

MAILE SEKHETHELA

A key that opens every door?

Rationality under the principle of legality today.

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ABSTRACT

In recent years the principle of rationality has attracted more judicial attention than any other principles under the principle of legality. The principle has expanded such that the scope of what constitutes the principle of rationality and the manner in which the courts apply and interpret the principle has developed significantly. As it shall become apparent in this paper, the courts have interpreted the principle of rationality to demand procedural fairness and the right to be given written reasons. To this end, there is a confusion as to the scope of what constitutes the principle of rationality. It has also been evident that the courts interpret the principle to mean whatever the courts want it to mean. It will also become apparent that rationality may be susceptible to manipulation. It would seem, however, that in most cases the principle has become a more preferred ground of review than any other principle and thus a key that opens all doors. The objective of this research report is to explore the principle of rationality under the principle of legality as developed in the South African courts and ultimately answers the question of whether the principle has become the key that opens all doors in cases of alleged abuse of public power. The report finds that rationality is not a key that opens all doors.

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INTRODUCTION

The new South African constitutional order is shaped by different principles that underpin it; the principle of constitutionalism; the rule of law; democracy and accountability; separation of powers and checks and balances; co-operative government and devolution of power.¹

In accordance with the principle of subsidiarity, direct application of more specific provisions, mostly from legislation must be applied when resolving legal disputes and only when these specific provisions run out can the more general principles be directly relied on.² Of particular importance for this research report, in relation to the principle of rationality under the principle of legality, is the principle of subsidiarity and the separation of powers. It will be demonstrated that the way in which courts have applied rationality review circumvents subsidiarity as well as the separation of powers. It is important to note at the outset that rationality as discussed herein, is rationality as a ground of review under the principle of legality. The principle of legality is one of the pathways to judicial review when the impugned exercise of public power does not constitute administrative action.

The purpose of this report is to explore the principle of legality and in particular, the principle of rationality in judicial review. The ultimate issue to be responded to is whether rationality under the principle of legality has become a key that opens every door in terms of judicial review in South African courts. It would seem that the courts as well as litigants use rationality review in circumstances which do not permit. The rationality test has been extensively expanded, so much so that it allows for the judiciary to intrude on the decisions of the executive and legislature. The cases below will show how rationality review has the potential to avoid the Promotion of Administrative Justice Act³ (“PAJA”) as well as undermine it. The report will also show how rationality review, when applied inappropriately, has the potential to create legal uncertainty and foster subjectivity to an objective test. The report will further demonstrate how rationality review may be susceptible to manipulation.

The report aims to analyse rationality, how it has developed and applied in various cases. The first part of the report outlines the test for rationality and its development. The

¹ Ian Currie and Johan de Waal *The New South African Constitutional Law* (2002) 7.

² Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 119.

³ The Promotion of Administrative Justice Act 3 of 2000.

second part focuses on the inclusion of procedural fairness, procedural rationality and the right to be given reasons as aspects of the principle of rationality under the principle of legality. The third part discusses the potential manipulation which rationality is susceptible to. Finally, the fourth part provides a conclusion.

I. THE TEST FOR RATIONALITY

The test for rationality was formulated in *Pharmaceutical Manufacturers Association*⁴. (“PMA”) This case has found reference in most, if not all, cases involving the exercise of public power pertaining to rationality under the rule of law. The Court held that at minimum, when any public power is being exercised, it is required that there be a rational relationship between the exercise of power and the purpose for which the power was given.⁵ The Court held that if such relationship cannot be found, the exercise of the power (public) is irrational, arbitrary, inconsistent with the requirements of the Constitution and therefore unlawful.⁶

Prior to the test laid out in *PMA*⁷, the Labour Court proffered a test for rationality.⁸ Rationality is central to the rule of law, even though it is not explicitly provided for in the Bill of Rights.⁹ Prior to PAJA, the test for rationality in respect of public power was held to be whether there is a ‘rational objective basis justifying the connection made by the administrative decision –maker between the material properly available to him and the conclusion he or she eventually arrived at.’¹⁰

The *Democratic Alliance v The President of the Republic of South Africa and Others*,¹¹ (“*Simelane*”) aptly phrases the test by holding,¹² that the primary focus of rationality review is premised on the evaluation of a relationship between means and ends. This relationship is in the form of a connection or link between the means commissioned to attain a purpose and the purpose itself. The objective of the evaluation is neither to decide whether specific means will attain the purpose, nor is it to determine whether some means will achieve

⁴ *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674.

⁵ Ibid para 85 & 90.

⁶ Ibid.

⁷ Ibid.

⁸ *Carephone (Pty) Ltd v Marcus NO and Others* 1998 (11) BLLR 1093(LAC) para 37.

⁹ De Ville J.R “Judicial Review of Administrative Action in South Africa” 2003 200.

¹⁰ Geo Quinot, Janice Bleazard & Steven Budlender et al: *Administrative Justice in South Africa, an introduction*, (2015) 175.

¹¹ *Democratic Alliance v The President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC).

¹² Ibid para 32.

the purpose better than other means. The evaluation is only concerned with whether the means commissioned are rationally related to the purpose for which the power was conferred. If it is found that there is a rational relationship, then the decision is constitutional.¹³

As Boule, Harries and Hoexter write that, the essential requirement of legality is that statutory powers must always be exercised strictly in accordance with the terms on which they were conferred by Parliament to the executive. Malan furthers this point and also places rationality at the forefront of legally sound decisions. He notes that it is a requirement of the rule of law that decisions be rational which are not arbitrary and do not flow from vague legislative provisions. Ultimately, ‘Arbitrary, unpredictable public conduct is the arch-enemy of the rule of law’.¹⁴ Ideally this would fit squarely with the principle of rationality. The issue arises when it is not clear what the terms of that power are or if the legislative provisions are vague. In certain instances; the terms are clear however, in others such terms need to be inferred. Vagueness of enabling statutes may invite subjectivity and the judicial officer’s preferred interpretation.

The principle of subsidiarity dictates that substantive issues should be adjudicated in terms of indirect constitutional norms rather than direct constitutional norms.¹⁵ This is to avoid the direct application of the Constitution when there is legislation governing the issue in dispute. Subsidiarity demands applicable and available legislation to be used in adjudication as opposed to direct application of the Constitution. As will be explored later in the report, rationality may be subject to the manipulation of the principle of subsidiarity as well as the separation of powers.

Rationality review under the principle of legality is entrenched in our case law and has materially departed from the principle laid in *PMA*.¹⁶ This will be explored in the coming parts of the paper. Put simply, the test (in terms of *PMA*) is whether there is a rational connection to the purpose pursued to be attained, being the “end”, and the decision or conduct pursued to attain this purpose, being the “means”.¹⁷ *Albutt v Centre for the Study of Violence and*

¹³ Ibid.

