases which support the proposition that there are twin rationales that are traditionally associated with procedural fairness. These twin rationales will later form an important part of my discussion in relation to the requirement of procedural fairness under the principle of legality.

4. PROCEDURAL FAIRNESS: THE *AUDI ALTRAM PARTEM* PRINCIPLE

Procedural fairness has become one of the most important areas of administrative law in South Africa. The principle of *audi alteram partem* is one of the fundamental tenets of natural justice, which forms part of the common law. *Audi alteram partem*, which denotes affording people an opportunity to participate in decisions that are likely to affect them,[44] was confirmed in *Du Preez & Another v Truth & Reconciliation Commission*, to be one of the most important components of procedural fairness.[45] *Audi alteram partem* was summarised in *Traub*, as follows:

> 'The maxim [*audi alteram partem*] expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers

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43 Hoexter & Penfold op cit note 7 at 157.

44 Ibid at 502.

45 *Du Preez & Another v Truth & Reconciliation Commission* 1997 (3) SA 204 (A) (*Du Preez*) at 231G.

> a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken…, unless the statute expressly or by implication indicates the contrary'.[46]

The decision in *Traub* has changed the landscape of natural justice in South Africa. What was once a rigid concept that only afforded hearing to those whose rights were (literally) adversely affected by administrative action, natural justice has morphed into a more flexible duty to act fairly.[47] However, acting fairly does not imply substantive fairness, but rather fairness in a procedural sense.[48] As the court indicated in *Bel Porto School Governing Body*,[49] this is in order to show a degree of deference for the separation of powers. The court acknowledged that imposing a substantive fairness standard would be asking the court to deal with matters that should not be dealt with at a judicial level.[50] Thus, procedural fairness has to do with the decision-making process than the outcome of the decision.[51] This distinction was made clear in *Du Preez*, where Corbett CJ stated that:

> 'The *audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly .... The duty to act fairly, however, is concerned only with the

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46 *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) (*Traub*).

47 Hoexter & Penfold op cit note 7 at 503.

48 *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 (3) SA 265 (*Bel Porto School Governing Body*) para 85–8.

49 Ibid.

50 Ibid. See also Hoexter & Penfold op cit note 7 at 503 footnote 3.

51 Ibid Hoexter & Penfold.

manner in which the decisions are taken: it does not relate to whether the decision itself is fair or not'.[52]

In *Mohamed*[53] the Constitutional Court also stated that *audi alteram partem* should be enforced unless a statutory provision expressly or by implication provides that it may be dispensed with or where there are exceptional circumstances which justify a court dispensing with it.

It is trite that *audi alteram partem* serves twin rationales. First, it gives people a chance to be heard and to influence the outcome of decisions likely to affect them. In this way, it protects the worth and dignity of those participants.[54] Secondly, it enhances the rationality of administrative decision-making and the legitimacy of those decisions.[55] This was confirmed by the Constitutional Court in *Joseph*.[56] Insofar as the second rationale is concerned, in *De Lange v Smuts*, Mokgoro J stated that:

'When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision.'[57]

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52 *Du Preez* supra note 45.

53 *National Director of Public Prosecutions v Mohamed NO and Others* 2003 (4) SA 1 (CC) (*Mohamed*) para 37.

54 Hoexter & Penfold op cit note 7 at 502.

55 Ibid.

56 *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) (*Joseph*) para 42. See also *Drift Supersand (Pty) Limited v Mogale City Local Municipality and Another* [2017] 4 All SA 624 (SCA) para 42.

57 *De Lange v Smuts NO and Others* 1998 (3) SA 785 (*De Lange*) para 131.

As Mokgoro J stated, no arbiter is infallible.[58] A hearing therefore provides the arbiter with an opportunity to evaluate the cogency of an argument and enables the arbiter to reach a justifiable conclusion.[59] In this way, arbitrariness is limited and rationality is enhanced. The importance of *audi alteram partem* was also highlighted in *Zondi*, where the Constitutional Court indicated that:

> 'A hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explained'.[60]

In *Qwelane* the court also reaffirmed the importance of the second rationale for procedural fairness, and held that '*audi alteram partem* inherently conduces better justice' and 'is an indispensable condition of fair proceedings'.[61] In other words, it remains an ever-present component of procedural fairness – whether it serves the first rationale or the second. This view was echoed in *Hospital Association of South Africa Ltd v Minister of Health*, where the court indicated that fairness is an 'inherent' requirement of the rule of law.[62]

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58 Ibid.

59 Ibid.

60 *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) para 112.

61 *Psychological Society of South Africa v Qwelane and Others* 2017 (8) BCLR 1039 (CC) (*Qwelane*) paras 33–4.

62 *Hospital Association of South Africa Ltd v Minister of Health and Another* 2010 (10) BCLR 1047 (GNP) (*Hospital Association*) para 156.

