CASES / VONNISSE

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))**

1 Introduction

Apart from conferring a wide range of powers on the President, the Constitution also regulates the manner in which the President may exercise these powers. One of the ways in which the Constitution does this is by imposing an obligation on the President to exercise his or her powers in accordance with the principle of legality, which is an incident of the rule of law. A necessary consequence of this requirement is that a decision of the President may be reviewed and set aside on the grounds that it infringes the principle of legality.

From its relatively modest beginnings in *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council* (1999 (1) SA 374 (CC)) – where the Constitutional Court held that the exercise of public power is only legitimate when it is lawful (par 56) – the principle of legality has expanded in leaps and bounds over the past 21 years; today, it encompasses several other grounds of review, including lawfulness, rationality, undue delay and vagueness (see Hoexter "Administrative Justice in Kenya: Learning from South Africa's Mistakes" 2018 62(1) *Journal of African Law* 105 123).

Of all of these broad grounds of review, substantive rationality has received the most attention from the courts and today encompasses several other grounds of review itself, such as procedural fairness (*Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC)) (*Albutt*), procedural rationality (*Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC)) (*Democratic Alliance*), relevant and irrelevant considerations (*Democratic Alliance*), non-jurisdictional mistake of fact (*Pepkor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA)), and, on occasion, the giving of reasons (*Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA)).

Unfortunately, the development of the principle of legality has not been all plain sailing, and the rationality jurisprudence of the Constitutional Court has given rise to complex and difficult questions. This is particularly the case

when it comes to procedural fairness and procedural rationality. It is not entirely clear what the difference between these two requirements is and in what circumstances the one should be applied rather than the other. The court attempted to address some of these questions in *Law Society of South Africa v President of the Republic of South Africa* (2019 (3) SA 30 (CC)) (*Law Society*). The purpose of this note is to discuss this case critically.

2 The facts

In this case, the Law Society of South Africa (LSSA) applied for an order declaring that former President Jacob Zuma's decision – taken together with the other members of the Summit of the Heads of State of the Southern African Development Community (SADC) – to suspend the operation of the SADC Tribunal (Tribunal), as well as his decision to deprive the Tribunal of its existing jurisdiction to hear individual complaints, was unlawful and irrational and, therefore, unconstitutional.

Former President Zuma's decisions to suspend the Tribunal and deprive it of its existing jurisdiction to hear individual complaints arose out of the Tribunal's judgment in *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* ([2008] SADCT 2 (28 November 2008)). In this case, the applicant was dispossessed of his farm in terms of Amendment 17 of the Constitution of Zimbabwe (2005). Apart from vesting ownership of agricultural land required for resettlement and other purposes in the State, by operation of law, Amendment 17 also provided that no compensation would be paid for such land and that its acquisition could not be challenged in a court of law.

After he was dispossessed, the applicant and several other dispossessed landowners applied to the Tribunal for an order declaring that Zimbabwe had breached its obligations under the Treaty by enacting and implementing Article 17. The Tribunal granted the order. In arriving at this decision, it found that Article 17 not only denied the applicants access to the courts in Zimbabwe but also that it discriminated against them on the basis of race. It thus breached Article 4(c), which provides that SADC and its member states must act in accordance with the principles of "human rights, democracy and the rule of law", and Article 6(2), which provides that SADC and its member states shall not discriminate against any person on the grounds of, *inter alia*, race.

Despite the fact that Article 16(5) provides that decisions of the Tribunal are binding on member states, Zimbabwe refused to comply with the judgment. Zimbabwe's non-compliance was then referred to the Summit of the Heads of State for further action. Instead of living up to its responsibility to enforce the judgments of the Tribunal, the Summit turned on the Tribunal itself, first, by suspending its operations; and, secondly, by depriving it of its existing jurisdiction to hear individual cases. The first goal was achieved by simply refusing to reappoint or replace those members of the Tribunal whose terms of office had expired, and the second by drafting and adopting the 2014 Protocol to the SADC Treaty, which provided that the Tribunal's jurisdiction is limited to inter-state disputes.

Former President Zuma's decision to suspend the operation of the Tribunal and especially his decision to deprive it of its existing jurisdiction to

hear individual complaints was met with dismay by members of the legal fraternity in South Africa and, as pointed out above, the LSSA then applied for an order declaring that these decisions were unlawful and irrational and, therefore, unconstitutional. The President's decisions were unlawful, the LSSA argued, because they purported to amend the SADC Treaty without following the procedure set out in Article 36 of the Treaty for doing so. The President's decision was irrational because the process he followed to amend the SADC Treaty was not rationally related to the purpose for which the power to amend the SADC Treaty was given. The Constitutional Court agreed with the LSSA and set the President's decision aside.

