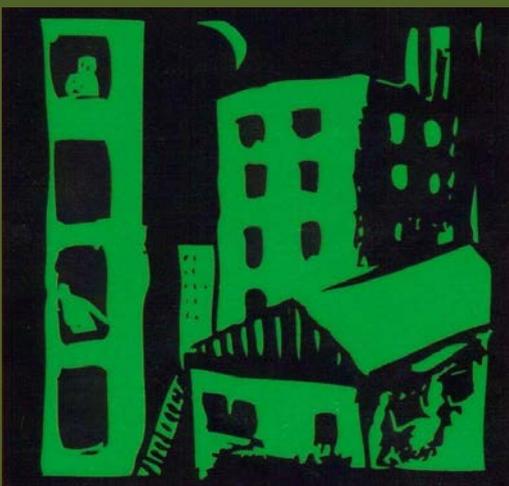


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Judicial review of administrative and executive decisions: Overreach, activism or pragmatism?

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1 INTRODUCTION

Section 33 of the South African Constitution¹ guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair. As a consequence of section 33(3) of the Constitution, the Promotion of Administrative Justice Act² (PAJA) was promulgated. In terms of the provisions of this Act all administrative action is subject to review. Executive action is however excluded from the definition of administrative action.

Since the Constitution proclaims the rule of law as one of the values upon which the Republic of South Africa is founded, and that all law or conduct inconsistent with the Constitution is invalid, executive decisions are subject to constitutional review in terms of the

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

² Act 3 of 2000.

rule of law and its principle of legality. Two parallel systems of review appear to exist in South Africa. The review standard as set by PAJA is generally recognised as the more exacting standard. For this reason, the executive is often at pains to convince a court that a particular decision is executive rather than administrative, in order to avoid it being subjected to a more vigorous judicial scrutiny. In cases involving the review of executive decisions, the executive has also accused the judiciary of judicial overreach and of violating the doctrine of separation of powers.

The doctrine of separation of powers is implicit in the Constitution in order to prevent the concentration of power in one branch of government while at the same time preventing the branches of government from usurping power from one another. This doctrine means that the judiciary must exercise due caution when reviewing a decision of the executive. While it must play an oversight role on the use of executive power it must not be seen to usurp the function of the executive. This article demonstrates that the South African constitutional dispensation does not require two systems of review. The review presented below supports this submission while also demonstrating judicial respect for the separation of powers doctrine.

The article begins with a brief discussion of the doctrine of separation of powers and judicial overreach. This is followed by a discussion of administrative law review and constitutional law review. The article then deals with the judicial approach to the review of executive decisions and concludes that there is no need for two parallel systems of review within the South African constitutional dispensation.

2 THE DOCTRINE OF SEPARATION OF POWERS AND JUDICIAL OVERREACH IN BRIEF

The former Chief Justice of the South African Constitutional Court, Justice Dikgang Moseneke, once described the South African Constitution as follows: “Ours is a never and never again Constitution...the one objective [of the Constitution] was to shut the door firmly on what Mr Mandela called ‘the oppression of one by another’”³

One way in which the Constitution sought to achieve the objective quoted above was to adopt a system wherein a separation of powers exists among the three key arms of government, that is, the executive, the legislature and the judiciary. Although this doctrine is not specifically mentioned in the Constitution, “there is no doubt that it is accepted as a dominant organising principle of State power”.⁴ The doctrine of separation of powers assumes that power corrupts and hence seeks to avoid the concentration of power in any one arm of government. This will necessitate a system of appropriate checks and balances in order to ensure that the power conferred on one

³ Moseneke D in a speech delivered at the University of the Western Cape, 2015. Available at https://wwwgroundup.org.za/article/separation-of-powers-have-courts-crossed-line_3152 (accessed 24 October 2017).

⁴ Moseneke (2015). See also *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) where the court held that the existence of the doctrine of separation of powers in South Africa may be derived from the wording and structure of the Constitution.

arm of government is not abused. Therefore, while there exists a clear separation of powers, each arm of government must play an oversight function on the exercise of power by the others. Mojapelo elaborated as follows in an explanation of the doctrine:

“The doctrine of separation of powers means ordinarily that if one of the three spheres of government is responsible for the enactment of rules of law, that body shall not also be charged with their executive or with judicial decision about them. The same will be said of the execution authority, it is not supposed to enact law or to administer justice and the judicial authority should not enact or execute laws.”⁵

Similarly, Moseneke provides the following practical explanation of the doctrine:

“Checks and balances ensure that all branches of government are interdependent, and that no single branch may act unilaterally. For example, the President is elected by Parliament and sworn in by the Chief Justice. In other words, the head of the executive is elected by the legislature and sworn in by the judiciary. The judiciary itself is appointed by the executive. And the legislature enacts laws to which the President must assent, and which are subsequently interpreted by the judiciary and whose orders must be enforced by the executive. The branches of government are not in competition with one another. Rather they are symbiotic. They are part of a beautiful mosaic which will work only if we bring all our public goodness to the fore.”⁶

Notwithstanding the doctrine of separation of powers and its system of checks and balances, the tension between the executive and the judiciary is no doubt real.⁷ Thulare submits that since the African National Congress-led government agreed to a number of constitutional compromises in the democratic negotiation process, it is a reality that it might seek to interfere and change the Constitution to achieve a compliant judiciary.⁸ This opinion is not unfounded. There have been numerous allegations that the judiciary has trod upon the terrain of the executive. The government believes that “the courts are being used in a ‘form of law-fare’ by institutions and political parties to resolve issues that fall within the political and policy spheres”.⁹ Accordingly the judiciary has been accused of overreaching its powers. Judicial overreach occurs “when a court acts beyond its jurisdiction and interferes in areas which fall within the executive’s and/or the legislature’s mandate”.¹⁰ This accusation against the judiciary is so prevalent in South Africa that certain components of the African National Congress government have

⁵ Mojapelo PM “The doctrine of separation of powers (a South African perspective)” Paper delivered at the Middle Temple South Africa Conference, September 2012.

⁶ Moseneke (2015).

⁷ Thulare MP *The limits of judicial review of executive action – A South African perspective*, (Unpublished LLM dissertation, University of Pretoria, 2016) 5.