In *Janse van Rensburg NO v Minister of Trade and Industry NO* the Constitutional Court reminded us that procedural fairness ensures that a decision-maker 'has an open mind and a complete picture of the facts and circumstances' within which the decision is to be taken.[63]

It is undeniable that the courts have recognised that procedural fairness is an essential requirement of the rule of law.[64] But, what do the courts say about the requirement of procedural fairness under the principle of legality (when exercising executive power) – is it a requirement or not? The next discussion looks to answer this question, with reference to case law.

5. THE REQUIREMENT OF PROCEDURAL FAIRNESS WHEN EXERCISING EXECUTIVE POWER UNDER THE PRINCIPLE OF LEGALITY

It is immediately clear from s 33(1) of the Constitution and s 3(1) of the PAJA, that the trigger for procedural fairness is administrative action. In other words, procedural fairness is limited to administrative action.[65] Therefore, any person whose rights have been affected by administrative action (within the meaning of s 3 of the PAJA), by reason of the actions being procedurally unfair, will be entitled to seek review of the administrative action on procedural fairness grounds under s 3 of the PAJA.

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63 *Janse van Rensburg and Another v Minister of Trade and Industry and Another* 2001 (1) SA 29 (*Janse van Rensburg*) para 24.

64 *Hospital Association* supra note 62 para 156. See also Hoexter & Penfold op cite note 7 at 571.

65 Ibid Hoexter & Penfold at 501.

However, the same cannot be said about a person whose rights have been affected by non-administrative action. Given that s 1 of the PAJA expressly excludes the exercise of executive power from the definition of administrative action, the question then becomes whether those who exercise executive power are constrained by the requirement of procedural fairness under the principle of legality. The discussion that follows deals with a series of decisions in which this question arose.

5.1. The tension between *Masetlha* and *Albutt*

The exclusion of executive power from the definition of administrative action in s 1 of the PAJA means that executive power must be exercised in accordance with the principle of legality. The courts have not always agreed in relation to whether the exercise of executive power is constrained by the requirement of procedural fairness under the principle of legality. This tension began in the Constitutional Court in *Masetlha* and *Albutt*, which set in motion a series of confusing decisions on this issue.

5.1.1. *Masetlha*

At issue was the President's decision to dismiss Mr Masetlha as the head of the National Intelligence Agency (NIA), by unilaterally amending his term of office. Mr Masetlha sought to review the President's decision and argued that the President had failed to comply with procedural fairness requirements, in that Mr Masetlha was not afforded a hearing prior to his dismissal. Mr Masetlha relied on the importance of the *audi alteram partem* principle, as expressed in *Traub*.

The court held that the President's power to dismiss is an essential corollary of the power to appoint which must be read into s 209(2) of the Constitution.[66] The court observed that the President's power to appoint and to dismiss are conferred specially upon him for the effective business of government, and particularly, to effectively pursue national security.[67] As a consequence, the court took the view that '[i]t would not be appropriate to constrain executive power to requirements of procedural fairness',[68] as procedural fairness is a cardinal feature in reviewing administrative action.[69] This was notwithstanding the court having acknowledged that the power to dismiss 'must ordinarily be constrained by the requirement of procedural fairness, which incorporates the right to be heard ahead of an adverse decision'.[70] Nevertheless, the court found that procedural fairness is not a requirement when exercising executive power.[71] The court also stated that if procedural fairness were a requirement when exercising a power to dismiss, that requirement had been satisfied.[72]

Furthermore, the court indicated that that is not to say that executive power is not subject to constitutional constraints.[73] Rather, the exercise of executive power is constrained by 'the principle of legality and rationality'.[74] This meant that the President's decision to

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66 *Masetlha* supra note 3 para 68.

67 Ibid para 77.

68 Ibid.

69 Ibid.

70 Ibid para 75.

71 Ibid para 78.

72 Ibid para 83.

73 Ibid para 78.

74 Ibid para 77–8.

dismiss Mr Masetlha had to be lawful and rationally related to the purpose for which the power was conferred on him.[75] Otherwise, his decision would be arbitrary and inconsistent with the rule of law.[76]

In addressing the requirement of rationality, the court noted that the President had dismissed Mr Masetlha due to an irreparable breakdown of the relationship of trust between them.[77] The court's view was that in order for the President to fulfil his duty in relation to national security, it was imperative that he subjectively trusts the head of the NIA.[78] As a consequence, the court found that the breakdown of relationship of trust was a rational basis for the President to dismiss Mr Masetlha –[79] notwithstanding that Mr Masetlha had not been afforded a hearing.

Ngcobo J disagreed with the majority in his dissenting judgment, and adopted a broader interpretation of the rule of law. Ngcobo J held that the requirement of the rule of law, that the exercise of public power by the executive should not be arbitrary,[80] has both a procedural and substantive component.[81] The substantive component is that of rationality, which requires a rational connection between the decision and the purpose for which the

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75 Ibid para 81.