3 The judgment

In arriving at its decision, the Constitutional Court dealt, first, with the argument that former President Zuma's decisions were unlawful and, secondly, that they were irrational. Each of these is discussed in turn.

3 1 Unlawfulness

Insofar as the question of unlawfulness was concerned, the Constitutional Court began by pointing out that although the Constitution confers vast powers on the President, these powers are constrained by the principle of legality, which is an incident of the rule of law (par 46). The principle of legality provides, *inter alia*, that the President "may exercise no power and perform no function beyond that conferred on [him or her] by law" (par 47). In other words, the President may exercise only those powers that have lawfully been conferred upon him or her and he or she must exercise them in the manner prescribed (par 48).

Given that the Protocol that operationalised the Tribunal forms an integral part of the Treaty itself, the Constitutional Court held that the requirement that the President must exercise his or her powers in the manner prescribed means that the President can lawfully amend the jurisdiction of the Tribunal only in accordance with the procedure set out for amending the Treaty. This procedure provided that the Treaty may be lawfully amended by a decision supported by three-quarters of all the member states (Article 35(1)). It may not be amended simply by means of a protocol, which requires the support of only 10 member states, as the Summit of the Heads of State purported to do (par 49).

Apart from providing that the President must exercise his or her powers in the prescribed manner, the Constitutional Court held further that the requirement of lawfulness also provides that the President must exercise those powers in good faith and must not misconstrue them (par 46). Given that the purpose of the Treaty is to protect and promote the principles of democracy, human rights and the rule of law, it followed that the President could not exercise the power to amend the Treaty in a manner that infringed these goals (par 51). Unfortunately, the President's decision to amend the Treaty in a manner that effectively suspended the Tribunal and stripped it of its existing jurisdiction to hear individual complaints did precisely that. It deprived the Tribunal of its most critical function – namely, resolving

individual disputes relating to human rights, democracy and the rule of law and thus undermined these principles (par 55).

In light of these points, the Constitutional Court went on to find that the President had acted unlawfully by

> "following an impermissible or irregular procedure. Worse still, not only did he not have the power to not appoint or renew the terms of Members of the Tribunal but also lacked the authority to suspend its operations. This illegality of his conduct also stems from purporting to exercise powers he does not have. And it cannot be overemphasised that his conduct was also unlawful in that he failed to act in good faith and in pursuit of the object and purpose of the Treaty we have bound ourselves to." (par 56)

3 2 Irrationality

Insofar as the issue of irrationality was concerned, the Constitutional Court began by confirming that besides imposing an obligation on the President to exercise only those powers that have lawfully been conferred on him or her, the principle of legality also imposes an obligation on the President to exercise those powers rationally. This requirement, however, applies not only to the decisions taken by the President but also to the process in terms of which such decisions are taken. In the case at hand, this meant that the decision to amend the Treaty as well as the process leading up to the amendment must be rationally related to the purpose for which the power to amend was exercised (par 51).

Although the principle of legality encompasses the requirement of procedural rationality, the Constitutional Court held that it was necessary to note that, in *Masetlha v President of the RSA* (2008 (1) SA 566 (CC)) (*Masetlha*), it was held that the principle does not encompass the requirement of procedural fairness. It was, therefore, essential to distinguish between these two requirements. Procedural fairness provides that a decision-maker must grant a person who is likely to be adversely affected by a decision a fair opportunity to present his or her views before any decision is made. Procedural rationality provides that there must be a rational relation not only between a decision and the purpose for which the power was given, but also between the process that was followed in making the decision and the purpose for which the power was given (par 63).

> "The proposition in *Masetlha* might be seen as being at variance with the principle of procedural irrationality laid down in both *Albutt* and *Democratic Alliance*. But it is not so. Procedural fairness has to do with 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. Not so with procedural irrationality. The latter is about testing whether, or ensuring that, there is 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." (par 64)

The critical issue in this case, therefore, was not whether former President Zuma gave anybody a fair hearing or not. Instead, the critical issue was whether the process followed by former President Zuma before he decided effectively to suspend the Tribunal and deprive it of its existing jurisdiction to hear individual complaints was rationally connected to the purpose for which

the power to amend the Treaty had been given to him – namely, to uphold the principles on which the Treaty was based (democracy, human rights and the rule of law), and to protect the Tribunal as one of the institutions created by the Treaty (par 65) and thus secure the best interests of the citizens of SADC (par 69).