⁸ Thulare (2016) at 5.

⁹ ANC “Strategy and tactics of the African National Congress” 5th National Policy Conference (8 March 2017), available at <http://www.anc.org.za/sites/default/files/National%20Policy%20Conference%202017%20Strategy%20and%20Tactics.pdf> (accessed 24 October 2017).

¹⁰ Suttner R “The question of judicial overreach” *Polity* (22 May 2017), available at http://www.polity.org.za/article/the_question_of_judicial_overreach-2017-05-22 (accessed 24 October 2017).

challenged Parliament to enact laws which will restrict the courts from interfering in the affairs of the legislature and the decisions of the President.¹¹

That said, it must be borne in mind that the Constitution guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair.¹² Hoexter submits that administrative action is generally concerned with the implementation of legislation which is ordinarily carried out by the public service, while executive action is concerned with the formulation of policy.¹³ Executive decisions may therefore be said to fall outside the purview of administrative law review.

However, the Constitution furthermore provides in its founding provisions that law or conduct inconsistent with the Constitution is invalid. This clearly does not exclude actions or decisions by the executive in the pursuit of exercising its executive functions. Section 34 of the Constitution also provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. It is clear therefore that the Constitution has envisaged that decisions of the executive are subject to constitutional review by the courts. The salient question to be answered is whether in exercising such review the courts have passed beyond the limits of their judicial powers. In answering this question, it will be necessary to examine the nature of administrative law review on the one hand and that of constitutional review on the other. In the final analysis it will be shown that the constitutional framework does not permit a distinction between the two. Courts are largely applying the same review criteria to both administrative and executive decisions without impermissibly reaching over into the constitutional terrain of the executive.

3 ADMINISTRATIVE LAW REVIEW AND CONSTITUTIONAL LAW REVIEW IN BRIEF

Before 1994, the general administrative law of South Africa was based on the common law system. The dictum of the Court in *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council*¹⁴ provides an excellent characterisation of such system. The Court held as follows:

“Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court...”¹⁵

¹¹ This challenge was brought by the Kwa-Zulu Natal branch of the ANC. See Hans B “Protest over judicial overreach” *The Mercury*, 16 May 2017, available at <https://www.pressreader.com/south-africa/the-mercury/20170517/28151363080463> (accessed 25 October 2017).

¹² Section 33 of the Constitution.

¹³ Hoexter *C Administrative law in South Africa*, 2nd ed (Cape Town: 2012, Juta & Co) 113.

¹⁴ 1903 TS 111.

¹⁵ At 115.

Common law administrative law, though, was carried out in the shadow of parliamentary supremacy.¹⁶ This means that administrative justice was vulnerable to legislative infringement by an unrepresentative Parliament. As Currie points out:

“though the courts could review the lawfulness of the actions of the administration, legislation...could determine what was lawful and what was not. Through the use of ouster clauses, legislation could prevent the courts from reviewing certain administrative actions at all.”¹⁷

This led to a long history of abuse of government power. Particularly in its latter years, the apartheid regime was characterised by “executive autocracy”.¹⁸

As alluded to above, today the right to administrative action that is lawful, reasonable and procedurally fair is enshrined in section 33 of the Constitution. Further, section 33(3) of the Constitution provides for the enactment of national legislation to give effect to this right. As a consequence thereof, the PAJA was enacted. In terms of section 1 of the PAJA administrative action means any decision taken, or any failure to take a decision, by

“(a) an organ of state, when –

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...”

The PAJA prescribes that administrative action must be, *inter alia*, procedurally fair¹⁹ and includes principles of natural justice, such as, the *audi alteram partem* principle,²⁰ and the right of any person whose rights have been materially and adversely affected by an administrative action to be provided with written reasons for the action.²¹ In terms of section 4 of the PAJA there may be circumstances wherein public participation procedures must be followed before an administrative action is taken. Section 6 of the PAJA provides for the judicial review of an administrative action. Some of the factors which a review court may take into account include: whether or not the administrator was authorised to so act by empowering legislation; whether there are elements of bias; whether a mandatory or material legislative procedure or condition was not complied with; whether the action was influenced by an error of law; and whether irrelevant factors were taken into account or relevant factors not considered. The full list of factors is enumerated in section 6 of the PAJA. Therefore, in order to pass judicial review an administrative action must be free of any of the prohibited factors listed in section 6. These factors point largely to procedural regularity which is the hallmark of review of

¹⁶ Currie I *The promotion of administrative justice Act in context* (Cape Town: Siber Ink, 2007) 10.

¹⁷ Currie (2007) 10.

¹⁸ Currie (2007) 11.

¹⁹ Section 3.

²⁰ Section 3(2)(ii).

²¹ Section 5.

administrative action. The limitation of such review to procedural regularity, it is submitted, is intended to preserve the doctrine of separation of powers.

As mentioned above executive decisions however fall outside the review provisions of the PAJA. Indeed, the definition of administrative action in the PAJA contains a list of excluded powers and functions. This list excludes executive powers and functions mentioned therein, the legislative functions of Parliament, a provincial legislature or a municipal council, as well as the powers and functions of the judiciary. It is submitted that these exclusions are seemingly in line with the doctrine of separation of powers. There is a school of thought however which argues that the provisions of the PAJA, and most especially its definition of administrative action, were formulated to perpetuate the narrow manner in which administrative law review was applied prior to 1994. During the apartheid era, Hoexter submits, all three branches of government used administrative justice very grudgingly for fear of overburdening the administration.²² Therefore, although it was virtually the only mechanism available for challenging the invasion of rights, it was largely ineffective, as the courts began to adopt an exaggerated deference to the legislature and the executive.²³

As Currie points out: "The Constitution, premised as it is on the doctrine of constitutional supremacy, attempts to reconcile two conflicting goals: to establish a state system with enough power to govern, and to find ways of constraining and regulating that power so that it is not abused."²⁴ Section 1 of the Constitution provides that the supremacy of the Constitution and the rule of law are among the principle values upon which the Republic of South Africa is founded. The rule of law, and the related principles of legality²⁵ and accountability²⁶ are the central constitutional doctrines governing the exercise of public power.²⁷ This is therefore the standard of constitutional review to which all executive decisions must be subjected.

