

THE SOUTH AFRICAN CONSTITUTIONAL COURT AND THE RULE OF LAW: THE *MASETHLA* JUDGMENT, A CAUSE FOR CONCERN?

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1 Introduction

The facts of *Masethla v President of the Republic of South Africa*¹ remind one in some way of a James Bond story – instructions from on high led to covert surveillance and phone tapping, followed by copious investigations and filing of reports with high-ranking individuals. With the necessary background music, the scene could be set for the hero to save the day.

Fortunately – or unfortunately – the judgments of the Constitutional Court in *Masethla* are less romantic than a Bond story, but they are no less dramatic. For constitutional lawyers, the judgments' specific pronouncements regarding the scope of the rule of law as a foundational constitutional concept are of great importance. The majority of the Court interpreted the rule of law narrowly, while the minority opted for a more inclusive interpretation incorporating procedural fairness as a constraint on the exercise of public power.

This case note considers the *Masethla* judgment against the background of literature on the rule of law and earlier judgments of the Constitutional Court which relied on this concept. In the first instance, the note provides an overview of the *Masethla* case.

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1 2008 1 BCLR 1 (CC).

2 *Masethla: An overview*

2.1 *Facts*

In December 2004, the President of the Republic of South Africa appointed Billy Lesedi Masethla the Director-General of the National Intelligence Agency (NIA) for a fixed three-year term.² His letter of appointment made specific reference to the *Intelligence Services Act*³ and the *Public Service Act*,⁴ but no contract to regulate the employment relationship of Masethla was ever concluded.⁵ Approximately twenty months after Masethla's appointment as head of the NIA, a surveillance scandal involving a prominent businessman was uncovered.⁶ Masethla was called to provide a formal account to the Minister of Intelligence Services (the Minister).⁷ In his report to the Minister, Masethla denied authorising the surveillance, placing the blame for the amateurish surveillance operation on the Deputy Director-General of the NIA.⁸ However, Masethla's explanation was not accepted and the Minister instructed the Inspector-General of Intelligence Services to investigate the matter.⁹ The Inspector-General's report portrayed Masethla as obstructing the investigation and he recommended disciplinary action against Masethla for failing to exercise his managerial and oversight duties properly.¹⁰ This report was forwarded to the President of South Africa and Masethla was called to a meeting with the President.¹¹ During the meeting, the parties discussed Masethla's role in attempting to dissuade the now-suspended Deputy Director-General from instituting legal proceedings to challenge his own suspension.¹² The President, Masethla, the Minister and the Inspector-General of Intelligence Services attended a follow-up meeting the next day. However, rather than proceeding with the meeting, the President asked

2 *Masethla v President of the Republic of South Africa* 2008 1 BCLR 1 (CC) para 7 – hereafter *Masethla*.

3 65 of 2002.

4 103 of 1994.

5 *Masethla* para 55.

6 *Masethla* para 7.

7 *Masethla* para 7.

8 *Masethla* para 10.

9 *Masethla* para 10.

10 *Masethla* para 11.

11 *Masethla* para 13.

12 *Masethla* para 13.

Masethla to listen to what the Minister had to say. The Minister read out a letter stating that Masethla had been suspended from his position as Director-General of the NIA. This letter was signed by the Minister and gave no indication that the decision to suspend Masethla was that of the President.¹³

Following Masethla's delivery of court papers to challenge the decision to suspend him as unlawful, a Presidential Minute to record the President's decision to suspend Masethla was issued.¹⁴ Months later, Masethla sought to challenge the validity of the President's decision to suspend him. The founding papers for this application "carried attacks on the integrity of the President [... and] accused the President of lying".¹⁵ In response to the delivery of these papers, the President unilaterally amended Masethla's term of office to end within days of this amendment.¹⁶ The President explained that the trust relationship between Masethla and him had broken down irretrievably and that Masethla could therefore not continue in his position as the head of the NIA.¹⁷ Arrangements were made for Masethla to receive the full financial benefits of his appointment,¹⁸ but he refused to accept the payment that was made to him, maintaining that his initial suspension and effective dismissal happened in contravention of the law.

The judgment of the Constitutional Court followed a further High Court application by Masethla to challenge the validity of the President's decision to amend his term of office unilaterally and to obtain a declaratory order to the effect that he was still the head of the NIA.¹⁹ He was unsuccessful in the High Court, hence his appeal to the Constitutional Court.