The Constitutional Court held that it was not. In arriving at this decision, the court found that the process followed by former President Zuma would be rationally connected to the purpose for which the power to amend the Treaty had been given to him, only if he followed the procedure for amending the Treaty set out in Article 36(1), which requires a decision supported by three-quarters of all the Member States of SADC. Given that former President Zuma had not followed this procedure, his decision was irrational and thus unconstitutional (par 70).

> "It is necessary to reiterate that the legitimate purpose for prescribing an amendment process that requires the support of three-quarters of Member States is designed to render it very difficult to fatally amend provisions that relate to the very essence of the Treaty, like the protection of human rights, access to the Tribunal and the rule of law. We emphasise that the purpose for regulating the power to amend so tightly is to secure the best interests of SADC citizens. An amendment like the downgrading of the status of the Tribunal is therefore required to be overwhelmingly supported. The procedure for the amendment through the Protocol that was followed is not only unavailable to the Member States, but also frustrates the purpose for giving them the power to amend the Treaty. It requires a lesser majority support to pass than the amendment procedure prescribed by the Treaty." (par 69)

4 Comment

While there is no doubt that the Constitutional Court came to the correct conclusion, its judgment gives rise to several interesting issues.

4 1 Unlawfulness

As the summary set out above clearly indicates, the Constitutional Court based its decision on two critical grounds: first, that the President's decision was unlawful and, secondly, that it was irrational. Insofar as the first ground was concerned, the Constitutional Court found that the President's decision was unlawful, not because he lacked the authority to amend the jurisdiction of the SADC Tribunal, but rather because he did not do so in the manner prescribed by Article 35(1) of the Treaty.

This aspect of the requirement of lawfulness also forms a part of the common-law rules governing administrative action and has been codified in section 6(2)(*b*) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which provides that "a court or tribunal has the power to judicially review an administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with".

At common law, prescribed procedural requirements were referred to as procedural jurisdictional facts, and a distinction was drawn between mandatory procedural jurisdictional facts and discretionary procedural jurisdictional facts. This distinction was necessary because a failure to

comply strictly with mandatory procedural jurisdictional facts would usually result in invalidity, while a failure to comply strictly with discretionary procedural jurisdictional facts would not.

As Hoexter points out, mandatory procedures are usually denoted by the use of peremptory words in legislation such as "must" or "shall", while discretionary procedures are usually denoted by the use of a permissive word such as "may". Apart from peremptory words, she points out further that mandatory procedures are also denoted by "the use of negative words such as 'no person shall' and the presence of a sanction for non-compliance" (Hoexter *Administrative Law in South Africa* 2ed (2012) 292).

It is important to note, however, that the mere fact that a procedure is classified as mandatory does not mean that it must be strictly complied with. In some cases, sufficient compliance may be adequate. This is because the courts do not approach this issue in a legalistic manner. Instead, they ask whether the procedure followed by the administrator was sufficient to achieve the purpose of the provision in question. If it was, then the procedure of the administrator will be upheld as lawful (see Quinot, Corder, Maree, Murcott, Kidd, Webber, Bleazard and Budlender *Administrative Justice in South Africa: An Introduction* (2015) 137).

The vital role of the purpose of the statutory provision in determining whether an administrator has complied with a mandatory procedure was highlighted by the Constitutional Court in *Allpay Consolidated Investment Holdings* (*Pty*) *Ltd v Chief Executive Officer of the South African Social Security Agency* (2014 (1) SA 604 (CC)), where it held:

> "[A]ssessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between 'mandatory' or 'peremptory' provisions on the one hand and 'directory' ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although several factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being 'whether what the Applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'." (par 30)

Although the Constitutional Court did not classify the procedure for amending the SADC Treaty as mandatory or material, there is no doubt that it is. Apart from the fact that Article 35(1) of the Treaty uses the word "shall", the court has consistently held that the procedure for passing a Bill, including a Bill amending the Constitution or an Act, must be complied with strictly. This is because these manner-and-form procedures are designed to promote the fundamental democratic values such as deliberation, public participation, openness and transparency.