Much attention has been afforded to the rule of law in recent times and it has been termed "the most important political development of the second millennium."²⁸ However, it is also a concept which has remained quite nebulous in its application. For instance, Tamanaha espouses that:

"...disagreement exists about what the rule of law means amongst casual users of the phrase, among government officials and among theorists. The danger of this rampant uncertainty is that rule of law

²² Hoexter (2012) 113.

²³ Hoexter (2012) 113.

²⁴ Currie (2007) 31.

²⁵ *President of the Republic of South Africa and Others v South African Rugby Football Union and others* 2000 1 SA 1 (CC) para 148 (SARFU).

²⁶ *Rail Commuters Action Group and Others v Transnet Ltd/t/a Metro Rail and Others* 2005 2 SA 359 (CC) para 73-78; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another* 2007 (1) SA 343 (CC) para 89.

²⁷ *Rail Commuters Action Group and Others v Transnet Ltd/t/a Metro Rail and Others* 2005 2 SA 359 (CC) para 73-78; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another* 2007 (1) SA 343 (CC) para 89.

²⁸ Johnson P "Laying down the law: Britain and America lead the way in establishing legal regimes based on universal principles" *Wall Street Journal* 10 March 1999, at 22.

might devolve into an empty phrase, so lacking in meaning that it can be proclaimed with impunity by malevolent governments”.²⁹

It is true that the rule of law is thought to encompass something less than what is envisaged in terms of a PAJA review. For instance, in *Minister of Defence and Military Veterans v Motau and others*³⁰ (*Motau*) Khampepe J stated at paragraph 27 that the question of whether the Minister’s decision constituted administrative or executive action was an important one, as it would point to the standard of review to be applied: “If it amounts to administrative action, it is subject to a higher level of scrutiny in terms of PAJA. If it is executive action, it is subject to the less exacting constraints imposed by the principle of legality.”

It is therefore a logical consequence that members of the executive would strive to convince a court that a particular decision is an executive decision rather than an administrative one, thereby avoiding a higher level of judicial scrutiny. However, in the discussion that follows it will be shown that the South African judiciary is alive to the warning offered by Tamanaha, and that under a dispensation which proclaims the Constitution as the supreme law, the need for two standards of review of public power is unnecessary.

In the case law discussion which follows it will be shown that the courts are inclined to develop a single standard of review of public power. The courts are giving content to the rule of law in such a manner that it reflects many of the review elements contained in the PAJA, without necessarily disturbing or violating the doctrine of separation of powers.

4 THE JUDICIAL APPROACH

Before delving into the case law discussion, it would perhaps be prudent to provide a brief explanation of the nature of executive powers. This is necessary as the context of this article relates to the standard of judicial review applicable to executive decisions. The predecessor to South Africa’s constitutional executive powers is the royal prerogative, which found its way into South Africa’s history during the period of the country’s colonisation by the British Crown during the 19th century.³¹ However, as Vally J held in *Democratic Alliance v President of the Republic of South Africa: In Re: Democratic Alliance v President of the Republic of South Africa and Others*³² (*Democratic Alliance*), the royal prerogative is “a relic of an age gone by”, and current executive powers are “not as unfettered as its predecessor”.

As discussed above, today executive powers must be understood and interpreted in the light of the provisions of the Constitution and the doctrine of separation of

²⁹ Tamanaha B Z *On the rule of law, history and politics, theory* (Cambridge: Cambridge University Press, 2004) 114.

³⁰ 2014 (5) SA 69 (CC)

³¹ Venter F “South Africa: Introductory Notes”, North-West University, 2008, available at http://www.icla.up.za/images/country_reports/south_africa_country_report.pdf (accessed 24 October 2017).

³² (9 May 2017) (24396/2017)[2017] ZAGPHC 148 para 18.

powers implicit therein. Executive powers usually entail high-policy or broad direction-giving powers.³³ The executive authority is essentially involved with the preparation, initiation and implementation of legislation, the development and implementation of national policies, and co-ordination of the functions of State departments.³⁴ The Constitutional Court in *Hugh Glenister v President of the Republic of South Africa and others*³⁵ held that “under our constitutional scheme it is the responsibility of the executive to develop and implement policy”. The Court also expressed with approval the sentiment that it is “not for the court to disturb political judgments, much less to substitute the opinions of experts”.³⁶ The function of the executive is therefore to co-ordinate the formulation of policies which may lead to the making of laws, and to oversee the implementation of laws and policies by government departments. In this way the executive is meant to promote effective and efficient governance.

We turn now to a review of the judicial approach. In the pre-democratic era, Hoexter opines, the desire to use administrative law stingily (or “parsimoniously”, as she refers to it) and formalistically in order to prevent victims of an oppressive system from enforcing rights in any substantive manner, led to the stifling of the development of judicial review.³⁷ It stands to reason, therefore, that now, courts, being free to apply democratic constitutional principles, will strive to give as much content as possible to evidently nebulous concepts, such as the rule of law.

The Constitutional Court became functional prior to the enactment of the PAJA. However, some of its key judgements have influenced the exclusions contained in the definition of “administrative action” in the PAJA alluded to above. In *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*³⁸ the Court held that budgetary resolutions made by a local authority were clearly legislative and not administrative action. In *Pharmaceutical Manufacturers Association of SA and another: In re Ex parte President of the Republic of South Africa and others*³⁹ (*Pharmaceutical Manufacturers*) the impugned decision was the presidential proclamation which brought into force a statute which regulated the sale and possession of medicines before certain essential schedules and regulations were ready. The Constitutional Court rejected the argument that the President’s decision was an administrative action. The Court held that the President’s decision required a “political judgment”, and thus lay closer to the legislative than to the administrative process.⁴⁰ In *SARFU*, the Court found that the President’s decision to appoint a commission of inquiry was executive rather than administrative. As can be seen, these judicial exclusions have now found expression in the definition of “administrative action” as contained in PAJA.

³³ *Motau* para 37.

³⁴ Venter (2008).

³⁵ 2011 (3) SA 347 (CC) para 67.

³⁶ *Glenister* para 67

³⁷ Hoexter C “The Principle of Legality in South African Administrative Law (2004) 4 *Maquarie Law Journal* 165 at 167.