¹⁴ Malan J ‘The rule of law versus decisionism in the South African constitutional discourse’ (2012) 45 De Jure 272 at 275.

¹⁵ L du Plessis ‘Subsidiarity: What’s in the Name for Constitutional Interpretation and Adjudication?’ (2006)

¹⁷ Stellenbosch Law Review 215–223.

¹⁶ See also *DA v Acting National Director of Public Prosecutions and Another* 2012 (3) SA 486(SCA); *National Director of Public Prosecutions v Freedom Under Law* 2014(4) SA 298; *President of the Republic of South Africa and Others v South African Dental Association of South Africa and Another* 2015 (4) BCLR 388 (CC).

¹⁷ L Kohn ‘The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?’ (2013) 130 *SALJ* 810 at 825.

Reconciliation and Others(“*Albutt*”) ¹⁸ and *Simelane*¹⁹ are examples where the rationality test materially expanded. In those cases, procedural fairness was included as an aspect of rationality. The test has further expanded to include the right to written reasons as found in *Judicial Service Commission and Another v Cape Bar Council*²⁰. In order to highlight the expansion of the test, it is prudent to discuss the exclusion of procedural fairness before its inclusion.

II. PROCEDURAL FAIRNESS, PROCEDURAL RATIONALITY AND THE RIGHT TO WRITTEN REASONS AS ASPECTS OF THE PRINCIPLE OF RATIONALITY.

Since *PMA* introduced rationality as an aspect of the principle of legality, the courts have, in certain instances, expanded the test of rationality to include procedural fairness. *Albutt*²¹ and *Simelane*²² are such cases. However, in some instances the courts have found that procedural fairness does not feature in the rationality enquiry. *Masetlha v President of the Republic of South Africa and Another*²³ (“*Masetlha*”) and *Association of Regional Magistrates of South Africa v President of the Republic of South Africa*²⁴ (“*ARMSA*”) are examples of this.

*Judicial Service Commission and Another v Cape Bar Council and Another*²⁵ (“*JSC*”) included the right to be given reasons as an aspect of rationality. As it will become apparent in this part of the paper, the courts have gone so far as to distinguish between procedural fairness and procedural rationality. The inclusion of procedural fairness expands the test for rationality. Such expansion creates an additional pathway to review and may have negative effects on PAJA and the principle of separation of powers. This chapter explores the impact the expansion has on separation of powers, subsidiarity and PAJA.

a, Exclusion of Procedural Fairness

It will become apparent in the discussion of this case that the court in *Masetlha v President of the Republic of South Africa and Another*²⁶ did not include procedural fairness

¹⁸ *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).

¹⁹ *Democratic Alliance* supra note 11.

²⁰ *Judicial Service Commission and Another v Cape Bar Council* 2013 (1) SA 170 (SCA).

²¹ *Albutt* supra note 18.

²² *Democratic Alliance* supra n 11.

²³ *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC).

²⁴ *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC).

²⁵ *Judicial Service Commission* supra n 20.

²⁶ *Masetlha* supra note 23.

as an aspect of rationality. Notwithstanding this, it is important to discuss this case in order to contrast the different views that the Constitutional Court has taken regarding the principle of procedural fairness being an aspect of the principle of rationality. This case concerned the constitutional validity of the decision of the then President of the Republic, Thabo Mbeki, to first; suspend Mr Billy Masetlha (“Masetlha”), the head and Director-General of the National Intelligence Agency (“The Agency”), and at a later stage to amend his term of office which the amendment resulted in a premature expiry of his term of office. The effect of the amendment was that Masetlha’s term of the office was to end 21 (twenty one) months earlier than his original term.²⁷ The premise of the President’s decision was that the relationship between him, as head of state and of the national executive, and Masetlha, as head of the Agency, had disintegrated irreparably.²⁸

The Court had to decide, inter alia, on the issue of the decision being procedurally unfair under the PAJA alternatively under the principle of legality. Moseneke DCJ writing for the majority agreed with the finding of the High Court that the decision of the President to amend or dismiss Masetlha amounted to the exercise of executive power in terms of s 85(2)(e) of the Constitution and it was excluded from the purview of ‘administrative action’ under s 1 of the PAJA. For this reason, it was not subject to the standards of procedural fairness contained in the PAJA.

In deciding whether there are any executive constraints on the exercise of public power, more particularly in deciding whether the standards of procedural fairness are applicable under the principle of legality, the majority of the Court held that it would be inappropriate to confine executive power to procedural fairness in the same way which procedural fairness is applied in administrative action cases.²⁹

In essence, Moseneke DCJ, writing for the majority, held that procedural fairness is not a requirement of the principle of legality or a stand-alone pathway to review. Having decided so, the Court held that the authority conferred on the executive must be exercised lawfully, rationally and in a manner consistent with the Constitution. Moreover, the Court held that the executive authority should not be constrained any more than through the principle of legality and rationality.³⁰

²⁷ *Masetlha* supra note 23 para 1.

²⁸ Ibid para 24.

²⁹ Ibid para 77.

³⁰ Ibid para 78.

It is of importance to note that the view of majority of the Court is that the principle of rationality under legality does not require procedural fairness, nor is procedural fairness a requirement of the principle of legality. It was held that Court should be cautious not to impose obligations on the government that will obstruct its ability to act effectively.³¹ It was further held that the power vested in the President to dismiss Masetlha was one which had the objective of promoting effective government business and national security.³²

The decision of the minority judgment on the issue of procedural fairness being part of the principle of legality differed from that of the majority judgment. Ngcobo J writing for the minority held that the doctrine of legality constrained the exercise of the power to alter the term of office. It also found that the power to unilaterally alter the term of office is inconsistent with the rule of law.³³ The minority of the Court seemed to have a view that the right to be consulted or the requirement of procedural fairness is required by the principle of legality; that failure to adhere to the standards of procedural fairness amounts to a breach of the principle of legality and the Constitution. It found that the rule of law requires a wider approach which includes fundamental fairness and not only that the power be exercised in a manner that is rationally related to purpose for which the power was conferred.³⁴

The import of the minority judgment is that in order for a decision not to be regarded as arbitrary and irrational, there must be fairness on how the public power is being exercised. Thus, since the Constitution requires decisions to be non-arbitrary then, it implies that there must be procedural fairness.³⁵ It would seem that the view of the minority of the court is that procedural fairness is a standalone requirement of the principle of legality and it is not an aspect of rationality. This, by reading of the minority judgment, all flows from fairness being a central theme in the Constitution.

Kohn correctly states that fairness is at best an overarching constitutional norm rather than a specific stand-alone constitutional requirement.³⁶

The minority of the court went on to emphasise that the principle of legality, has both a substantive and a procedural aspect in order for the exercise of public power not to be arbitrary. Moreover, that rationality deals with the substantive component while the procedural requirement requires the decision maker to act fairly. To this end, it was held that when acting

³¹ Ibid para 79.