76 Ibid.

77 Ibid para 85.

78 Ibid para 86.

79 Ibid.

80 Ibid para 173.

81 Ibid para 184. See also *Pharmaceutical Manufacturers* supra note 21 para 37, where the court recognised that the principle of the rule of law 'had a substantive as well as a procedural content'.

power is given.[82] The procedural component, on the other hand, is generally expressed in the maxim *audi alteram partem*, which relates to the manner in which the decision was taken,[83] and imposes a duty on those who exercise executive power to act fairly when making decisions that adversely affect individuals.[84] It 'refers to a wider concept and deeper principle' of fundamental fairness,[85] which places a significant constraint also on the exercise of executive power.[86]

That constraint is the duty to act fairly when taking decisions that adversely affect others.[87] Acting fairly involves the decision-maker having the opportunity to hear the individual who is likely to be affected by the decision. This provides the decision-maker with all the relevant facts prior to making a decision, and minimises arbitrariness.[88] This procedural component of the rule of law requires 'that no one should be condemned unheard', and reflects a fundamental principle of fairness.[89] Given that arbitrariness may be considered to include the failure to act fairly, Ngcobo J found that a fair hearing provides 'an insurance against arbitrariness'.[90]

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82 *Masetlha* supra note 3 para 184.

83 Ibid.

84 Ibid para 180.

85 Ibid para 179.

86 Ibid para 180.

87 Ibid.

88 Ibid para 184.

89 Ibid para 187.

90 Ibid.

Further, Ngcobo J indicated that a failure to recognise the relationship between the failure to act fairly and arbitrariness, would give rise to a potential for 'executive decisions which have been arrived at by a procedure which was clearly unfair being immune from review'.[91] Ultimately, Ngcobo J took the view that the President had a duty to consult prior to dismissing Mr Masetlha.[92]

In contrast to the majority judgment, Ngcobo J's minority judgment acknowledges that *audi alteram partem* may be required for the sake of rationality. It recognises the second rationale traditionally associated with procedural fairness, whereas the majority fails to do so. Apart from enhancing rationality in decision-making, *audi alteram partem* also protects the worth and dignity of individuals likely to be affected by a decision.[93] This is first rationale traditionally associated with procedural fairness. It is arguable that insofar as the first rationale is concerned, the majority judgment is also susceptible to criticism.[94] It ignores the importance of *audi alteram partem* in relation to dismissals in an administrative law context in South Africa.[95] This concern stems from the court's finding that if procedural fairness were a requirement, it had been satisfied. Surely procedural fairness could not have been satisfied in the absence of a hearing. Ngcobo J confirmed in his minority judgment that fairness required that a pre-dismissal hearing be afforded.[96]

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91 Ibid para 184.

92 Ibid para 207.

93 Hoexter & Penfold op cit note 7 at 502.

94 See criticisms in Cora Hoexter 'Clearing the intersection? Administrative law and labour law in the Constitutional Court' (2008) 1 *CCR* 209 at 231–3.

95 Ibid at 231 and at footnote 53 of the article.

96 *Masetlha* supra note 7 para 205.

Hoexter raises two justifiable criticisms of *Masetlha*. First, she questions how national security or effective government would be jeopardised by requiring the President to hear Mr Masetlha?[97] I would imagine that a hearing would only have served to ensure that the President's decision is rational. Secondly, she highlights the point that Ngcobo J made in his minority judgment, that the content of the rule of law under the new constitutional order cannot carry less substance than it did during the apartheid regime.[98] Even during the apartheid regime, the Appellate Division in *Zenzile*[99] recognised that a pre-dismissal hearing was required.[100] To deny a pre-dismissal hearing in a constitutional democracy is contrary to the foundational values contained in s 1 of the Constitution.[101] In this regard, Hoexter argues that the decision in *Masetlha* is retrogressive.[102] In truth, it has the effect of diluting 'the content of the *audi alteram partem* principle in relation to dismissal' which recognises that fairness requires that a person be afforded a hearing prior to taking a decision that is likely to adversely affect them.[103]

Unsurprisingly, the Constitutional Court in *Albutt,* did not quite agree with *Masetlha*. I now turn to the position adopted by the Constitutional Court in *Albutt*.

5.1.2. *Albutt*

97 Hoexter op cit note 94 at 231.

98 Ibid at 231–2.

99 *Administrator of the Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (AD).

100 Ibid.

101 Hoexter op cit note 94 at 231–2.

102 Ibid at 231.

103 Ibid at 233.

In November 2007, President Mbeki announced a special dispensation in relation to prisoners who were convicted of politically motivated offences and who had not applied for amnesty during the Truth and Reconciliation Commission (TRC). Those prisoners could apply for a pardon under s 84(2)(j) of the Constitution – a power conferred upon the President by the Constitution. The dispensation was aimed at dealing with the 'unfinished business' of the TRC, by granting pardons to prisoners who qualified under the process, and the President would do so 'in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past'. The President's decision was challenged on the basis that he was required to hear the victims of the offences prior to making a decision to grant a pardon, and that his failure to do so was irrational.

On the back of the decision in *Chonco*,[104] Ngcobo CJ (as he had by then become) preferred to decide the case on the basis of the principle of legality. He indicated that the principle of legality required that there be a rational connection between the exercise of the pardoning power and the objectives of the special dispensation process. Here the court introduced the evaluation of the means used and the end sought to be achieved – something akin to a proportionality analysis.[105] In that regard, the court found that victim participation was the only rational means to contribute towards the objectives of national

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104 *Minister for Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25 para 30.