³⁸ 1999 (1) SA 374 (CC).

³⁹ 2000 (2) SA 1 (CC).

⁴⁰ *Pharmaceutical Manufacturers* para 79.

However, it is submitted that these cases are noteworthy for something much more significant than their classification of functions. The actions in question, in each case were held to be executive, and the Court reviewed such actions against the requirements of the principle of legality. In so doing the Constitutional Court gave content to the principle of legality. For instance in *SARFU* the Court held that the fact that the President's action did not constitute administrative action, did not mean that there were no constraints upon it.⁴¹ The Court held that "the President's decision to appoint had to be recorded in writing and signed, and since these were implicit in the Constitution, the President had to act in good faith and not misconstrue his powers".⁴² A further development of the principle of legality was seen in *Pharmaceutical Manufacturers*.⁴³ In this case, the Court held that rationality was a "minimum threshold requirement applicable to the exercise of all public power".⁴⁴ Chaskalson P, explained as follows:

"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action".⁴⁵

Is it not true that many of these elements that the Court found applicable to the principle of legality are also found in the PAJA? For instance, does the requirement to act in good faith not reflect the elements of non-bias and absence of bad faith as required by the PAJA? The PAJA states that a court may review an administrative action if the decision-maker was not authorised by an empowering provision or acted arbitrarily or capriciously.⁴⁶ Can these elements not be present in a decision-maker who has misconstrued his powers? With regards to the element of rationality as espoused above by Chaskalson P (as he then was), this is clearly a ground for review in terms of the PAJA under section 6(2)(f)(ii). Hoexter perhaps answers all these questions in the affirmative, stating as follows:

"To say that the wielders of public power must act within their powers, in good faith and without misconstruing their powers is to summarise a considerable number of well-established administrative law grounds."⁴⁷

It appears that the real question before any court is not whether a particular decision is administrative in nature and hence subject to the PAJA,⁴⁸ but whether a clear abuse of public power has taken place or an irrational decision has been made. As Hoexter points out that "while the courts could not interfere with a decision simply because it

⁴¹ *SARFU* para 148.

⁴² *SARFU* para 148.

⁴³ At para 241.

⁴⁴ At para 90.

⁴⁵ At para 85.

⁴⁶ See ss 6(2)(a)(i) and 6(2)(e)(vi) of the PAJA.

⁴⁷ Hoexter (2004) 183

⁴⁸ As clearly the review whether in terms of the principle of legality or in terms of the PAJA, would entail a consideration of virtually identical factors.

disagreed with it, this applied only to rational decisions”.⁴⁹ The following dictum by Chaskalson P, in *Pharmaceutical Manufacturers* is instructive in this respect: “...it would be strange indeed if a court did not have the power to set aside a decision that is clearly irrational.”⁵⁰ It is submitted that such an approach will go a long way to curb the kind of “executive autocracy” as was seen in apartheid-era South Africa.

More recent case law also demonstrates the inclination of the courts, notwithstanding the classification of functions as executive in nature, to apply PAJA administrative law principles thereto, in the interests of promoting the principles of legality and accountability. This was seen in *Democratic Alliance*. This case concerned the actions of the President in making radical changes to the composition of the National Executive (Cabinet). The President had taken decisions to dismiss, with immediate effect, some Ministers and Deputy Ministers and replace them with others. The Court commented as follows:⁵¹

“The announcement caused a great deal of consternation for a significant proportion of the populace. It is no exaggeration to say that it was received with shock, alarm and dismay by many. One reason for this is that it came on the heels of an extensive public complaint that incessant malversation had embedded itself in our public life and that the country was mired in the quicksand of corruption. The Minister of Finance and the Deputy Minister of Finance perform important functions that, amongst others, involves the control of the public purse.”

The applicant in the case sought to have the decisions of the President with respect to the removal of the Minister and Deputy Minister of Finance reviewed and set aside. Being a review application, the applicant invoked Rule 53 of the Uniform Rules of Court, which also called for the decision-maker to furnish a record of the proceedings which led to the impugned decision, together with such reasons as he or she is by law required or desires to give or make. The President opposed the application, arguing that the decisions of the President constitute executive decisions in terms of section 91 of the Constitution and that accordingly Rule 53 is not applicable.⁵² Notwithstanding that the Court declared the decisions of the President to be executive in nature, it also pointed out that it is indeed “settled law that these decisions must comply with the doctrine of legality”.⁵³ Having held as such and finding that such decisions are subject to judicial review, the only question left for the court to decide was whether Rule 53 presented the correct procedure for the Applicant to approach the Court. It bears noting here that Rule 53 applies to all “proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions.”⁵⁴ It clearly did not include an executive decision and the President relied on this to contend that the provisions of Rule 53 do not apply to an application to review an executive decision.⁵⁵

⁴⁹ Hoexter (2004) 182

⁵⁰ *Pharmaceutical Manufacturers* (note 44 above) para 90.

⁵¹ At para 5.

⁵² *Democratic Alliance* para 16.

⁵³ *Democratic Alliance* para 19.

⁵⁴ *Democratic Alliance* para 6.

⁵⁵ *Democratic Alliance* para 21.

The Court in deciding this point adopted a purposive approach to the meaning of Rule 53 and held that Rule 53 did in fact apply to the decisions under review. The Court cited with approval the following dictum of Maya DP in *Helen Suzman Foundation v Judicial Service Commission*:

“By facilitating access to the record of the proceedings under review, the rule enables the courts to perform their inherent review function to scrutinise the exercise of public power for compliance with constitutional principles.”⁵⁶

The Court ultimately held:

“Relying on the purposive interpretation there is no logical reason not to utilise it in an application to review and set aside an executive decision. The judicial exercise undertaken by the court in such a review is no different from the one undertaken in review applications of an inferior court, a tribunal, a board or an officer performing judicial, quasi-judicial or administrative functions.”⁵⁷