³² *Masetlha* supra note 23 para 75 and 77.

³³ Ibid para 108.

³⁴ Ibid para 179.

³⁵ Ibid para 178.

³⁶ Kohn op cit note 17 at 829.

fairly, the decision maker has the opportunity to hear the side of the individual affected by the decision. This would encourage the decision maker to make the decision after considering all relevant factors, thus minimising arbitrariness.

The Court found that the substantive component of the rule of law requirement that the exercise of public power should not be arbitrary is found in the test for rationality as applied in *PMA*.³⁷ The procedural component thus arises from the manner in which the decision was taken. The minority then held

‘To hold otherwise would result in executive decisions which have been arrived at by a procedure which was clearly unfair being immune from review.’³⁸

Considering the manner in which the decision was taken increases the scope of the rationality test. The test has been said to be a low one.³⁹ Once a court is considering the manner of a decision, does that not blur the line between PAJA review and rationality review under the principle of legality? Kohn wrote that reasonableness requires something more than what the test for rationality requires.⁴⁰ In essence, reasonableness also requires proportionality.⁴¹ She further stated ‘This more vigorous judicial assessment requires more than a simple determination of whether the means are rationally linked to the ends: it demands an assessment of whether the chosen means actually justify the ends pursued. It essentially requires that it be shown that the means chosen were the most appropriate, or ‘suitable’, in the circumstances.’⁴² The proportionality ingredient is what distinguishes review for reasonableness from rationality review simpliciter.⁴³ Thus, the extension of rationality to include procedural fairness may be extending rationality to include reasonableness.

The finding of the minority seems to be placing an onerous obligation on the other spheres of government. This is what the majority aimed to prevent. *PMA* was clear on its minimum threshold requirement. The minority raises the threshold.

Procedural fairness as an aspect of rationality was also rejected in *Association of Regional Magistrates of South Africa v President of the Republic of South Africa*⁴⁴ (“*ARMSA*”).

³⁷ *Pharmaceutical Manufacturers Association* supra n 3 para 184.

³⁸ *Ibid.*

³⁹ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) para 67.

⁴⁰ Kohn op cit note 17 at 826.

⁴¹ Hoexter op cit note 2 343–4 & 349.

⁴² Kohn op cit note 17 at 826.

⁴³ *Ibid.*

⁴⁴ *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC).

In this case, the Independent Commission for the Remuneration of Public Office Bearers (“the Commission”) recommended that Magistrates should receive a 7 percent increase on their salaries. The salient aspect for the purposes of this paper is the fact that the president increased the salaries by 5 percent. The President then tabled this decision in Parliament for approval and the decision was subsequently published in the Government Gazette.

On Appeal from the High Court to the Constitutional Court, ARMSA contended that it was not consulted by the President or the Commission prior to the decision being made. The Court rejected this contention based on *Masetlha* by pointing out that executive action may be reviewed only on certain narrow grounds that fall within the principle of legality which include lawfulness and rationality. It further stated that unlike administrative action, rationality does not include procedural fairness and it is not a requirement for the exercise of executive action.

On the issue of consultation, the Court held that the Magistrates Act 90 of 1993, which is the enabling statute, does not require a hearing. As such, there was no duty of the President to conduct a hearing or consultation.⁴⁵ The Court excluded procedural fairness from the test for rationality on the basis that administrative action would require procedural fairness, while rationality does not.

The views expressed by the Court in the above cases are correctly stated since the inclusion of procedural fairness would be at odds with the principle of the separation of powers. First, the effective running of government business is at stake if procedural fairness is an aspect of rationality or even a stand-alone requirement. It is so because procedural fairness may be too onerous on the executive or legislature when making decisions which are not administrative in nature.

Murcott argues that the imposition of procedural fairness has the ability to fetter the political discretion of the decision maker.⁴⁶ De Ville correctly states the closer a decision is to policy making or the more a decision is political in nature, then procedural fairness finds no place.⁴⁷ If procedural fairness is included as an aspect of rationality or as a stand-alone pathway of review, then what differentiates the principle of legality from administrative law? As it stands, procedural fairness is one of the only components that set administrative law from the rule of law.

⁴⁵ *Association of Regional Magistrates of South Africa v President* supra note 44 para 59.

⁴⁶ M Murcott ‘Procedural Fairness’ in G Quinot (ed) *Administrative Justice in South Africa: An introduction* (2015) 167.

⁴⁷ J R de Ville ‘Judicial Review of Administrative Law in South Africa’ (2003) at 221.

The following part of the paper illustrates how the test for rationality has been expanded to include procedural fairness.

b, Inclusion of Procedural Fairness

Procedural fairness was said to be an aspect of rationality in *Albutt*.⁴⁸ The then President, Thabo Mbeki, announced that he intended to create a special dispensation in terms of which certain political prisoners (those who decided not to participate in the Truth and Reconciliation Commission's amnesty process for whatever reason) could apply for a pardon under section 84(2)(j) of the Constitution. Section 84(2)(j) provides that the President is responsible for 'pardoning or relieving offenders'. The objectives of the dispensation were the interest of nation building, national reconciliation, the further enhancement of cohesion from conflicts of the past.⁴⁹ During March 2009, the office of the President in effect declined the request for victim participation in the special dispensation and refused to furnish any undertaking in this regard. NGOs took the matter to the court.⁵⁰ The NGOs contended that the victims of the offences in respect of which pardons are sought under the special dispensation process are entitled to be heard. One of the main grounds in which they challenged the decision of the President to exclude the victim participation in the dispensation process was that the decision was irrational.⁵¹

Ngcobo CJ held that the exercise of public power must be rationally related to the purpose sought to be achieved by the exercise of it.⁵² This meant that in order for the President's decision to 'proceed with the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process.' If not, that decision would be unconstitutional.⁵³

The Court held that the purpose of the enquiry in matters where rationality is sought to be a ground of review, is not to determine whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved.⁵⁴ In deciding whether the exclusion of the participation of the victims of politically motivated crimes, was rationally related to the objectives of nation building and national

⁴⁸ *Albutt* supra note 18.

⁴⁹ Ibid para 4.

⁵⁰ Ibid para 8.

⁵¹ Ibid para 38.

⁵² Ibid para 50.

⁵³ Ibid.

⁵⁴ Ibid para 51.

reconciliation, the Court held that the participation of victims would assist in determining what happened and it is pivotal to nation-building and national reconciliation.