105 Lauren Kohn 'The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?' (2013) 130 *SALJ* 810 at 830.

reconciliation and national unity.[106] Further, in order to establish the facts and the motive for crimes in respect of which a pardon is sought, the President must hear both the perpetrators and the victims.[107]

As he previously did in his minority judgment in *Masetlha*, Ngcobo CJ emphasised the principles and values of accountability, responsiveness and openness that underpin our Constitution.[108] In doing so, he pointed out that victim participation was one of the principles that underpinned the special dispensation process in seeking to achieve its objectives.[109] The court found that the context of the special dispensation process was such that it required that the victims must be given the opportunity to be heard, 'as a matter of rationality' in order to determine the facts on which pardons are based.[110] In doing so, the court accepted that rationality encompasses considerations of procedural fairness,[111] which are imposed by the principle of legality.

This reasoning accords with the Constitutional Court's view that *audi alteram partem* serves a second purpose, and that is to prevent arbitrariness, enhance rationality and conduce to better justice.[112] It therefore appears that in order to ensure rationality when

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106 *Albutt* supra note 4 paras 55 and 69.

107 Ibid para 70.

108 Ibid para 71.

109 Ibid.

110 Ibid para 72.

111 Kohn op cit note 105 at 830.

112 See *De Lange* supra note 57, *Zondi* supra note 60 and *Qwelane* supra note 61.

exercising executive power, procedural fairness may be required. Ngcobo CJ's reasoning also echoes the concern he raised in his dissenting judgment in *Masetlha*.[113]

5.2. Some conflicting jurisprudence following *Masetlha* and *Albutt*

Following the decision in *Albutt*, it became apparent that there was tension between *Masetlha* and *Albutt* in relation to whether procedural fairness is a requirement when exercising executive power under the principle of legality. I now discuss some conflicting decisions which subsequently followed.

5.2.1. *ARMSA*

The issue in *ARMSA*[114] related to the President's decision to increase the annual salaries of members of the Association of Regional Magistrates of Southern Africa (ARMSA) by 5% under s 2 of the Independent Remuneration of Public Office-bearers Act 92 of 1997. ARMSA sought to set aside the decision on basis that it was procedurally unfair and irrational in that its members were not given an opportunity to make representations. Nkabinde J simply followed the decision in *Masetlha* and held that procedural fairness was not a requirement when exercising executive power, unless a hearing is specifically required by the enabling legislation.[115] This finding is particularly concerning given that the court referred to the position endorsed in *Albutt* in relation to

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113 *Masetlha* supra note 3 para 184.

114 *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others* 2013 (7) BCLR 762 (CC) (*ARMSA*).

115 Ibid para 59.

rationality, but inexplicably failed to apply it. It is difficult to see how affording a hearing to members of ARMSA would not have minimised the arbitrariness of the President's decision and in so doing, achieved the second rationale for *audi alteram partem*.

5.2.2. *Scalabrini I, Somali Association* and *Kubukeli*

Shortly after *ARMSA*, the SCA in *Scalabrini I*[116] had to determine whether there was a duty to consult when exercising executive power. This case relates to the decision of the Director-General (Director-General) of the Department of Home Affairs to close a Refugee Reception Office in Cape Town. Scalabrini Centre of Cape Town (Scalabrini) challenged this decision on behalf of migrant communities who had been displaced as a result of the decision. Scalabrini sought to have the decision reviewed and set aside on the basis that the Director-General had failed to consult with interested parties. The SCA indicated that whilst there is no general duty to consult,[117] 'there are indeed circumstances in which rational decision-making calls for interested persons to be heard'.[118] Those circumstances arise where the rationality of a decision is dependent on a consultation being held, 'because of the special knowledge of the person or organisation to be consulted, of which the decision maker is aware'. [119] In this case, that circumstance was the fact that the Director-General had acknowledged that it was necessary for a

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116 *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA) (*Scalabrini I*).

117 Ibid para 72.

118 Ibid paras 67–8.

119 Ibid para 72.

consultation to be held.[120] The court therefore, held that a consultation was necessary as a matter of rationality.[121]

Similarly, in *Somali Association*[122] the SCA followed the reasoning in *Scalabrini I* and held that the duty to consult arises if it would be irrational to take a decision without a consultation being held.[123]

Whilst the SCA in *Kubukeli*[124] ultimately found that a consultation was not required for the purposes of rationality in that case, given that the purpose for which the power was given had been achieved,[125] it confirmed that the duty may arise in some circumstances.[126] The court indicated that cases such as *Albutt* and *Scalabrini I* are examples of such circumstances.[127]

5.2.3. *Motau*

In *Motau* the Constitutional Court had something to say about the question whether procedural fairness may be a requirement when exercising executive power under the

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120 Ibid.

121 Ibid paras 70–2.

122 *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) (*Somali Association*).

123 Ibid para 17.

124 *National Treasury v Kubukeli* 2016 (2) SA 507 (SCA) (*Kubukeli*).