The implication of this judgment is that the judiciary now appears to hold that the furnishing of reasons is applicable also to executive decisions. This is significant, as despite the judicial expansion of the principle of legality in judgments such as *SARFU*, *Fedsure* and *Pharmaceutical Manufacturers*, the Constitutional Court’s principle of legality was not made to require the giving of reasons by an administrator. The Court in *Democratic Alliance* held that the Applicant is entitled to an order compelling the President to furnish the reasons for the decisions. It is becoming increasingly clear that the formal classification of functions as either administrative or executive is not the central question in a judicial review proceeding, but rather what the requirements are which such decisions must meet in order to be declared lawful and valid. The dictum of the Court alluded to earlier which reflected the Court’s appreciation of the public’s complaint of graft and corruption embedded in South African public life, cannot be merely glanced over. It is clear that there is a judicial attempt to prevent abuse of executive powers. It is submitted that it is also not accurate to criticise this approach as judicial overreach which extends unjustifiably into the terrain of the executive. As Moseneke points out: “The Constitution itself commands judges to pronounce on the legal validity of the exercise of public power.”⁵⁸

A violation of the separation of powers doctrine would entail a usurpation of a function which belongs to another arm of government. It can hardly be said that requiring the President to provide written reasons for his decision is a usurpation of his function by the judiciary.

Motau is indicative of the respect that the judiciary has for the doctrine of separation of powers, while at the same time appreciative of their oversight role as a check and balance on executive power.

Khampepe J begins her judgment in *Motau* by pointing out that the judgment is about: “to what standard should a court of law hold that Minister when she exercises her powers of oversight in relation to that state-owned entity”⁵⁹ In this particular case the

⁵⁶ 2017 (1) SA 367 (SCA) para 13.

⁵⁷ *Democratic Alliance* para 29.

⁵⁸ Moseneke (2015).

⁵⁹ *Motau* para 1.

Minister of Defence and Military Veterans had terminated the services of the Chairperson and Deputy Chairperson of the Armaments Corporation of South Africa (Armscor), which is the Department of Defence's armaments and technology procurement agency. Among the reasons for the terminations the Minister cited that the incumbents failed to act in the best interests of the Department and incurred alleged financial losses for the Department, which ran into tens of millions of rands, as a result of delayed procurement contracting processes.⁶⁰ The Minister contended that her actions constituted executive decisions as contemplated in section 85(2)(c) of the Constitution.⁶¹ She argued that the "power to appoint and dismiss members of the Board is conferred especially on her for the effective pursuit of government business".⁶²

The respondents on the other hand contended that the Minister's actions amounted to administrative action since she was implementing the Armscor Act.⁶³ The Constitutional Court in *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others*⁶⁴ had held that the failure to include the implementation of national legislation under section 85(2)(a) of the Constitution under the PAJA's list of excluded executive powers, was deliberate, as the Constitutional Court has held in other cases that the implementation of legislation by a senior member of the Executive ordinarily constitutes administrative action.⁶⁵ The Court in *Motau* in deciding whether the decisions in question were administrative or executive in nature, explained:

"It is also true that the distinction between executive and administrative action is often not easily made. The determination needs to be made on a case-by-case basis; there is no ready-made panacea or solve-all formula."⁶⁶

The Court went further to stress that:

"...it should be considered whether it is appropriate to subject the exercise of the power to the higher level of scrutiny under administrative law. It may be that this level of scrutiny is not appropriate given that the power bears on particularly sensitive subject matter or policy matters for which courts should show the Executive a greater degree of deference".⁶⁷

It is clear from the above dictum that judicial respect for the doctrine of separation of powers is intact and unimpeachable. In the final analysis the Court held that the Minister's decision was executive rather than administrative.⁶⁸ Having decided on the nature of the power, the Court went on to subject it to the principle of legality and scrutinised it for rationality and good cause. On these scores the Court found that the Minister had acted within her powers.⁶⁹

⁶⁰ *Motau* paras 10 & 14.

⁶¹ *Motau* para 26.

⁶² *Motau* para 26

⁶³ *Motau* para 26; Armscor Act 51 of 2003.

⁶⁴ 2006 (8) BCLR 872 (CC).

⁶⁵ *Permanent Secretary, Department of Education and Welfare, Eastern Cape and another v Ed-U-College (PE) (Section 21) Inc* 2001 BCLR 118 (CC) para 18; and *SARFU* para 142.

⁶⁶ *Motau* para 36.

⁶⁷ *Motau* para 43.

⁶⁸ *Motau* para 47.

⁶⁹ *Motau* para 84.

Notwithstanding this finding, and that the Court classified the power as being executive in nature, the Court did not hesitate to consider whether the Minister had acted in a procedurally fair manner in terminating the services of the respondents. As has been alluded to above, procedural fairness is a requirement of administrative law. As Hoexter rightly points out, the judicial jurisprudence prior to the enactment of PAJA did not develop the principle of legality to cover procedural fairness.⁷⁰ Therefore the Minister in *Motau*, relying on the Court's decision in *Masetlha v President of the Republic of South Africa and another*⁷¹ (*Masetlha*) contended that the requirement of procedural fairness was not applicable to the review of an executive action. The Court rejected this argument of the Minister, first, by holding that its decision in *Masetlha* did not apply to the circumstances of the case before it, but rather was limited to the specific context of that case⁷² and secondly, by reaffirming that "procedural fairness obligations may attach independently of a statutory obligation in virtue of the principle of legality".⁷³ The Court held that the Minister failed to follow due procedure in her terminations of the respondents' positions on the Board of Armscor, as required by the Companies Act 71 of 2008.⁷⁴

It is true, however, that the courts have not always been prepared to attribute procedural fairness obligations to review of an executive action. For instance, in *Masetlha* the court held that the constitutional constraints on the exercise of executive authority did not include procedural fairness as a requirement.⁷⁵ The Constitutional Court in *Association of Regional Magistrates of South Africa v President of the Republic of South Africa*⁷⁶ (*ARMSA*) held that the decision of the President to increase the annual salaries of public office bearers by only 5 percent constituted an executive action. The Court (at paragraph 59 of the judgment) held as follows:

"Procedural fairness is not a requirement for the exercise of executive powers and therefore executive action cannot be challenged on the ground that the affected party was not given a hearing unless a hearing is specifically required by the enabling statute."