The Court further held that victim exclusion from the processes leaves them ‘unassuaged’ which may cause resentment and grief, which feelings do not encourage nation-building and reconciliation.⁵⁵ Given the aforesaid findings, the Court concluded that it could not be intimated that the exclusion of the victims from the special dispensation process was rationally related to the achievement of the objectives of the special dispensation process.⁵⁶

What is noticeable about the decision of this court is that the court did not express any view that procedural fairness is an aspect of the principle of legality. The court did not categorise the principle of legality into substantive (dealing with rationality) and procedural components as it was done in *Masetlha*. Instead it can be argued that the application of the procedural requirement was implicit in the substantive test for rationality. The substantive test for rationality required that the procedure be rational. To this end it can be argued that this case introduced what is known as procedural rationality which essentially requires that the standards of procedural fairness be adhered to (where it is necessary) in order for the decision to be rational.

Moreover, the view seems to be that procedural fairness is an aspect of rationality and not a standalone requirement of the principle of legality. However, the court emphasized that its finding that the procedure must be rational does not apply to all cases but that each case would be decided on its own facts.⁵⁷ Thus, it did not set a general precedent for all cases where a special dispensation is sought. The Court followed a more liberal approach by including procedural fairness as an aspect of rationality. This judgment echoes the minority findings of Ngcobo J, as he was then, in *ARMSA*. It seems that the Court applied the *PMA* test with procedural fairness being applied implicitly.

Kohn⁵⁸ argues that the rationality requirement was expanded in two respects. First, it included procedural fairness by mandating victim participation and their opportunity to be heard as was implemented in the TRC process.⁵⁹ Second, the court expanded rationality to include ‘what seems like a type of proportionality assessment by examining both the “means” and the “end” in question.’ Kohn makes this point through the reasoning of the court in which the Court found that the purposes of the special dispensation were similar to those of the TRC

⁵⁵ Ibid para 61.

⁵⁶ Ibid para 68.

⁵⁷ Ibid para 75.

⁵⁸ Kohn op cit note 17 at 830.

⁵⁹ *Albutt* supra note 18 para 72.

and as such,⁶⁰ *the means* chosen to pursue these ends had, at the very least, to involve victim participation.⁶¹

Thus, the rationality test was met since the purpose of the special dispensation was for nation building and reconciliation. It is difficult to see how this could have been achieved without the victims being heard. It would therefore have been one sided and the reconciliation aspect could not practically have been achieved. It is arguable that this was an appropriate application of the test since the purpose and objective were clear and the Court was able to merge the two in its judgment. But for the inclusion of procedural fairness in this case, victim participation would not have been implemented.

If we cognisant of the purpose of the dispensation (reconciliation and nation building) then victim participation is a necessity. However, the Court did not prescribe the extent and manner of the participation, which is what proportionality would demand.

Another aspect of the judgment which is startling is the fact that the Court did not consider PAJA prior to entertaining the matter on the principle of Legality. It found it unnecessary to consider whether PAJA applied.⁶² This has been said to have ‘actually reversed the normal order of things by holding that since the case could be resolved by the principle of legality, there was no need to ask whether the PAJA was applicable’.⁶³ This goes against Hoexter’s heed that ‘PAJA is, or ought to be, the first resort in any administrative law matter on the basis that it is intended to give effect to the rights in s 33 and because it essentially codifies those rights. For these reasons, the constitutional court has emphasised that constitutionally mandated legislation such as the PAJA must be used where applicable, and it has cautioned that litigants may not go ‘behind’ the PAJA by resorting directly to s 33 or the common law.’⁶⁴

Murcott & Westhuizen note that the approach followed by the Court flouts the theory of subsidiarity in that the Court applied a general constitutional norm, being legality, as opposed to PAJA (which might well have been applicable). PAJA is a constitutional norm of greater specificity.⁶⁵ They went onto state that by failing to consider the applicability of PAJA, the Court, in effect, disregarded the legitimate role of the legislature in formulating

⁶⁰ *Albutt* supra note 18 para 55.

⁶¹ *Ibid* para 61.

⁶² *Ibid* paras 49-56.

⁶³ Hoexter “A rainbow of one colour? Judicial review on substantive grounds in South African law” in Wilberg and Elliott (eds) *The Scope and Intensity of Substantive Review* (2015) 183.

⁶⁴ Hoexter “The rule of law and principle of legality” in Carnelley and Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 65.

⁶⁵ M Murcott & W 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) Constitutional Court Review 54.

PAJA. Moreover, the Court's failure to justify, properly, on substantive grounds, the basis upon which it would not apply PAJA, undermined the separation of powers.⁶⁶

*Simelane*⁶⁷ confirmed the position held in *Albutt*. In this case, President Zuma appointed Mr Menzi Simelane as the National Director of Public Prosecutions (the "NDPP"). Before his appointment, Simelane gave evidence on oath at the Ginwala commission of inquiry. The truthfulness of his evidence was questioned and the Public Services Commission investigated Simelane and recommended that he be subjected to a disciplinary hearing. Two days after that recommendation, The President appointed Simelane as the NDPP. The Democratic Alliance ("DA") applied to the High Court for an order declaring the President's decision to be declared unconstitutional in that the Appointment of Simelane was irrational and contravened the rule of law. The contentions of the DA were premised on the fact that the report of Ginwala Commission showed that Simelane was not a fit and proper person as required by National Prosecuting Authority Act.⁶⁸ After several appeals, the matter was brought to the Constitutional Court by the President.

Like in *Albutt*, the Court found it unnecessary to decide whether the decision by the State President constituted executive or administrative action. The Court relied solely on the principle of legality.⁶⁹ The court ultimately found that the President's decision was irrational. This was done without considering whether PAJA could in fact apply. Again, the court should not merely accept an applicant's say-so without at least enquiring on the veracity. The principle of subsidiarity is again at stake.

In determining the rationality of the President's decision to appoint Simelane, the Court confirmed the position of *Albutt* by stating that the test for rationality applies not only to the decision taken by the President but also to the process which was followed. Thus, this case confirmed that the rationality of a decision lies both in the process which the decision followed as well as decision itself.⁷⁰ The Court further held that it would be illogical to apply the rationality test only to the *decision* in cases of appointments while applying the same test to the *process* as well as the *decision* in cases of pardons, as was the case in *Albutt*.⁷¹

⁶⁶ Ibid.

⁶⁷ *Democratic Alliance* supra note 11.

⁶⁸ National Prosecuting Authority Act 32 of 1998.

⁶⁹ Ibid para 12.

⁷⁰ *Democratic Alliance* supra note 11 para 34.

⁷¹ Ibid para 35.

The Court then found that the decision to appoint Simelane was irrational in that the process followed was not rationally connected to the fit and proper person test and the President did not take into account the Ginwala Commission report into consideration.⁷²

Price argues that procedural fairness is not a general requirement of legality but may sometimes be a requirement of rationality.⁷³ He favours this approach because it gives the decision-maker room for flexibility to apply procedural fairness when the facts require that of him or if it would be irrational for him not to do so.⁷⁴ The issue that arises here is when will it be irrational not to follow a fair procedure and when will it be required of a decision-maker to keep procedural fairness in mind? In my view, this invites the intrusion by the Judiciary into decisions that were solely meant for the executive or legislature. When a litigant approaches the courts, they may phrase their papers in such a way that points to procedural unfairness, even though procedural fairness is not a feature of the impugned decision. Again, separation of powers is at stake here since the Judiciary is essentially prescribing what procedures must be followed, even though those procedures are at purview of the executive or legislature.