This summary of the facts clearly indicates that there were several issues at stake in this matter. Time and space do not permit a detailed consideration of all these issues and their relation to one another. It is however necessary to explain why the rule of

13 *Masethla* para 14.

14 *Masethla* para 15.

15 *Masethla* para 17.

16 *Masethla* para 17.

17 *Masethla* para 18.

18 *Masethla* paras 18–20.

19 *Masethla* para 21.

law was said to be at the root of this matter. The note discusses, first, the majority judgment penned by Mosenke DCJ, and then considers the dissent of Ngcobo J (as he was then known). The separate concurring judgment of Sachs J is not discussed.

2.2 **Majority judgment**

Section 209(2) of the Constitution provides that the President, as the head of the national executive, has to appoint the head of each of the intelligence services and that he must assume political responsibility for the control and direction of these services, or that he may designate such responsibility. The legislation that regulates the different services and their operation is rooted in this section.²⁰ According to Mosenke DCJ, the power to dismiss such an official is concomitant to the power to appoint such an official.²¹ When the President appoints or dismisses a head of one of the intelligence services, he exercises a public power that must be exercised "in a constitutionally valid manner".²² Masethla maintained that this required the President to adhere to the *audi alteram partem* principle by affording him a hearing before deciding to dismiss him. Mosenke DCJ²³ noted that precedent has recognised that "the power to dismiss must ordinarily be constrained by the requirement of procedural fairness, which incorporates the right to be heard ahead of an adverse decision". However, the power that the President exercises is an executive power and the relationship between the President and the head of the NIA is a "special legal relationship" that requires particular consideration.²⁴ This relationship is special since the head of the NIA plays a vital role in relation to the maintenance of national security.²⁵ The exercise of executive power should not be constrained by the requirement of procedural fairness that is, according to the judge, the hallmark requirement of administrative action.²⁶ Whilst maintaining that the exercise of the

20 Masethla para 35.

21 Masethla paras 39, 64 and 68.

22 Masethla para 63.

23 Masethla para 75.

24 Masethla paras 75 and 76.

25 Masethla para 32.

26 Masethla para 77: "It is clear that the Constitution and the legislative scheme give the President a special power to appoint and that it will be only reviewable on narrow grounds and constitutes executive action and not administrative action. The power to dismiss – being a corollary of the power to appoint – is similarly executive action that does not constitute administrative action, particularly in this special category of appointments. It would not be appropriate to constrain

power to dismiss the head of the NIA was not subject to the requirement of procedural fairness, Moseneke DCJ added that even if that were a requirement, Masethla had several opportunities to state his case at the various meetings he had with the Minister, the Inspector-General and the President.²⁷ The finding that procedural fairness did not constrain the exercise of this power did not leave Moseneke DCJ to conclude that the power was without constitutional limits. The exercise of this executive power was, in the view of the judge, constrained by the principle of legality and by the requirement of rationality.²⁸ It appears therefore that the judge was of the view that procedural fairness exists as a constraint separate from legality and rationality. This distinction will be discussed at a later stage in the note.

Legality, an implicit principle in our constitutional ordering, requires the President, according to the Moseneke DCJ, to act "in accordance with the law and in a manner consistent with the Constitution."²⁹ This means that the power conferred "must not be misconstrued".³⁰ It was established that the President had the power to dismiss the head of the NIA. In the view of the judge, the legality constraint was thus adhered to. The second constraint of rationality requires the decision to be rationally related to the purpose for which the power was given.³¹ National security interests require the President to be able to subjectively trust the head of the NIA.³² This trust relationship was of utmost importance and its irretrievable breakdown was a rational basis for the decision of dismissal.³³ The rationality requirement was thus also met.

executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security." See also para 75.

27 *Masethla* para 83.

28 *Masethla* para 78.

29 *Masethla* para 81.

30 *Masethla* para 81.

31 *Masethla* para 81.

32 *Masethla* para 86.

33 *Masethla* para 86.