However, the Constitutional Court clearly adopted the opposite stance in *Motau* as discussed above. It has done so in other cases as well. For instance, in *Albutt v Centre for the Study of Violence and Reconciliation and another*⁷⁷ the President announced in November 2007 that in order to complete the work of the Truth and Reconciliation Commission, he intended to create a special dispensation in terms of which certain prisoners could apply for a Presidential pardon in terms of section 84(2)(j) of the Constitution.⁷⁸ The respondents (a coalition of non-governmental organisations) made

⁷⁰ Hoexter (2012) 113.

⁷¹ 2008 (1) BCLR 1 (CC).

⁷² *Motau* para 81.

⁷³ *Motau* para 82. This was affirmed by the Constitutional Court in *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 (5) BCLR 391 (CC).

⁷⁴ *Motau* para 84.

⁷⁵ *Masetlha* para 78.

⁷⁶ 2013 (7) BCLR 762 (CC).

⁷⁷ 2010 (3) SA 293 (CC).

⁷⁸ These prisoners were to be those convicted of a politically motivated offence committed before 16 June 1999 and who has chosen not to participate in the TRC proceedings for whatever reason.

numerous requests to the President for the victims of the offences in respect of which pardons were sought to participate in the special dispensation. The President declined these requests. The respondents had approached the High Court arguing that the President's conduct amounted to administrative action and hence was subject to procedural fairness in terms of section 3(2) of the PAJA. The High Court agreed with this argument and so did the Constitutional Court. Unlike the High Court, however, the Constitutional Court held it unnecessary to determine whether the President's decision was an administrative or an executive one. Rather than engage in a formalistic classification of functions in order to assess whether the provisions of the PAJA became applicable, it is submitted that the Constitutional Court chose to adopt a broader approach and delve into an enquiry which related to rationality of the decision in question. In the final analysis the Court held that every exercise of public power, including the President's decision to grant a pardon, has to be both lawful and rational. In this particular case the Court held that in order for the decision to be rational, it had to be determined whether the means adopted by the President to achieve the aims of the amnesty process (which were cited as being nation building and national reconciliation) were rational. The Court was of the view that the victims' participation in the decision process was crucial. Failure to allow such participation in the process, which relates to procedural fairness, therefore amounted to an irrational decision. It is therefore submitted that in this case the Constitutional Court held that procedural fairness was crucial in determining the rationality of an executive decision.

A similar approach was followed by the Constitutional Court in *Democratic Alliance v President of the Republic of South Africa*.⁷⁹ This case concerned the decision of the President to appoint Mr Menzi Simelane as the National Director of Public Prosecutions after the Ginwala Commission of Enquiry had severely criticised Mr Simelane and after the Public Service Commission had recommended that disciplinary steps be taken against Mr Simelane. Once again the Constitutional Court deemed it unnecessary to determine whether the President's decision amounted to administrative action or executive action. And once again the Court deemed it necessary to determine whether not only the decision but the process of arriving at the decision were rational, in order to meet the test for rationality. It is clear therefore that procedural fairness is applicable to executive decisions as it would be applicable to administrative decisions.⁸⁰ It is further submitted that, in fact, the non-application of procedural regularity to executive decisions would make no sense at all, since the judicial focus on procedure rather than substance in terms of the PAJA is meant to preserve the doctrine of separation of powers. It is logical to conclude therefore that procedural fairness may rightfully be applied to the review of executive decisions as well, without violating the doctrine of separation of powers in all cases.

However, seeing the divergent positions taken by the Constitutional Court on the question of the applicability of procedural fairness to executive decisions, it would not

⁷⁹ 2013 (1) SA 248 (CC).

⁸⁰ It is worth noting that the approach followed in the *Albutt* case was also followed by the Supreme Court of Appeal in *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA).

be unfair if any commentator were to conclude that this creates judicial uncertainty. It is submitted, however, that such conclusion would not be reached if one were to look at each judgment on a case by case basis. It is submitted that in not applying procedural fairness in *ARMSA* and *Masetlha* the court was not setting a precedent as to whether or not this element is applicable in general to all executive decisions, but was rather adopted in order to afford appropriate judicial deference to the executive. This submission is supported by Kruger, who argues that the decision not to apply procedural fairness was driven by the specific context of the case, which was the need to protect national security, which cannot be achieved if the President's relationship of trust with the head of the National Intelligence Agency has broken down irreparably.⁸¹ Similarly in *ARMSA* it is submitted that the context of the case was the basis for not applying the element of procedural fairness. The remuneration of judicial officers is an important element of the independence of the judiciary. Moseneke has pointed out that "not only has the Court affirmed the doctrine [of separation of powers] in making rulings that affect the executive and legislature, it has also stepped aside where the Constitution so requires".⁸² Perhaps, this being a case which involved the remuneration of the judges themselves the judgment reflects an element of deference on the part of the judiciary.

The facts in *Albutt* and *Democratic Alliance*, however, it may be submitted, concern the rights of people who might not, but for the development of the principle of legality to include procedural fairness, be able to assert and enjoy their rights. Victims of the pardoned prisoners may not have other effective avenues open to them, to participate in a process which cannot be said to achieve its objectives without their participation. Similarly, in *Democratic Alliance* while the appointment of the NDPP by the President is an executive decision, the implication of appointing a seemingly unfit person to such office would impact on the rights of citizens to enjoy an independent and impartial prosecuting authority. The reference to context as the central determiner as to whether or not a particular element of administrative law review may apply to an executive decision, is clear in the reasoning of the Court itself. This is explained above in the Court's rejection of the Minister's argument in *Motau*. In this way the judicial approach seems to move away from the "parsimonious" approach to administrative law that was prevalent in pre-democratic South Africa, as alluded to by Hoexter.⁸³

It is submitted therefore, that the requirements for the principle of legality, which is the accepted standard of review for executive powers, summarises an even greater number of the well-established administrative law grounds. In this regard it is submitted that the Constitutional Court has answered its initial question in *Motau* regarding the standard to which a court should hold a Minister when she exercises her powers of oversight. Seemingly this standard is arriving much closer to the standard applicable in a review of an administrative action.

⁸¹ Kruger R "The South African Constitutional Court and the rule of law: The *Masetlha* judgment a cause for concern" (2010) 13 *Potchefstroom Electronic Law Journal* 468 at 485.