125 Ibid paras 25–7.

126 Ibid para 16.

127 Ibid paras 16–9.

principle of legality. In contrast to *Masetlha* and *ARMSA*, the court acknowledged that procedural fairness obligations may arise under the principle of legality, as a matter of rationality.[128] This was a clear endorsement of the position in *Albutt*.

Further, the court indicated that the manner in which *Masetlha* had been interpreted was incorrect.[129] It stated that *Masetlha* did not actually stand for the 'unequivocal proposition' that procedural fairness itself is not a requirement when exercising executive power under the principle of legality.[130] Instead, the court's view was that *Masetlha* was limited to the specific context of that case and the power under consideration.[131] Given how unequivocal the court was in *Masetlha*, this explanation is tenuous.

Nevertheless, as Konstant argues, *Motau* provides an insight into the court's evolving thinking on the position.[132] Effectively, the court acknowledged that procedural fairness itself may be a requirement under the principle of legality.[133] It also reminded us of the importance of *audi alteram partem,* as stated in *Mohamed*.[134] Whilst the court did not decide on this issue, it indicated that it was sufficient to note that 'our law has a long tradition – which was endorsed by this Court in *Mohamed* – of strongly entrenching *audi*

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128 *Motau* supra note 10 para 82.

129 Ibid para 81. See also Hoexter & Penfold op cit note 7 at 573.

130 Ibid.

131 Ibid.

132 Andrew Konstant 'Administrative action and procedural fairness – *Minister of Defence and Military Veterans v Motau*' (2016) 133 *SALJ* 491 at 500.

133 Ibid.

134 *Motau* supra note 10 para 83.

alteram partem'.[135] This is what informs the view that dismissal from service attracts procedural fairness requirements.[136]

In light of these conflicting decisions, which are largely due to the tension between *Masetlha* and *Albutt*, it became apparent that this tension needed to be resolved and the position needed to be clarified. The next discussion focuses on four aspects in turn. I discuss the emergence of procedural rationality, followed by a discussion on how the court in *Law Society* relied on procedural rationality in an attempt to resolve the tension. I then provide an analysis of the purported distinction between *Masetlha* and *Albutt*, and conclude the discussion by considering whether procedural fairness itself may be a requirement under the principle of legality, despite the court's views in *Masetlha* and *Law Society*.

6. THE EMERGENCE OF PROCEDURAL RATIONALITY: RESOLVING THE TENSION BETWEEN *MASETLHA* AND *ALBUTT*

In *Democratic Alliance*, better known as *Simelane*,[137] rationality was expanded further, beyond what it was stated to mean in *Pharmaceutical Manufacturers*. This time it emerged as a component of the principle of legality which covers an element of procedural fairness. Only, it would not be referred to as procedural fairness, but

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135 Ibid.

136 Ibid.

137 *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) para 32 (better known as *Simelane*).

procedural rationality which postulates that 'if the process followed when making a decision is tainted by irrationality, a decision taken as a result of such process would itself be irrational'.[138] This is similar to the reasoning that the Constitutional Court adopted in *Albutt*, when rationality was extended to encompass procedural fairness.

The court in *Simelane* found that rationality applies not only to the decision itself, but also to the process by which the decision is taken.[139] In this sense, rationality review is concerned with the evaluation of the relationship between the means employed to achieve a particular purpose and end sought to be achieved,[140] a theme that featured prominently in *Albutt*. According to *Simelane*, this encompasses an evaluation into both the procedural and substantive rationality of the decision.[141] In other words, it is not only the decision itself that must be rational, but the process leading to the decision must also be rational.[142]

In short, procedural rationality involves a consideration of the means used to achieve the purpose for which the power was conferred. This relates to everything done in the process of taking a decision and includes *audi alteram partem*,[143] a duty to consult, taking relevant

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138 *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* 2020 (1) SA 450 (CC) (*NERSA*) para 116. See also *Simelane* supra note 137 para 37 and *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another* 2023 (1) SA 1 (CC) (*Sembcorp Siza*) para 45.

139 Ibid *Simelane* para 36.

140 Ibid para 32.

141 Ibid paras 36–7.

142 Ibid para 37.

143 *Albutt* supra note 4 para 72. See also *Sembcorp Siza* supra note 138 paras 49–53.

material into account[144] and giving reasons for a decision.[145] Any failure to do so in a decision-making process, may render the entire process irrational.[146]

It seems peculiar for procedural rationality to have been extended to require that relevant material be taken into account when making a decision. This is because a failure to take relevant material into account is a subset of a failure to apply the mind, which constitutes a failure to exercise authority at all.[147] This is an essential requirement of lawfulness and is already of itself a ground of review under the principle of legality. The purpose behind this extension seems to be redundant.