Henrico states that where the PAJA is not applicable, the principle of legality may then be relied upon.⁷⁵ He correctly points out there is a difference between merely concluding that it is unnecessary to find whether PAJA is applicable and establishing its non-applicability as a legal and factual reality.⁷⁶ The only way to determine whether PAJA to be applied is to actually consider it and whether the decision or action meets the requirements of administrative action.

To this end, however, the courts still refer to ‘procedural rationality’. This was seen in the case *eTV* of and *Scalabrini II* which will be discussed below.

c, Procedural Rationality

*Electronic Media Network Ltd v E.tv Ltd*⁷⁷ (*e.tv*) concerns the Broadcasting Digital Migration policy (the policy) amended and publication by the then Minister of Communications, Faith Muthambi. The aim of the policy was to facilitate the migration of television broadcasting signals in South Africa from analogue terrestrial television system to a digital terrestrial television system in order to free up signal space. The older television sets were to require a

⁷² *Democratic Alliance* supra note 11 para 92.

⁷³ A Price ‘The evolution of the rule of law’ (2013) 130 SALJ 649 655.

⁷⁴ Ibid.

⁷⁵ Henrico R ‘Subverting the Promotion of Administrative Justice Act in judicial review: the cause of much uncertainty in South African administrative law’ 2018 (2) TSAR 291 at 303.

⁷⁶ Ibid.

⁷⁷ *Electronic Media Network Ltd v E.tv Ltd* 2017 (9) BCLR 1108 (CC).

functionality known as set top box in the foreseeable future for as long as television sets with signal-unscrambling capabilities are beyond reach.⁷⁸ The policy was published in terms of s 3 (1) of the Electronic Communications Act⁷⁹ (ECA).

Initially, the policy provided that there will be incorporation of decryption capabilities into set top boxes. However, when the policy was published in 2015 it provided that the set top boxes would no longer incorporate the decryption capabilities into the set top boxes.

The publication of the policy was preceded by numerous consultative processes. The requirements of the consultation are set out in s 3 (5) of ECA. The initial consultation process was with Minister Matsepe-Casaburri and the relevant stakeholders, followed by Minister Dina Pule, then Minister Yunus Carrim.⁸⁰ Minister Faith Muthambi came into office and she amended the policy and dropped the inclusion of decryption capabilities into set top boxes. Subsequent to the amendment she published the policy. However, unlike her predecessors she did not hold any consultation processes with the relevant stakeholders prior to the amendment and subsequent publication of the policy.⁸¹

Aggrieved by this, E.tv brought an application to court for an order setting aside the decision to amend the policy. E.tv contended, inter alia, the potential impact of the decryption amendment on it and the public required of the Minister to consult them in order to take a rational policy decision. It essentially argued that its input on how it would cover the additional costs occasioned by the inclusion of decryption capabilities in the government-supplied set top boxes was critical to the rationality of the Minister's decision. Further, that she took without first finding out what E.tv's position was. For this reason, E.tv contended that the Minister's policy decision was procedurally invalid or irrational.⁸²

In response to this contention, Mogoeng CJ writing for the majority held that the consultative process must always be rational and constitutional. The Court provided that since the requirements of the consultative process are provided for in s 3 (5) of ECA, a consultative process that meets the demand of this section is rational. The court further emphasized that the consultation process pursuant to s 3 (5) is not inferior from the consultative process laid down in *Motau*⁸³, *Albutt* and *Simelane*, and that both processes owe their legitimacy and completeness in the Constitution.⁸⁴

⁷⁸ Ibid para 9.

⁷⁹ Electronic Communications Act 36 of 2005.

⁸⁰ *Electronic Media Network Ltd* supra note 77 para 16.

⁸¹ Ibid para 16.

⁸² Ibid para 64.

⁸³ *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC).

⁸⁴ *Electronic Media Network Ltd* supra n 77 para 65.

The Court held that suggesting that a consultative process that meets all the aspects of a statutory requirement is still not sufficient would be a ‘misunderstanding of our constitutional jurisprudence’. The court went on to hold that a law which has provided for a consultative process can only be said to have sufficiently done so if the consultation meets the procedural rationality test. the court the held:

‘We have but only one standard for consultation in our jurisprudence. And that is the standard that insists on a genuine and meaningful consultative process that passes constitutional muster, regardless of which legislation or legal framework regulates that process.’⁸⁵

The majority went on to point out that since the consultative process contained in s3(5) had not been declared constitutionally invalid and its demands had been met then no room existed for exploring the *Motau, Albutt and Simelane* procedural rationality avenue, for they are an integral part of the statutory process. Exploring these cases would only be appropriate where there was no statutory or other provision providing for a consultation process.⁸⁶ In the premise the majority found that e.tv had been an integral part of the consultation process since its inception and the requirements of the process were met, its attack on procedural irrationality fails.

It would seem the courts will not bother to apply the rationality test where the there is a statutory provision which demands have been met. The positive enquiry into the statutory requirements of the said provision is tantamount to the procedure being rational. Moreover, the majority judgment seems to be of the view that procedural rationality is not a standalone requirement of the principle of legality but rather it is a component of rationality. The majority judgment relied heavily on the principle of separation of powers. It emphasized the need to guard against the judicial intrusion on the executive’s terrain. Having decided that the consultation was rational, the majority was of the view that judicial intrusion was not permissible and it further held that it was for the judiciary to decide and change the means employed to achieve its (the executive) purpose.⁸⁷ The court finally held, which finding is the basis of this paper and I am in complete agreement with:

‘What courts must always caution themselves against is the temptation to impose their preferences or what they consider to be the best means available, on the other arms of

⁸⁵ Ibid para 66.

⁸⁶ Ibid para 67.

⁸⁷ Ibid para 84.

the State. Separation of powers forbids that. Again, we say, that rationality is not a master key that opens all doors, anytime, anyhow and judicial encroachment is permissible only where it is necessary and unavoidable to do so.’⁸⁸

Kohn aptly states that the practical value of the doctrine of separation of powers in modern democracies lies in this principle of checks and balances in that the doctrine has come to serve a more useful purpose in ensuring the *supervision* of state power, rather than its *division*.⁸⁹ The judgment by the Court clearly indicates the supervision of the exercise of public power by deciding on whether the decision was rational but also keeping a safe distance from intruding and supplying its own preferences or ideas.