⁸² Moseneke (2015).

⁸³ Hoexter (2004) 167.

In this regard it is submitted that perhaps executive decision-makers, mindful of the higher level of scrutiny to which their decisions may be subject, may be more inclined to exercise such powers with a greater degree of circumspection and adherence to the rule of law. The remedy imposed by the Constitutional Court in *Motau* once again demonstrates that the courts are mindful and respectful of the doctrine of separation of powers, despite their vigorous scrutiny of executive powers. The Court stressed:

“So the setting aside of the Minister’s decision and the reinstatement of the aggrieved parties or an award of compensation would usually flow from a finding that a dismissal was procedurally defective and did not comply with the relevant legislative prescripts. But the very exceptional circumstances of this case mean that it would not be just and equitable for this Court to award such remedies here.”⁸⁴

It is submitted that the stance adopted by the judiciary with respect to the review of executive powers is necessary to ensure more accountable and responsible exercise of executive powers. It is also submitted that it is becoming increasingly evident that under the South African constitutional dispensation, two standards of judicial review are perhaps no longer necessary.

The well-known saga of South Africa’s attempt to enter into a nuclear arms deal contract with Russia for the alleged procurement of 9.6 gigawatts of nuclear power, is perhaps evidence of “executive autocracy” reminiscent of that which existed in apartheid South Africa. The details of this deal were ventilated in the Western Cape Division of the High Court in *Earthlife Africa-Johannesburg and another v The Minister of Energy and others*⁸⁵ (*Earthlife*).

In *Earthlife* the applicants sought, amongst others, the review and setting aside of two determinations made by the Minister of Energy in terms of section 34 of the Electricity Regulation Act, 4 of 2006 (section 34 determinations). The section 34 determinations related to the requirement for, and procurement of, 9 600 megawatts of electricity from nuclear energy.⁸⁶ Subsequently the President approved the entering into of an agreement between South Africa and the Government of the Russian Federation in relation to a strategic nuclear partnership and to this extent authorised the Minister to sign such agreement, which the Minister did on 21 September 2014. The applicant also sought to have the decision of the President and the signing of the agreement by the Minister reviewed and set aside. It was the applicants’ case that the section 34 determinations amounted to administrative action but breached the requirements for such action to be lawful, reasonable and procedurally fair. In determining this issue, the Court referred with approval to the caution offered by Woolman and Bishop⁸⁷ as follows: “*Woolman* cautions against the over extension of executive policy decisions so as to exclude a large range of actions from the application

⁸⁴ Para 86.

⁸⁵ (19529/2015) [2017] ZAWCHC 50 (26 April 2017).

⁸⁶ *Earthlife* para 21.

⁸⁷ Woolman S & Bishop M *Constitutional law of South Africa* 2 ed vol 4 [original service: 06-08] 63-32.

of the right to just administrative action.”⁸⁸ Referring to Woolman and Bishop the Court went on further to state:

“The authors contend that it is important to distinguish between policy in the narrow sense and policy in the broad sense, of which only the latter should be excluded from the ambit of administrative action”.⁸⁹

Although the Court did not address directly whether the Minister’s action in making the section 34 determination was administrative in nature, it found that the concurrence of the National Energy Regulator of South Africa, with the determinations, amounted to administrative action. In this regard the Court held as follows:

“In the present matter the source of the power exercised by the Minister was sec 34(1) of ERA and the nature of the power was one which had far reaching consequences for the public as a whole and for specific role-players in the electricity generation field. The determination also had external binding legal effect in that, at the very least, it bound or authorised NERSA to grant generation licences for nuclear energy subject to an overall limit of 9 600MW. Specific affected parties in this case would be not only those engaged in the field of nuclear energy generation but other electricity generation providers such as oil, gas or renewable energy inasmuch as their potential to contribute to the need for extra capacity would be removed. These factors all point towards the sec 34 determination constituting administrative action.”⁹⁰

Although this case did not pronounce clearly whether the actions of the Minister and the President were administrative or executive in nature, the judicial rejection of the section 34 determinations meant that the resulting international agreement with Russia also had no standing. It is worth noting that this agreement, as pointed out by the Court contained such technical and precise details, that it at the very least “sets the parties well on their way to a binding, exclusive agreement in relation to the procurement of new reactor plants from that particular country”.⁹¹ This is significant taking into account the fact that a further specific ground upon which the section 34 determinations were challenged was the absence of any specific system for the procurement of nuclear new build capacity.⁹² In effect therefore, had the Court not invalidated the section 34 determinations, South Africa could very well be on its way to procuring 9.6 gigawatts of nuclear energy from the Russian Government, the cost of which was estimated to be in excess of one trillion rands⁹³, without a defined and approved procurement process as required by section 217 of the Constitution.⁹⁴ The tragedy averted by the Court is that this massive expenditure of public funds may have been executed under the guise of the executive performing its high-level executive policy functions. It is submitted that the *Earthlife* case illustrates the possible large-scale

⁸⁸ *Earthlife* para 31.

⁸⁹ *Earthlife* para 31.

⁹⁰ *Earthlife* para 32.

⁹¹ *Earthlife* para 110.

⁹² *Earthlife* para 16.

⁹³ *Earthlife* para 44.

⁹⁴ Section 217(1) of the Constitution states that “When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

abuse of executive powers which may ensue, in the absence of a vigilant and independent judiciary.

Perhaps the most elegant balancing of judicial vigilance, on the one hand, and respect for the doctrine of separation of powers, on the other, has recently been seen in the Constitutional Court judgment of *United Democratic Movement v Speaker of the National Assembly and others*⁹⁵ (*UDM*). In this case the Speaker of Parliament was requested by some Members of the Assembly to make a determination that voting in the motion of no confidence in the President be conducted by secret ballot.⁹⁶ The Speaker maintained that she was not empowered or permitted to do so either by the Constitution or the Rules of Parliament. The motion of no confidence sought was as a result of the President's removal from office of the then Minister of Finance and Deputy Minister of Finance. The motion of no confidence, as explained by the Court, is an "accountability-ensuring mechanism"⁹⁷ resorted to only when all "regular checks and balances seem to be ineffective or a serious accountability breach is thought to have occurred".⁹⁸ As explained by the court, the President's actions in removing the Minister and Deputy Minister concerned executive accountability⁹⁹ and no doubt had serious repercussions for the country and hence the people.