6.1. *Law Society*

The emergence of procedural rationality appears to have been convenient for the Constitutional Court in its quest to resolve its confusing jurisprudence in relation to the requirement of procedural fairness under the principle of legality. It appeared uncontroversial that *Masetlha* and *Albutt* laid down two conflicting positions. But, the Constitutional Court does not agree. In *Law Society*, the court dismissed any notion of tension between *Masetlha* and *Albutt*.[148] Instead, it held that *Masetlha* and *Albutt* are not at variance with each other – apparently because they were concerned with two separate

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144 *Simelane* supra note 137 para 39.

145 *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) paras 44–5.

146 See *Simelane* supra note 137 para 39, *NERSA* supra note 138 para 116 and *Sembcorp Siza* supra note 138 para 45.

147 Hoexter & Penfold op cit note 7 at 432 – 441.

148 *Law Society* supra note 5 para 64.

grounds of review.[149] According to the court, *Masetlha* was a case of procedural fairness, which relates to 'affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered'.[150] *Albutt*, on the other hand, was a case of procedural rationality, requiring 'a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power'.[151]

6.1.1. Is there really a *distinction* between *Masetlha* and *Albutt*?

The finding that *Albutt* was a case of procedural rationality is particularly confusing. This is primarily because, in reaching its finding, the court used the language of *audi alteram partem*. The court's reasoning in *Albutt* is premised on an understanding that procedural fairness (in the form of *audi alteram partem*) conduces to rationality. If indeed *Albutt* was a case of procedural rationality, one wonders why the court did not make this distinction clear at the time. In truth, procedural rationality emerged as a component of the principle of legality only in *Simelane*, which was decided almost three years after *Albutt*. It seems to me that this distinction may well have been an attempt, an exercise of judicial sophistry,[152] to resolve a tension which the court asserts does not exist.

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149 Ibid paras 64–5.

150 Ibid para 64.

151 Ibid.

152 Hoexter & Penfold op cit note 7 at 574.

Aside from that confusion, the court's distinction is artificial and incorrect.[153] It is based on a narrow interpretation of procedural fairness (in the form of *audi alteram partem*). The court's reasoning implies that procedural fairness is aimed at affording a hearing for the sake of the affected party, whereas procedural rationality is aimed at affording a hearing for the sake of rationality. However, both these purposes are served by *audi alteram partem* – that much is clear from the Constitutional Court's previous jurisprudence (as I have indicated under heading 4 above). As Hoexter and Penfold argue, the distinction suggests that *audi alteram partem* 'qualifies as "procedural fairness" only when and to the extent that' it is for the sake of the affected party.[154]

The reasoning in *Law Society* is in stark contrast with the Constitutional Court's previous jurisprudence. It only recognises the first rationale traditionally associated with procedural fairness. In doing so, the court makes an artificial distinction by categorising of cases relating to *audi alteram partem* in an 'either/or manner', in that they either have to do with procedural fairness or procedural rationality.[155]

It suggests that *audi alteram partem* does not qualify as procedural fairness, but as procedural rationality, to the extent that it seeks to enhance rationality.[156] This reasoning contradicts the Constitutional Court's previous jurisprudence 'since enhancing the

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153 Ibid at 575. See also Warren Freedman & Nkosinathi Mzolo 'The principle of legality and the requirements of lawfulness and procedural rationality *Law Society of South Africa v President of the RSA* (2019 (3) SA 30 (CC)) 2021 *Obiter* 421 at 429.

154 Hoexter & Penfold op cit note 7 at 574.

155 Ibid at 575.

156 Ibid at 501 footnote 5.

rationality of a decision has always been one of the rationales informing "procedural fairness"'.[157] Ngcobo J also acknowledged in his minority judgment in *Masetlha* that procedural fairness serves two purposes: hearing the affected individual and minimising arbitrariness.[158] When arbitrariness is minimised, rationality is enhanced. As Hoexter and Penfold argue, it is difficult to think of a situation where hearing both sides and having a full picture of all the facts and circumstances would not enhance the rationality of a decision.[159] In *Masetlha*, for instance, had the President given Mr Masetlha a hearing, that certainly would have enhanced the rationality of his decision. In consequence, the court would have had great difficulty in finding that procedural fairness is not a requirement under the principle of legality. It would therefore have been impossible for *Law Society* to distinguish between *Masetlha* and *Albutt* in the manner that it has. It is for this reason that I agree with Hoexter and Penfold that a hearing in *Masetlha* would have enhanced the rationality of the decision,[160] just as it did in *Albutt*. This supports the view expressed in *Albutt*, that procedural fairness may apply under the principle of legality to the extent that it serves the second rationale for procedural fairness.[161]

This further illustrates that the distinction made in *Law Society* between procedural fairness and procedural rationality is untenable, as it completely disregards the second traditional rationale for procedural fairness. In view of this, it difficult to see how *Masetlha* and *Albutt* are distinguishable.

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157 Ibid. See also *De Lange* supra note 57, *Janse van Rensburg* supra note 63 and *Qwelane* supra note 61.

158 *Masetlha* supra note 3 para 184.