In *Executive Council of the Western Cape Legislature v President of the RSA* (1995 (4) SA 877 (CC) par 62), for example, Chaskalson P stated that the manner-and-form provisions of the interim Constitution were not merely directory. Instead, "they prescribed how laws were to be made and changed and were part of a scheme which guaranteed the participation of both houses in the exercise of the legislative authority vested in Parliament under

the Constitution, and also established the machinery for breaking deadlocks".

In *Doctors for Life International v Speaker of the National Assembly* (2006 (6) SA 416 (CC) par 208), the Constitutional Court held that "[i]t is trite that legislation must conform to the Constitution in terms both of its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid". See also *Tongoane v National Minister for Agriculture and Land Affairs* (2010 (6) SA 214 (CC) par 97–109).

This aspect of the judgment in *Law Society* thus confirms that the requirement of unlawfulness encompasses both a lack of authority and a failure to follow a mandatory and material procedure. It also highlights (once again) that the grounds of review under the principle of legality overlap in many respects with the grounds of review under PAJA (see Brand and Murcott "Administrative Law" 2013 *Annual Survey of South African Law* 61 62).

Apart from finding that the President's decision to amend the jurisdiction of the SADC Tribunal was unlawful because he failed to follow the mandatory procedure prescribed by Article 35(1) of the Treaty, the Constitutional Court also found that the President's decision was unlawful because he acted in bad faith and misconstrued his powers. His decision was not aimed at protecting the Tribunal and, thus, the Treaty principles it was established to uphold, but rather at paralysing it (*Law Society* par 45).

Both grounds of review were recognised by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union* (1999 (4) SA 147 (CC) par 148), when it held that not only is the exercise of public power constrained by the principle of legality but the President must also act in good faith and not misconstrue his or her powers. These requirements are aimed at ensuring that the President exercises the powers conferred upon him or her in the public interest, rather than in his or her own interest (see Hoexter *Administrative Law* 308).

Although these grounds of review have formed part of the principle of legality for a long time, this is the first case in which the Constitutional Court has found that the President acted in bad faith and misconstrued his powers. (In *Democratic Alliance*, the SCA also found that the President had misconstrued his powers, but on appeal, the Constitutional Court held that it was not necessary to decide this question.) Apart from its historical significance, this aspect of the judgment highlights another dismal aspect of former President Zuma's lamentable presidency and confirms the crucial role the Constitutional Court has played in ameliorating at least some of his constitutionally delinquent decisions.

4 2 Rationality

After the Constitutional Court came to the conclusion that the President's decision was unlawful, it was strictly speaking not necessary for the court to go on and also consider whether it was irrational. The finding that the President's decision was unlawful was sufficient to render it unconstitutional

and invalid. However, the fact that the court went on to consider the rationality requirement is to be welcomed.

This is because it allowed the court to address one of the more complex and challenging issues to which its legality jurisprudence has given rise – namely, whether the principle of legality encompasses the requirements of procedural fairness as a separate and self-standing ground of review and, if so, what the difference is between procedural fairness and procedural rationality.

Insofar as this issue is concerned, the Constitutional Court has adopted at least three different approaches. In *Masetlha,* a majority of the court held that legality does not encompass procedural fairness as a self-standing ground of review. In arriving at this decision, the majority held that it is inappropriate to subject executive action to the potentially onerous requirements of procedural fairness requirements for two reasons: first, executive action is expressly excluded from the purview of PAJA (par 76); and, secondly, procedural fairness is a "cardinal feature" of administrative action, not executive action (par 77).

In its subsequent judgment in *Albutt*, the Constitutional Court refined the strict approach it adopted in *Masetlha* and held that executive action might be subjected to the requirements of procedural fairness, and in particular the requirement to hear interested parties, when this was the only way in which the President could exercise the power that had been conferred upon him or her in a rational manner (par 72). It followed, therefore, that while the principle of legality did not encompass procedural fairness as a self-standing ground of review, it did encompass it as a part of rationality review in an appropriate case.

Finally, in *Minister of Defence and Military Veterans v Motau NO* (2014 (5) SA 69 (CC)), the Constitutional Court interpreted *Masetlha* very narrowly and held that it applied to the specific circumstances of that case – namely, the relationship between the President and the Head of the National Intelligence Agency, which was a matter of national security (par 81). Outside of these specific circumstances, the court stated in an *obiter dictum* that there was no reason for the requirements of procedural fairness not to apply to executive action as a self-standing ground of review (par 83).