This is very much in line with *President of the Republic of South Africa v South African Rugby Football Union*⁹⁰ in that the Court correctly limited both legislative and executive acts to the arms concerned and did not extend the review to the terrain of the formulation of policy but limited it to its implementation.⁹¹ In finding that the consultation process was not sufficient, the Court would be interfering with policy and offering its own preference. It seems the courts will be reluctant to decide on the test for rationality where there is a statutory provision that provides certain demands to be met. Only if such provisions are constitutionally invalid, does the test of rationality becomes applicable.

The minority of the court took an opposite direction in its reasoning. It disagreed with the majority on the issue that the doctrine of separation of powers does not permit for judicial intrusion into the scrutiny of the Minister’s executive power of making policy, relevant to this case the Minister’s amendment of the policy. Cameron J and Froneman J writing for the minority held that the application of the test of rationality, both in process and substance, is not an intrusion into the executive’s authority to make policy.⁹²

Furthermore, it was held that rationality in this case must be determined in the context of our own brand of constitutional democracy, and that brand is one of participatory democracy, designed to ensure accountability, responsiveness and openness.⁹³ The minority then held ‘if accountability, responsiveness and openness are fundamental to our Constitution, then a consultation process that lacks those attributes needs to be explained. Where there is no

⁸⁸ Ibid para 85.

⁸⁹ Kohn op cit note 17 at 815.

⁹⁰ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC)

⁹¹ Ibid para 143.

⁹² *Electronic Media Network Ltd* supra note 77 para 95.

⁹³ Ibid para 96.

explanation there is no reason, and where there is no reason there is arbitrariness and irrationality’⁹⁴

On the issue of procedural rationality, as referred to in the case, the minority held that the Minister could not achieve a rational outcome if the means she employed to achieve the outcome were irrational. Ultimately, the process followed when formulating the policy must be rationally connected to the purpose for which the power to issue the policy was conferred.⁹⁵

The court went on to quote *Simelane* and said ‘whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality’.⁹⁶ The Court went on to explain that, if in a particular case there is a failure to take into account relevant material, that failure would constitute ‘part of the means to achieve the purpose for which the power was conferred’. And if that failure had an impact on the rationality of the entire process, ‘then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole’⁹⁷

The view of the minority judgment is that the principle of rationality, which requires both the process and the substance to be rational is an intrinsic principle of our Constitution and every exercise of power must pass the Constitutional muster. Thus, this is contrary to the majority judgment which held that an application of such a test in some instances is prevented by the doctrine of the separation of powers. More so, the minority judgment seems to have the view that procedural fairness is not a standalone requirement of the principle of legality, that it is in fact a component of the principle of rationality.

In my view, the majority is correct since it is very much in line with *PMA*. The test for rationality is maintained here and it also has regard to the principle of separation of powers. More importantly, it has regard to the principle of subsidiarity. The majority does not readily apply rationality without anything leading to its application. Instead it considered the enabling statute (ECA) and moved from that premise to find that the consultation process was sufficient. The minority moves from the premise of the Constitution and the general underlying principle of fairness. The majority judgment offers legal certainty while the minority judgment leaves litigation to who pleads the best case.

⁹⁴ Ibid para 98.

⁹⁵ Ibid para 99.

⁹⁶ Ibid para 124.

⁹⁷ Ibid.

This case concerns a decision taken by the Director-General of the Department of Home Affairs (the Department) to close the Cape Town Refugee Reception Office (the office) in terms of the Refugee's Act⁹⁸ (the Act). The Director-General issued an invitation to interested parties to attend a meeting on the possible closure of the office and to submit comments on relevant issues to be discussed.⁹⁹ Written submission were made but none of the interested parties supported the closure of the office.¹⁰⁰ Subsequent to the meeting, the Director-General closed the office permanently with the effect that no new applications for asylum seekers could be lodged and processed at the office. However, the transitional arrangements for existing asylum seekers remained only on exceptional circumstances. The Director-General gave written reasons for his decision.¹⁰¹ An application was then brought to court for an order setting aside the decision of the Director-General to close the office. The applicants contended that the decision was irrational and unlawful because it did not comply with s 8 (1) of the Act, and the decision-maker ignored relevant considerations and made a material error of law.¹⁰²

Regarding rationality, the court held that the question to be answered is whether the office was necessary when the Director-General decided to close it¹⁰³ and this required a factual enquiry blended with a measure of judgment.¹⁰⁴ On the issue of rationality with regard to procedure, the court quoted *Simelane* in which it was stated that failing to take into account relevant considerations while making a decision, can render the decision to be irrational where; those considerations were relevant; or there was a failure to consider material which is rationally linked to the purpose for which the power was conferred; or relevant facts are ignored and are of a kind that colour the entire process with irrationality and thus renders the final decision irrational.¹⁰⁵

The court then decided that the Director-General ignored relevant considerations, rendering his decision irrational. He also failed to properly consider whether the Cape Town Refugee Reception Office was necessary for the purposes of the Act as contemplated in s 8(1), and thus failed to comply with the empowering provision.¹⁰⁶

⁹⁸ *Scalabrini Centre, Cape Town v The Minister of Home Affairs* 2018 (4) SA 125 (SCA) para 9.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* para 10.

¹⁰¹ *Ibid* para 12.

¹⁰² *Ibid* para 30.

¹⁰³ *Ibid* para 31.

¹⁰⁴ *Ibid* para 36.

¹⁰⁵ *Ibid* para 51.

¹⁰⁶ *Ibid* para 52.

This case is different from the *e.tv* case in that the issue was not that there is failure to consult but rather that the views expressed in the consultation were not considered. Although, one of the main issues is how the decision was influenced by the procedure. If the majority judgment in *e.tv* were to be applied it would seem that the consultation process was properly construed in terms of the Act since the interested parties were able to give written reasons.

Thus, the process having met the demands of the provisions of section 8(1) of the Act then the test for rationality would have been met. The provision provides for the Director-General to determine the quantity of refugee reception offices. This determination is in consultation with the standing committee. Since the applicants were given the opportunity to make written representations, the rationality test would have been satisfied, at least in terms of *PMA*. Due to the expansion of the test, the court could not find that the decision was rational. Instead the court considered that relevant factors were ignored. This again is a replication of *PAJA* but more importantly, it seems that the ‘relevant factors’ were more relevant to the court than they were to the legislature. It is arguable that the court intruded on the executive terrain unconstitutionally by imposing its views on whether the reception office should remain opened or not. It is arguable that this is decision in the purview of the Director-general and not the court.

This case was also based on a policy, in the same way that *E.tv* was based on a policy. Yet, the findings are different. In *E.tv* the consultation was considered to be sufficient while in this case, the consultation process needed to be more extensive. This shows how even cases with material similarities can be decided differently depending how various tests are applied. This should not be the case. Henrico states an underpin of the rule of law is certainty.¹⁰⁷ There needs to be some level of certainty. It is clear that the court proffered its own vision and perhaps even the spirit of the Constitution, but the principle of separation of powers seems to be circumvented.