Moseneke DCJ was satisfied that the rule of law had not been breached and the appeal failed. Six judges of the Constitutional Court concurred in the judgment of Moseneke DCJ.³⁴

2.3 *Minority judgment*

The minority judgment of Ngcobo J³⁵ stands in sharp contrast to the majority judgment, particularly on the issue of procedural fairness as a requirement of the rule of law. Ngcobo J agreed with Moseneke DCJ that the power to remove or dismiss the head of the NIA was incidental to the power to appoint this official.³⁶ His argument in respect of the constraints that limit this power was that one of these constraints on the exercise of public power is the foundational value of the rule of law.³⁷ The rule of law requires legality, that is, that public power be exercised in compliance with the law and within the boundaries set by the law.³⁸ The rule of law further requires rational and non-arbitrary exercise of power.³⁹ The non-arbitrariness requirement means that there must be a rational connection between the exercise of power and the purpose for which that power was given. Ngcobo J then stated: "[t]he crisp question for decision is whether the rule of law, in particular, the doctrine of legality, has a procedural component".⁴⁰ Ngcobo J held that non-arbitrariness in the rule of law "refers to a wider concept and deeper principle: fundamental fairness".⁴¹ He linked the rule of law as a founding value with the founding values of accountability, openness and responsibility. Adherence to these values is only possible when there is participation in decision-making.⁴²

34 The judges who concurred were Langa CJ, Navsa AJ, Nkabinde J, O'Regan J, Skweyiya J and Van der Westhuizen J.

35 Madala J concurred in this judgment.

36 *Masethla* para 167.

37 *Masethla* para 173.

38 *Masethla* para 173.

39 *Masethla* paras 173–176.

40 *Masethla* para 178.

41 *Masethla* para 179.

42 *Masethla* paras 181–182.

Ngcobo J held that the non-arbitrariness requirement of the rule of law:

has both a procedural and substantive component. Rationality deals with the substantive component, the requirement that the decision must be rationally related to the purpose for which the power was given and the existence of a lawful reason for the action taken. The procedural component is concerned with the manner in which the decision was taken. It imposes an obligation on the decision-maker to act fairly. To hold otherwise would result in executive decisions which have been arrived at by a procedure which was clearly unfair being immune for review.⁴³

In the view of the judge, fundamental fairness requires adherence to the *audi alteram partem* principle, since this minimises arbitrariness in the exercise of power.⁴⁴ What is fair, and more particularly, what is procedurally fair, will be determined in the context of a specific case.⁴⁵ In this particular case, the President would have been able to terminate the contract of the head of the NIA for a lawful reason and in accordance with fair procedures that would "at a bare minimum, entail informing the head of the department of the proposed action and the reasons for it and allowing the head of department to comment on these matters".⁴⁶ This was not done; the President was of the view that the trust relationship had broken down irretrievably and he acted unilaterally on that view without complying with the demands of fairness.⁴⁷ On this interpretation of the rule of law, procedural fairness is a firm requirement; in a case in which the rights of a person may potentially be adversely affected by a decision, that person has a right to make representations to the decision-maker before the decision is made. The extent of procedural fairness required will be determined by the particular case.

The minority and majority judgments of the *Masethla* case clearly demonstrate that disagreement exists on the scope and the requirements of the rule of law. South African judges are not unique in their disagreement about the rule of law. Legal

43 *Masethla* para 184.

44 *Masethla* paras 184 and 187.

45 *Masethla* para 190.

46 *Masethla* para 195.

47 *Masethla* para 202–204.

scholar, Tamanaha,⁴⁸ echoing an earlier somewhat harsher comment by Shklar,⁴⁹ states:

Disagreement exists about what the rule of law means among casual users of the phrase, among government officials, and among theorists. The danger of this rampant uncertainty is that the rule of law might devolve to an empty phrase, so lacking in meaning that it can be proclaimed with impunity by malevolent governments.

What are we to make of this uncertainty? Should the rule of law be interpreted narrowly to exclude procedural fairness, or should we construe this constitutional ideal and practical constraint mechanism more widely to require adherence to fundamental fairness in the exercise of all public power?

In order to make sense of the competing interpretations of the rule of law in the *Masetshla* judgment and to assess the impact of these interpretations on the overall understanding of this concept in South African constitutional law, it is necessary to consider the different theories of the rule of law and the earlier interpretation of the concept by the South African Constitutional Court.

3 Rule of law theories

Tamanaha⁵⁰ helpfully outlines rule of law theories on a continuum, with formal theories on the one side of the spectrum, and substantive theories on the other.



48 *Rule of Law* 114.

49 "Political theory and the rule of law": "It would not be very difficult to show that the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians." See also Raz 1977 *LQR* 195–196 and Allan Law, *Liberty and Justice* 20.