At roughly the same time, the Constitutional Court also introduced the concept of procedural rationality when it held, in *Democratic Alliance*, that rationality applies not only to the decision itself but also to the process by which the decision is made. This is because rationality review "is an evaluation of the relationship between means and ends" and the means for achieving the purpose for which the power was conferred includes everything that is done to achieve the purpose:

> "Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred." (par 36)

Apart from introducing the concept of procedural rationality, the Constitutional Court also held that a failure to take into account relevant facts forms a part of the means to achieve the purpose for which the power

was conferred and that such a failure may colour the entire process with irrationality and thus render the final decision itself irrational. When it comes to deciding whether a failure to take into account relevant facts does colour the entire process with irrationality, a three-stage inquiry must be followed: first, have relevant factors been ignored?; secondly, if they are relevant, is the failure rationally related to the purpose for which the power was conferred?; and thirdly, if the failure is not rationally related to the purpose, does the failure colour the entire process with irrationality? (par 39).

After setting out these principles, the Constitutional Court applied them to the facts of the case. In this respect, it found that former President Zuma's decision to appoint Mr Menzi Simelane as the National Director of Public Prosecutions (NDPP) was procedurally irrational because he failed to take into account adverse findings made against Mr Simelane by the Ginwala Commission of Inquiry. These findings were relevant, the court held, because they suggested that Mr Simelane was not a fit and proper person to be appointed as the NDPP as required by section 9(1) of the National Prosecuting Authority Act 32 of 1998 and the President's failure to take them into account did colour the entire process with irrationality and thus rendered his final decision irrational.

As the summary set out above indicates, the Constitutional Court's jurisprudence is confusing and contradictory. In addition, it has introduced a new concept into South African constitutional law – namely, procedural rationality – but has failed to define this concept clearly or distinguish it from procedural fairness. In its judgment in *Law Society,* the court has attempted to address this last issue. In this respect, the following points may be extracted from its reasoning:

- First, procedural fairness and procedural rationality are separate aspects of the procedural dimension of the rationality requirement (par 64 and 65).
- Secondly, procedural fairness imposes an obligation on the President to afford a party the opportunity to make representations before the President takes a decision that may adversely affect that party (par 64 and 65).
- Thirdly, where an empowering provision expressly provides for a specific procedure, the President must follow that procedure before exercising the power in question. A decision to follow a different and especially less onerous procedure would not be rationally related to the purpose for which the power was granted (par 67–70).

While the Constitutional Court's attempt to distinguish between procedural fairness and procedural rationality is to be welcomed, the manner in which it did so gives rise to some concerns. One of these is the suggestion that procedural fairness and procedural rationality are separate aspects of the procedural dimension of rationality. Instead of seeing them as separate aspects, however, it appears, for two reasons, to be more correct to treat procedural fairness as one aspect of a broader requirement of procedural rationality.

First, this is the manner in which the Constitutional Court itself has described the relationship between procedural fairness and procedural

rationality in its earlier jurisprudence. Apart from relying on its judgment in *Albutt* as authority for the requirement of procedural rationality in *Democratic Alliance*, the court also described the duty to consult as an aspect of procedural rationality in *Electronic Media Network Ltd v eTV (Pty) Ltd* (2017 (9) BCLR 1108 (CC) par 66).

The same point was made more recently in *Democratic Alliance v Minister of International Relations and Cooperation* (2017 (3) SA 212 (GP) par 64–70) when the full bench held, *inter alia*, that the national executive's failure to consult with Parliament, as it was obliged to do, before delivering notice of South Africa's withdrawal from the Rome Statute of the International Criminal Court was procedurally irrational and thus invalid. In other words, the court held that the duty to consult is not separate from, but rather an aspect of, the requirement of procedural rationality.

Secondly, if procedural fairness and procedural rationality are separate aspects of the procedural dimension of rationality, then it appears that procedural rationality imposes only two obligations on the President: first, to take relevant factors into account (*Democratic Alliance*) and, secondly, to follow a material and mandatory procedure (*Law Society*). Given that these requirements are already encompassed by lawfulness, however, it seems that procedural rationality does not enjoy its own independent or separate content, or, at least that, thus far, the Constitutional Court has been unable to identify an independent and separate content for the requirement of procedural rationality. If this is correct, then it is difficult to understand what the purpose of procedural rationality is.

5 Conclusion

As pointed out in the introduction to this note, the decision to extend the requirement of rationality to include both procedural fairness and procedural rationality has given rise to complex and challenging questions. Although it was unnecessary to do so, the Constitutional Court sought to address some of these questions in *Law Society*. Unfortunately, it was not as successful as it could have been.

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