From the reading of the above cases, it is clear that the Constitutional Court caused confusion in relation to the content and extent of rationality under the principle of the Rule of Law. The Court attempted to clarify this in *Law Society of South Africa and Others v President of the Republic of South Africa and Others*¹⁰⁸ The Court held that it may seem that the proposition in *Masetlha* contradicted with the principle of procedural irrationality laid down in *Albutt* and *Simelane* however, this was not the case. The court seemed to have limited

¹⁰⁷ Henrico op cit note 75 at 293.

¹⁰⁸ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) (2018) ZACC 51 (11 December 2018).

procedural fairness to providing a party who is likely to be disadvantaged by the outcome of a decision with an opportunity to ‘be properly represented and fairly heard’ prior to an adverse decision being rendered.

The Court stated that this is not the same as procedural irrationality, in that procedural irrationality is more concerned with testing and ensuring that there is rational connection between the exercise of power regarding a) the process and the decision and b) the purpose sought to be achieved through exercise of that power. Ultimately, the relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power.¹⁰⁹

This is rather confusing in that the manner in which ‘procedural rationality’ is applied is in content identical to what the standards of procedural fairness demand. The only difference is the circumstances in which procedural fairness is applied. In cases falling under PAJA it will almost always be applied in cases of legitimate expectation or where rights have been adversely affected. The current position seems identical to PAJA. If this position is maintained, what is the point of PAJA. It would seem that PAJA may well be obsolete since the courts have adopted such a wide approach for the test for rationality. This is heightened by the tendencies of the court to apply legality without first considering the applicability of PAJA.

d, The right to be given reasons

In *Judicial Service Commission and Another v Cape Bar Council*¹¹⁰ the constitutional validity of the proceedings of the Judicial Service Commission (JSC) were in question. This involved the interview of candidates for judicial appointments in the Western Cape High Court in Cape Town (the WCHC). Pursuant to this interview, the JSC filled only one vacancy of the three vacancies that were initially advertised. Accordingly, only one of the seven shortlisted candidates was recommended to be appointed. No other recommendations in respect of other six candidates were made. This left the other two positions vacant. The Cape Bar Council (CBC) requested reasons from the JSC for not recommending the other six candidates and thus leaving the other two posts vacant. The JSC furnished only one reason, which was that the other candidates did not receive the majority votes of its members.¹¹¹ Aggrieved by this, CBC

¹⁰⁹ Ibid para 64.

¹¹⁰ *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* 2013 (1) SA 170 (SCA) para 2.

¹¹¹ Ibid.

took the matter to the High Court in order to have the failure of the JSC to fill two judicial vacancies to be declared unconstitutional and invalid and directing it to reconsider afresh the applications of the shortlisted candidates who were not selected. One of the grounds in which CBC based its application was that the decision of the JSC not to fill the other two posts was irrational and thus unconstitutional.¹¹²

CBC contended that the reason furnished by the JSC with regard to its failure to fill the two vacant posts amounted to no reason at all which, in the circumstances, warranted the inference that the decision not to recommend any candidate to fill the two vacancies, was irrational and thus unlawful.¹¹³ It was the JSC contention that neither the Constitution nor any other law required it to provide reasons for its decisions. It further contended that it had already given reasons for not filling the two vacancies and that because of a secret ballot vote, it was not possible to provide detailed reasons. The court had to decide on these contentions. Having decided that the decision by the JSC was excluded as administrative action under s 1 of PAJA.

In responding to the aforementioned contentions, the court held that although there is no express constitutional or other legal enactment that obliges the JSC to give reasons for not recommending a candidate for judicial appointment, there is however an implicit obligation of the principle of legality that requires the JSC to act in a manner that is not irrational or arbitrary.¹¹⁴

The court held that this was the only way in which an affected party can determine whether a decision is rational or not. The court held further that it is difficult to see how decisions can be accounted for without reasons being provided. Regarding rationality, the court held:

‘As to rationality, I think it is rather cynical to say to an affected individual: you have a constitutional right to a rational decision but you are not entitled to know the reasons for that decision. How will the individual ever be able to rebut the defence by the decision-maker: ‘Trust me, I have good reasons, but I am not prepared to provide them’? Exemption from giving reasons will therefore almost invariably result in immunity from an irrationality challenge.’¹¹⁵

¹¹² Ibid para 3.

¹¹³ Ibid para 38.

¹¹⁴ Ibid para 43.

¹¹⁵ Ibid para 44.

In the premise, the court found that the failure by the JSC to furnish CBC with reasons was irrational. In this case the right to be given reasons seems to be treated as an aspect of the principle of rationality. However, the court held that the failure to give reasons will only be irrational in certain circumstances. By implication, the failure to give reasons as a means to achieve a certain purpose will be irrational only in certain cases. Moreover, the right to be given reasons was not applied as a standalone requirement of the legality, but rather as an aspect of rationality.

This judgment is in accord with Hoexter's observation that there needs to be a duty to give reasons in respect of non-administrative action.¹¹⁶ This only makes sense. The Executive and Legislature should not escape giving reasons, otherwise, against what would a litigant test whether the decision is rational, at least in the eyes of the litigant. As the court noted, JSC is an organ of state in terms of s 239(b) of the Constitution. It thus fulfils a public function and should align itself with the values of transparency and accountability. It is bound to fulfil its important public function in accordance with the 'values of transparency and accountability' as contemplated by s 195 of the Constitution¹¹⁷

Kohn notes that the rationality requirement under the principle of legality has expanded beyond what is required under the test of rationality under PAJA. Since, rationality under PAJA does not mandate the giving of reasons, this is a separate requirement.¹¹⁸ True as this may be, it is arguable that this expansion supersedes the confined test for rationality because the given reasons are what can be tested against the decision by the complainant when framing a review application. Although this case highlights an expansion, it does not have a negative implication on the application of the rationality test. Instead, it promotes accountability and openness as envisaged by the Constitution.

III.MANIPULATION OF RATIONALITY

In his paper, Bishop explores various cases in South Africa as well as in the United States of America in which rationality was susceptible to manipulation.¹¹⁹ The context of Bishop's paper is set in equality law and cases. However, the principles he explores find equal applicability in the administrative law context. While advocating for rationality review, Bishop identifies some

¹¹⁶ Hoexter op cit note 2 at 62.

¹¹⁷ Ibid 43.

¹¹⁸ Kohn op cit note 17 at 833.