The motion of no confidence is therefore a judgment call of Parliament that elected the President and to which he accounts.¹⁰⁰ It is therefore a classic example of the checks and balances required by the doctrine of separation of powers, where Parliament is given the power to hold the executive to account. Of course this in turn meant that the court was obliged to tread carefully in considering the question of whether the Speaker of Parliament has the power to determine that a motion of no confidence be conducted by a secret ballot, lest it be accused of usurping the function of Parliament.

In the final analysis, the Court found that the Speaker is empowered to have a motion of no confidence in the President voted on by secret ballot.¹⁰¹ However, the Court respectfully refrained from determining when such a determination may be made, holding as follows:

"But, when a secret ballot would be appropriate, is an eventuality that has not been expressly provided for and which then falls on the Speaker to determine. That is her judgment call to make, having due regard to what would be the best procedure to ensure that Members exercise their oversight powers most effectively".¹⁰²

In this way the Court did not tread upon the terrain of the Speaker. That having been said however, the Court did not fail to note the abuses which might occur in instances

⁹⁵ [2017] ZACC 21. Date of judgment 22 June 2017.

⁹⁶ *UDM* para 49.

⁹⁷ *UDM* para 10.

⁹⁸ *UDM* para 10.

⁹⁹ *UDM* para 8.

¹⁰⁰ *UDM* para 11.

¹⁰¹ *United Democratic Movement* para 68.

¹⁰² *United Democratic Movement* para 68.

where, a motion of no confidence was not taken by secret ballot. The Court, looking at the particular circumstances of the matter before it, was wise to prescribe a set of factors which the Speaker ought to take into account when determining whether or not a motion of no confidence should be conducted by secret ballot. In summary the court held that the following factors would have to be taken into account:

“(a) whether the chosen voting procedure would allow Members of the National Assembly to vote according to their individual conscience and in furtherance of the best interest of the people, (b) whether the prevailing circumstances are either peaceful, or toxified and potentially hazardous, (c) the imperative of the Speaker’s impartiality must be consciously factored into the decision-making process, (d) the effectiveness of a motion of no confidence as an accountability and consequence-management tool must be enhanced by the chosen voting procedure, (e) the possibility of corruption or bribes in the event of a secret ballot must be considered, (f) the need for the value of transparency to find expression in the passing of the motion must be taken into account, (g) the decision must be rationally connected to the purpose of a motion of no confidence and should not be made arbitrarily.”¹⁰³

The elements of administrative law principles, particularly the need to ensure a rational connection between the purpose of the motion and the decision of the Speaker, are clear. It is becoming increasingly evident, from the above judicial formulation, that South African courts are concerned with preventing abuse of powers, while at the same time maintaining a clear respect for the functions of other spheres of State. The judgment in *UDM* has ensured that the decision of the Speaker, in respect of determining an appropriate procedure for a motion of no confidence in the President, is not an unfettered one. Rather it is one which may now be subject to review against clear and judicially defined factors, which factors bear a striking resemblance to the well-known administrative law principles. Once again it is submitted that the context of this particular case played a pivotal role in the decision arrived at by the Court. As explained above, the Court found that the President’s action in removing the Minister and Deputy Minister concerned executive accountability and had serious repercussions for the people of the country. Seeing that the motion of no confidence is meant to be an effective check and balance on executive power, the Constitutional Court has deftly and pragmatically ensured that abuse at the very highest level of the executive is further discouraged.

5 CONCLUSION

Prior to the enactment of the 1996 Constitution administrative justice was invoked in the shadow of Parliamentary sovereignty. In other words, even where courts attempted to adjudicate the lawfulness of a particular decision, the legislature could pass laws which prescribed what was lawful. Today, South Africa enjoys a democratic Constitution, which makes it the supreme law of the land, and which subjects every exercise of public power to the rule of law. This includes executive actions. However, in order to achieve the twin goals of establishing a State with enough power to govern

¹⁰³ Summary of judgment. Available at <http://www.constitutionalcourt.org.za/site/CCT89-17A-htm> (accessed on 23 June 2017).

effectively and a system of checks and balances to avoid abuse of power, the doctrine of separation of powers is implicit in the Constitution.

The executive has frequently relied on this doctrine to criticise the judiciary for judicial overreach in instances where executive decisions come under judicial review. The central stance of the executive has been that courts may not subject executive decisions to the standard of review contained in the PAJA, which is generally thought of as being a more exacting standard. However, it is submitted that the executive adopts such stance, not so much to entrench the doctrine of separation of powers, but as it is desirous to avoid a more exacting judicial scrutiny of its decisions.

It is clear from the judicial analysis that the formal classification of functions, as being either administrative or executive, is not the pivotal enquiry. The Rule of Law, and its principle of legality, has been judicially interpreted in such a manner that it largely reflects most of the administrative law elements of review found in the PAJA. The courts have also placed great emphasis on the particular context of each case. It has been demonstrated that judicial reviews of executive decisions are increasingly done in a manner which protects and preserves people's rights and prevents the abuse of executive powers, even if that may involve subjecting executive decisions to a more exacting review which mirrors an administrative review. This does not necessarily amount to judicial overreach and a violation of the doctrine of separation of powers. Rather it demonstrates that in a constitutional democracy *all* power should be subjected to certain minimum standards. As Hoexter submits: "primarily, the principle of legality is a convenient way of requiring all exercises of public power – including non-administrative action – to conform to certain accepted minimum standards".¹⁰⁴

A single system of administrative law does not translate into a violation of the doctrine of separation of powers. The courts have, on the contrary, shown an excellent appreciation of, and respect for, the doctrine. As the Constitutional Court advised in *De Lange v Smuts NO*:

'...over time our Courts will develop a distinctly South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest'.¹⁰⁵

It is evident that this judicial prediction offered in 1998, is now proving true. It is submitted that within the South African constitutional dispensation there ought to be one system of review which reflects the principles of the Constitution.

¹⁰⁴ Hoexter (2004) 184.

¹⁰⁵ 1998 (3) SA 785 (CC) para 60.