50 Rule of Law 91. The diagram is an adaptation of the one by Tamanaha *Rule of Law* 91. See also Craig 1997 *Public Law* 467. Radin 1989 *BULR* 781–783 refers to "instrumentalist" and "substantive" conceptions of the rule of law. These largely coincide with the "formal" and "substantive" versions discussed. Fallon 1997 *Columbia LR* 5 ff distinguishes between four "ideal types" of the rule of law, namely the historicist, formalist, legal process and substantive types. The latter three ideal types mirror the formal to substantive continuum. See also Mathews "The rule of law – a reassessment" 294.

Formal rule of law conceptions focus on the procedure or manner of the promulgation of laws and do not set any requirements for the content of laws.⁵¹ The most basic form (or "thinnest" form, according to Tamanaha) of the formal conception of the rule of law requires that *governmental action should be backed by law* or, stated differently, that government should only act through laws.⁵² This "thin" understanding of the rule of law allows any government, however authoritarian or abusive of human rights, to claim compliance with the rule of law so long as their authoritarian or abusive actions are sanctioned by law. Such an understanding of the rule of law contributes little, if anything, to the restraint of abuse of power, which is generally regarded as the purpose that the rule of law is meant to serve.⁵³

A more enhanced (or "thicker") formal version of the rule of law is that of *formal legality*. The rule of law in this guise requires laws to be public, general, clear, prospective in their application and relatively stable.⁵⁴ One of the foremost proponents of the rule of law as legality is Raz. Raz⁵⁵ views compliance with the rule of law as one of the many ideals or virtues that a legal system may possess, and he adds that this ideal may be realised to a greater or lesser extent within each jurisdiction. Raz⁵⁶ identifies eight principles of the rule of law as a formal concept that are very similar to those listed above. The rule of law requires open, clear, stable, general rules that must be applied without preference by independent courts. These principles have several practical legal implications. They require, in the first instance, exercise of public power within the framework of the law. In a case in which power is exercised *ultra vires*, the official exercising of that power is in breach of the rule of

51 Tamanaha *Rule of Law* 91–92; Craig 1997 *Public Law* 469.

52 Tamanaha *Rule of Law* 92.

53 Hutchinson and Monahan "Introduction" ix. See also Jowell "The rule of law today" 5, 19.

54 Raz 1977 *LQR* 198ff; Tamanaha *Rule of Law* 93; Craig 1997 *Public Law* 469; Fuller *The Morality of Law* 41.

55 1977 *LQR* 196, see also 204.

56 1977 *LQR* 198–201 lists the following principles: "(1) laws should be prospective, open and clear; (2) laws should be relatively stable; (3) the making of particular laws (legal orders) should be guided by open, clear, general rules; (4) the independence of the judiciary must be guaranteed; (5) the principles of natural justice must be observed; (6) courts should have review powers over the implementation of the principles of the rule of law in respect of administrative action and legislation; (7) courts should be easily accessible; and (9) the discretion of law enforcement agencies should not be allowed to pervert the law." Raz notes that principles (1) to (3) set standards and that principles (4) to (8) provide for the machinery to implement those standards.

law.⁵⁷ However, the rule of law as legality may mean more than merely acting within the scope of allocated power.

The rule of law, Raz⁵⁸ says, "is often rightly contrasted with arbitrary power". As such, it prevents retroactive or secret law-making by the legislature and the use of power for personal gain by the executive (for example nepotism), and it requires adherence to court procedures.⁵⁹ For Raz,⁶⁰ the non-arbitrariness aspect of the rule of law does not involve a consideration of the link between the exercise of power and the purpose meant to be served by the exercise of power. Such a consideration involves an interrogation of the subjective state of mind of the person exercising the power, which, according to Raz,⁶¹ is not what the rule of law as a formal concept requires. In those instances in which the rationality of the exercise of power is interrogated as explained, the rule of law is interpreted to set context-specific substantive standards.⁶² Such an interrogation requires a court to identify the purpose of the exercise of power and to determine whether such a purpose is constitutionally defensible. This requires a consideration of contextual and other factors, including, for example, the protection of specific human rights. For Raz, such a consideration falls *outside* the scope of the rule of law as a formal concept.

The rule of law as *formal legality* concerns itself with the manner, form and procedures of law, as indicated above. The principles of natural justice, which are generally understood to inform this view of the rule of law, require the application of law in "open and fair hearing(s)" and the absence of bias on the part of the decision-maker (the judge).⁶³ A person tried in a court of law has the right to state his or her case before judgment is delivered. This requirement of procedural fairness as an aspect of legality has not been restricted to court proceedings.⁶⁴ It is generally accepted that the rule of law requires compliance with this principle in relation to administrative decision-making. In a case in which the right to procedural fairness is

57 Jowell "The rule of law today" 19.

58 1977 *LQR* 202.