¹¹⁹ M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' (2010) 25 *SAPL* 312.

of the shortcomings of the principle of rationality if not applied correctly. In his analysis, he notes that it may well be that ordinarily courts seem to have adjudicated commendably, however, there are some cases that demonstrate the judge's temptation to over-reach, even though they are usually able to resist.¹²⁰

Bishop identifies several aspects which may render rationality review ineffective or less efficient. This includes the consideration that a law or decision may have multiple purposes with different intents. It is thus artificial for the judiciary to assign a single intent when there are several factors which the decision-maker considered in order to reach the decision and fulfil their mandated purpose. When the matter is before the Court, it is the Judge who considers relevant information to determine what the actual purpose of the law is.¹²¹ I illustrated this in *Scalabrini Centre, Cape Town v The Minister of Home Affairs* above.

To illustrate the point, Bishop refers to *Weare v Ndebele NO*¹²² wherein a provincial law was challenged that regulated licenses to be granted to natural persons and partnership, to the exclusion of juristic entities. It was argued that the regulation was necessary since holding juristic persons responsible for the violation of regulations was more challenging than natural persons.¹²³ Bishop proffered six possible purposes, in which promoting general welfare and limiting licenses to natural persons and partnerships were at the core of his argument.

The issue that arises from the above scenario, together with the several possible purposes stated by Bishop is that the test is thus not objective and could find equally plausible application, depending on the identity of the presiding officer. It also allows for the decision-maker to pick and choose which purpose he believes he was furthering. Such application allows for irrational decisions to be made rational, merely because the purpose for which the decision was made is achieved or well argued in court. This is a high possibility at the instance of laws with multiple purposes.

Bishop further argues that the issue with 'promoting general welfare' is that it could be easily found that there is no connection between the law, the means and the purpose or that

¹²⁰ Ibid at 321.

¹²¹ Ibid at 324.

¹²² *Weare v Ndebele NO* 2009 (1) SA 600 (CC).

¹²³ Bishop op cit note 119 at 326. Bishop lists the purposes as;

- (a) To promote the general welfare;
- (b) To prevent economic exploitation;
- (c) To regulate gambling;
- (d) To make the regulation of gambling manageable and efficient;
- (e) To hold all who violate gambling regulations responsible; and
- (f) To limit licenses to natural persons and partnerships.

there definitely is a connection.¹²⁴ It is easy to conclude that any law promotes general welfare, the only way to safeguard against it is if the courts attempt to define what is meant by general welfare. In so doing, the other side of the argument would be that courts are defying the doctrine of separation of powers. The minority judgment in *E.tv* might as well be general welfare since it moves from the implicit terms of the Constitution and not from the enabling statute.

Manipulation may come from many angles. The courts could import their own purpose which is influenced by the particular judicial officer's bias or it could come from the decision-maker who attaches a purpose which is not clearly stated in the law. It could further be a disgruntled litigant who advocates that the law and the purpose as well as the means are so far removed from each other that it is less likely that the purpose which the decision-maker has put forward is the true purpose and not just an afterthought.

Bishop correctly writes:¹²⁵

‘Ultimately judges have the power to manipulate the outcome of the means-ends inquiry by choosing how abstract or specifically to state the purpose. Although we can recognize flaws in reasoning and suggest guidelines, the test leaves this to the discretion of the judges... courts can manipulate the outcome by choosing which purposes they recognise and how they phrase those purposes.’

Thus, the test for rationality can be manipulated depending on characterisation of the law. If there is a certain emphasis and perspective, that may determine the outcome.¹²⁶ As much as the test for rationality may be said to be neutral and objective, characterisation of the means, purpose and the law will determine the outcome, no matter how objective the test is.

Bishop proffers a construction for the test for rationality in a way that minimises the potential manipulation. He suggests that government must assert the purpose of the law and the court must accept the assertion, unless the complainant can show that the asserted purpose is stated too specifically or so abstractly that it automatically justifies the law. If so, the court should reformulate the asserted purpose at such a level that if the Court were presented with sufficient evidence, it could conclude that the purpose was not met.¹²⁷

Although the suggestions by Bishop relate to the invalidation of laws in the context of equality laws, they are equally applicable to decisions by the Executive or any other

¹²⁴ Ibid at 326.

¹²⁵ Ibid at 328 & 9.

¹²⁶ Ibid at 335.

¹²⁷ Ibid at 342.

functionary. It is arguable that the standard of the test is too low and it would seem that it is such because the judiciary fears encroaching on other functionaries, hence a mere display of purpose, no matter how far removed, may allow for decisions and actions to be considered rational. A case in point may be *E.tv* above. A further manipulation lies in litigants and practitioners bypassing PAJA and relying solely on rationality under the principle of legality.¹²⁸

Henrico argues that if the courts choose to entertain matters which ought to be brought under PAJA but are brought under the principle of legality then the courts are first not adhering to subsidiarity and second, it creates uncertainty.¹²⁹ He further states that a salient feature of the rule of law is the element of certainty. Underpinning this certainty is the significant role played by the judiciary as one of the arms of government.¹³⁰

IV. CONCLUSION

From the analysis provided above, it is clear that the test for rationality under legality has evolved from when it was stated in *PMA*. It has moved from the evaluation of means and end to the inclusion of procedural fairness. It further evolved to include procedural rationality. The content or extent of procedural rationality is not exactly clear, apart from the attempted definition given by the court in *LSSA*.

Masetlha and *ARMSA* remain the closest case to the test set out in *PMA*. These cases encourage the doctrine of separation of powers. *Albutt* and *Simelane* departed from the test laid in *PMA* and included procedural fairness. This may have circumvented the separation of powers safeguard. The case also demonstrated that the principle of subsidiarity is at stake.

E.tv formally introduced procedural rationality while still maintaining the doctrine of separation of powers. This is the case that brought about the title of this report. In my view, it is the best version of the rationality test since it respects the separation of powers while also applying the expanded version of the test. It further had regard of the principle of subsidiarity.

The test was further expanded to include reasons. This part of the expansion is supported because how else will litigants know whether a decision is impugnable or not. The possibility of manipulation of the test should cause the courts to be wary of readily applying rationality under legality in judicial reviews, especially when PAJA may be applicable. Murcott & Westhuizen correctly state that ‘It is eminently more appropriate to test exercises of public power that amount to administrative action with reference to a statute

¹²⁸ Henrico op cit note 75 at 291.

¹²⁹ Ibid.

¹³⁰ Ibid at 293.

enacted by the legislature (PAJA) than through judge- made law conceived with reference to the flexible principle of legality.¹³¹

The application of the subsidiarity theory encourages and asserts the separation of powers in the legislature responsible for enacting PAJA is given recognition and there seems to be less encroachment of the judiciary on the executive or legislative arms of government.¹³²

The possibility of manipulation should at the very least cause courts to have restraint and reverence for enabling statutes, as well as the different functionaries of the government. The rationality test has either developed or has become the court's discretion and applied as the judicial officer sees fit and not as laid out in *PMA*. Legal certainty in litigation is at stake because of this.

Therefore, rationality should not be the key that opens every door in terms of judicial review.

¹³¹ Ibid.

¹³² Murcott op cit note 65 at 67.

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