159 Hoexter & Penfold op cit note 7 at 575.

160 Ibid.

161 Ibid. See also *Albutt* supra note 4 para 72.

What makes them even less distinguishable is the fact that both cases relate to the twin rationales for procedural fairness. One could even say that *Masetlha* and *Albutt* are two sides of the same coin – both fulfilling the requirement of procedural fairness, albeit in different ways. *Masetlha* does so through fairness, whereas *Albutt* does it through rationality. The court's explanation in *Law Society* is certainly unconvincing [162]

6.1.2. Could procedural fairness itself be a requirement under the principle of legality?

If *Masetlha* and *Albutt* are indistinguishable, as I argue, it begs the question, how could the Constitutional Court have come to different conclusions regarding the requirement of procedural fairness under the principle of legality? This can be explained by the fact that the Constitutional Court in *Masetlha* may have been too quick to find that procedural fairness is not a requirement under the principle of legality. Not only does this finding disregard the fact that *audi alteram partem* may be required for the sake of the affected person, but like *Law Society*, it also disregards the fact that *audi alteram partem* may be required to the extent that it enhances rationality.

Given how well established the principle of *audi alteram partem* is in South African administrative law, it is one thing for the court to say procedural fairness is not a

[162] Hoexter & Penfold op cit note 7 at 574.

requirement in the particular context of the facts in *Masetlha*,[163] but it is quite another to say that it is not a requirement at all. The Constitutional Court has made it clear that *audi alteram partem* is indispensable insofar as fair proceedings are concerned, except in exceptional circumstances.[164] It has equally reiterated the dual purpose behind *audi alteram partem*.[165] I agree with Hoexter and Murcott that the court should have made it clear that it was treating the case as an exceptional one, given the specific context of the issues therein, rather than 'eroding well established general principle of procedural fairness'.[166] With respect, the proposition made in *Masetlha* that procedural fairness is not a requirement under the principle of legality, is inaccurate.

However, the Constitutional Court in *Motau* believes that the proposition in *Masetlha* is not at all unequivocal.[167] According to *Motau,* the decision in *Masetlha* was limited to the to the specific context of that case.[168] In criticising various of its critics, for apparently having misinterpreted *Masetlha*, the Constitutional Court in *Motau* indicated that *Masetlha* should not be interpreted to 'exclude the requirement of procedural fairness in the review of executive action as a stand-alone requirement under the principle of legality'.[169] Whilst this remark is instructive, it is ironic that the Constitutional Court would be critical of its critics as from my reading of *Masetlha*, the Constitutional Court

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163 Melanie Murcott 'Procedural fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?' (2013) 130 *SALJ* 260 at 266 at 271.

164 See *Mohamed* supra note 53, *Zondi* supra note 60 and *Qwelane* supra note 61.

165 *De Lange* supra note 57, *Janse van Rensburg* supra note 63 and Ibid *Qwelane*.

166 Hoexter op cit note 94 at 233. See also Murcott op cit note 163.

167 *Motau* supra note 10 para 81.

168 Ibid.

169 Ibid.

was deserving of the criticism it received. As Hoexter and Penfold state, the Constitutional Court would have disarmed its critics more effectively if it had simply admitted that *Masetlha* had overstated the position.[170]

Nevertheless, the court in *Motau* has left a blueprint that strongly suggests that procedural fairness itself maybe be a requirement under the principle of legality. What informs this blueprint, is the long-standing tradition that has been endorsed by the Constitutional Court in *Mohamed*, that recognises the indispensable nature of *audi alteram partem* in fair proceedings.[171]

Whilst *Motau* has left the door open in relation to this question, by not having decided on this issue, its remarks do suggest that procedural fairness may indeed be a requirement under the principle of legality. It is undeniable that the court's remarks in *Motau* represent a positive shift from the reasoning in *Masetlha* and *ARMSA*, towards recognising that procedural fairness itself may be a requirement under the principle of legality.

In my view, and for the reasons given above, the reasoning of the Constitutional Court in *Law Society* does not go far in explaining the tension between *Masetlha* and *Albutt*, let alone resolving it.

7. PROCEDURAL RATIONALITY: THE NEW ORTHODOXY

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170 Hoexter & Penfold op cit note 7 at 573. For criticisms, see Konstant op cit note 132 at 499ff.

171 *Mohamed* supra note 53.

Notwithstanding the shortcomings of the reasoning in *Law Society*, the Constitutional Court in *Sembcorp Siza*[172] was content to adopt it. It once again indicated that procedural fairness should not be conflated with procedural rationality.[173] Ironically, this seems to be what the Constitutional Court has so often done since *Albutt*.

In *Sembcorp Siza* the court indicated that procedural rationality has nothing to do with fairness; that it is concerned with the decision-making process and not whether there should have been a pre-decision hearing.[174] This was also confirmed by the Constitutional Court in *NERSA*, which indicated that procedural rationality means that if the decision-making process is tainted by irrationality, a decision taken as a result of such process would also be irrational.[175] According to *Sembcorp Siza*, the fact that *Albutt* was concerned with a failure to give a hearing was merely a coincidence.[176] Procedural rationality encompasses giving reasons for a decision, or even more peculiarly (for the reasons I have proffered under heading 6 above) taking relevant material into account. It could also incidentally include providing a hearing before taking a decision – although that should not be taken to mean fairness.[177]

It is justifiable that procedural rationality has to do with the rationality of the decision-making process, and not fairness. This is clear from cases such as *Simelane* and *NERSA*,

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172 *Sembcorp Siza* supra note 138.