59 Raz 1977 *LQR* 203.

60 1977 *LQR* 203.

61 1977 *LQR* 203. See Tamanaha *Rule of Law* 94.

62 Tamanaha *Rule of Law* 94. See also Fallon 1997 *Columbia LR* 30–32.

63 Raz 1977 *LQR* 201.

64 Allan *Law, Liberty and Justice* 28–29.

extended to executive decision-making, it has been accepted that the facts of the particular case will determine the extent of the required procedural fairness.⁶⁵ When this is done, legality is extended to allow for context-specific considerations to determine the scope of the rule of law,⁶⁶ which means a move towards a more substantive interpretation of the rule of law.

In the main, the rule of law as *formal legality* focuses on the ability of law to guide behaviour of people in society.⁶⁷ As such, the rule of law is testament to valuing people as autonomous agents with the ability to make their own decisions.⁶⁸ Should the rationality requirement extend beyond the scope intended by Raz and should context-specific considerations be brought into the fold of the rule of law, one's interpretation of the rule of law is "thicker" and it moves in the direction of a substantive interpretation of this concept. Viewed as formal legality, as Raz and his supporters propose, the rule of law says nothing about the content of laws and does not take context-specific considerations into account.

The last formal conception of the rule of law, and "thicker" than those previously discussed, is the conception of the rule of law as requiring *legality and democracy*.⁶⁹ On this interpretation, the rule of law requires that people must consent to the laws that regulate their lives and that they must do so through the democratic process.⁷⁰ This view of the rule of law is limited by its focus on the manner in which law is passed and the legitimisation of law through the democratic process. Democracy does not ensure "good" or just laws.⁷¹

Substantive rule of law theories include aspects of the formal theories, such as legality, but place additional emphasis on various content requirements for law.⁷² The most basic (or "thinnest") substantive theory requires the content of laws to

65 Jowell "The rule of law today" 17.

66 Tamanaha *Rule of Law* 120.

67 Raz 1977 *LQR* 203; Tamanaha *Rule of Law* 94–96.

68 Raz 1977 *LQR* 204; Tamanaha *Rule of Law* 96; Craig 1997 *Public Law* 469.

69 Tamanaha *Rule of Law* 91, 99–100. For a criticism of this conceptualisation of the "rule of law as the butler of democracy", see Hutchinson and Monahan "Democracy and the Rule of Law" 97.

70 Tamanaha *Rule of Law* 100.

71 Tamanaha *Rule of Law* 100–101.

72 Tamanaha *Rule of Law* 102.

protect *individual rights*.⁷³ Further on the scale, and closer to the view that the rule of law requires the full realisation of the *socio-economic welfare* of people (the "thickest" substantive theory),⁷⁴ is the conceptualisation of the rule of law requiring the actualisation of justice through commitment to the right to *dignity*.⁷⁵ This view of the rule of law casts its net wide; compliance with the rule of law requires legality, democracy and laws that are just. Substantive theories of the rule of law that set content standards for laws in requiring the protection of certain rights do not account for the reality that rights are by their very nature contested and anti-democratic, since it requires unelected judges to interpret rights authoritatively.⁷⁶

Against this background of the spectrum of theories of the rule of law, the note considers earlier interpretations of the rule of law by the South African Constitutional Court. Thereafter, the note returns to the *Masetsha* judgment in relation to both the theories and earlier judgments.

4 The rule of law in South Africa

Prior to 1994, the rule of law in South Africa was in fact the rule by law.⁷⁷ Legality, as part of the rule of law, required government to act through law, that the actions of officials were *intra vires* and that arbitrary actions on the part of officials were prohibited.⁷⁸ Legality in the common law was narrowly construed as a constraint on administrative action and it did not reflect a broad normative commitment to the rule of law in the substantive sense.⁷⁹ The advent of constitutional democracy has changed all of this; constitutional supremacy replaced parliamentary sovereignty⁸⁰ and the supreme constitution introduced a justiciable bill of rights.⁸¹ In addition to this, Section 1(c) of the Constitution lists "supremacy of the constitution and the rule

73 Tamanaha *Rule of Law* 91, 102–103.

74 Tamanaha *Rule of Law* 91, 112–113.

75 Tamanaha *Rule of Law* 91, 110–112.

76 Tamanaha *Rule of Law* 103. See also Raz 1977 *LQR* 195–196.

77 Baxter *Administrative Law* 77.

78 Michelman "The rule of law, legality and supremacy of the Constitution" 11–1; Hoexter *Administrative Law* 116 and see also Baxter *Administrative Law* 301.