173 Ibid para 49.

174 Ibid paras 45 and 49.

175 *NERSA* supra note 138 para 116.

176 *Sembcorp Siza* supra note 138 para 49.

177 Ibid paras 49–53.

which were not concerned with a pre-decision hearing. However, in cases where the rationality of the decision is contingent on a pre-decision hearing being afforded (such as *Albutt*, *Scalabrini I* and *Somali Association*), I do not agree with the Constitutional Court's view that such cases relate to procedural rationality. This kind of characterisation fails entirely to recognise the second rationale for procedural fairness – and would perpetuate the same artificial distinction made in *Law Society*. Ultimately, where a pre-decision hearing would achieve rationality, that would serve the second rationale for procedural fairness. Quite clearly it is a question of procedural fairness, and not procedural rationality. Nevertheless, the approach postulated in *Sembcorp Siza* is evidently the new orthodoxy.

Soon after *Sembcorp Siza*, in *e.tv*,[178] the Constitutional Court also reaffirmed that *Albutt* was a case of procedural rationality. This case was concerned with the Minister's decision to announce the analogue switch-off implementation plan date, which would see the process of television migration from analogue signal to digital signal. The court found that the Minister's decision was not procedurally rational, as he had failed give the persons who would be affected by the digital migration process notice, and an opportunity to make representations.[179]

Both *Sembcorp Siza* and *e.tv* reaffirm the position that rationality does not mean fairness. In other words, although a hearing may sometimes be required as a matter of

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178 *e.tv* supra note 18.

179 Ibid paras 51–4.

rationality, as in *Albutt*, in such an instance a hearing is not about fairness. It is about procedural rationality – a hearing for the sake of rationality.

There is however, one thing that the court said in *Sembcorp Siza*, that is worth noting insofar as procedural rationality in the context of a pre-decision hearing is concerned. The court indicated that:

> 'It did not mean that in every case where there was no hearing, procedural rationality had been breached. There will be a violation of procedural rationality only if the purpose for which the power was exercised could not be achieved without a pre-decision hearing.'[180]

This is reminiscent of what the SCA stated in *Scalabrini I, Somali Association* and *Kubukeli*, that 'a duty to consult will arise only in circumstances where it would be irrational to take a decision without such consultation'.[181] This suggests that a pre-decision hearing will not always be required. It would only be required where it would be irrational not to have one. I find this reasoning to be likely to give rise to some practical difficulties in the context of cases such as *Albutt, Scalabrini I* and *Somali Association*.

In my view, a consultation would invariably conduce to rational decision-making in such cases. It is difficult to think of a circumstance where a hearing would not achieve this.[182] For this reason, I cannot imagine how a failure to consult or give a hearing would

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180 *Sembcorp Siza* supra note 138 para 49.

181 See *Scalabrini I* supra note 116 para 72, *Somali Association* supra note 122 para 17 and *Kubukeli* supra note 124 para 16.

182 Hoexter & Penfold op cit note 7 at 575.

not negatively impact on the rationality of a decision. Moreover, as Price argues, it would be difficult to distinguish between cases in respect of which a hearing would conduce to rationality and those which it would not.[183]

I had better emphasise, lest I get misinterpreted, that this argument is limited to cases (such as *Albutt*) requiring a hearing for the sake of rationality. It should not be misunderstood to mean that procedural rationality requires a hearing in all cases. As I have indicated above, there are cases of procedural rationality which have nothing to do with a pre-decision hearing. But, in relation to those cases that relate to a pre-decision hearing, it remains to be seen how the court will justify that it is rational not to hold a hearing.

8. CONCLUSION

It is clear that the courts have moved on from the apparent tension between *Masetlha* and *Albutt*. Procedural fairness is no longer a requirement under the principle of legality, even as a matter of rationality. Rather, the court has introduced the concept of procedural rationality, which is now the applicable standard when determining the rationality of a decision-making process. This includes cases where *audi alteram partem* is required as a matter of rationality. Despite this new orthodoxy, there is still 'scope for the further development of procedural fairness as a requirement of the principle of legality and

[183] Alistair Price 'The evolution of the rule of law' 2013 *SALJ* 649 at 655.

rationality'.[184] It is unlikely that this is the last that we hear of the procedural fairness debate, particularly in relation to the applicability of procedural fairness under the principle of legality. If anything, the reasoning in *Albutt* has left the door ajar for an argument that *audi alteram partem* qualifies as procedural fairness under the principle of legality to the extent that it enhances rationality. In addition, the views expressed by the Constitutional Court in *Motau* (insofar as the decision in *Masetlha* is concerned) strongly suggest that procedural fairness itself may be a requirement under the principle of legality.

[184] Cora Hoexter 'The rule of law and the principle of legality in South African administrative law today' in Marita Carnelley & Shannon Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 61).

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