79 Baxter *Administrative Law* 78.

80 S 2 Constitution.

81 Chp 2 Constitution.

of law" among the founding values of the sovereign, democratic South African state.⁸²

What role do founding values – and specifically the rule of law – play in constitutional adjudication? In the *United Democratic Movement v President of the Republic of South Africa*,⁸³ the Court held in respect of Section 1:

[t]hese founding values have an important place in our Constitution. They inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid.⁸⁴

In a subsequent judgment, the Court confirmed the importance of the foundational values but added that the values "do not, however, give rise to discrete and enforceable rights in themselves".⁸⁵ This, according to the Court, was clear from the language used in Section 1 and the structure of the Constitution, which contains a Bill of Rights protecting specific rights.⁸⁶ Founding values, including the rule of law, are thus to inform the interpretation of all legal provisions.⁸⁷ While the use of values-based interpretation is preferred to the strict literalist interpretation that dominated in South Africa prior to 1994,⁸⁸ values-based interpretation is not *per se* uncontroversial or easy.⁸⁹ Values "serve as reasons for rules" and "rules (if they are any good) serve

82 S 1 Constitution reads as follows: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

83 1 2002 11 BCLR 1179 (CC) – hereafter *United Democratic Movement*.

84 *United Democratic Movement* para 19.

85 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 5 BCLR 445 (CC); 2005 (3) SA 280 (CC) para 21 – hereafter *NICRO*. See also Henderson 1998 *SALJ* 215–216 and Roederer "Founding provisions" Chp 13, 13-29.

86 *NICRO* para 21. This view of the structure of the Constitution demanding interpretation and application of the Bill of Rights is supported by Woolman. See Woolman 2007 *SALJ* 762–763. See also Roederer "Founding provisions" 13–30, who reads Michelman to interpret the CC's rule of law jurisprudence as espousing "a right to legality".

87 Roederer "Founding provisions" 13-3-13-8 is of the view that the Constitution also has extra-textual founding provisions, eg the values of *ubuntu* and transformation. A further constitutional directive for values-based interpretation can be found in S 39(2).

88 For criticism of this approach, see Dugard 1971 *SALJ* 181. Values-based interpretation or purposive interpretation is generally hailed by commentators as a positive feature of the new dispensation. See for example Devenish *The South African Constitution* 199–213.

89 See for example the remarks of Kentridge AJ in the first judgment of the Constitutional Court, *S v Zuma* 1995 4 BCLR 401 (CC); 1995 2 SA 642 (CC) paras 15–18. See also Kroeze 2001 *Stell LR* 265.

to implement values".⁹⁰ In elaborating on the framework of values that underpin the Constitution, the Constitutional Court has stated that the Constitution embodies an "objective, normative value system".⁹¹ This "objective, normative value system" includes, but is not limited to, the founding values that are set out in Section 1.⁹² How has the Court interpreted the rule of law within this framework?

A review of the Constitutional Court's rule of law jurisprudence reveals that the Court combines formal and substantive interpretations of the concept, while still retaining the emphasis on a formal interpretation.⁹³ In *Fedsure Life Assurance Ltd*,⁹⁴ the Constitutional Court held that the rule of law in the form of legality was implicit in the interim Constitution.⁹⁵ The text of that Constitution did not refer to the rule of law or legality explicitly.⁹⁶ Legality was interpreted to mean that "the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".⁹⁷ This interpretation of legality requiring officials to act within the four corners of the law was

90 Michelman "The rule of law, legality and supremacy of the Constitution" 11–35.

91 *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC); 2001 4 SA 938 (CC) para 54. Subsequent judgments have repeated this notion of the existence of such a value system: *Kaunda v President of the Republic of South Africa* 2004 10 BCLR 1009 (CC); 2005 4 SA 235 (CC) para 218 (hereafter *Kaunda*), per O'Regan; *Thebus v S* 2003 10 BCLR 1100 (CC); 2003 6 SA 505 (CC) paras 27–28, *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC) para 15; *Masethla* para 183, per Ngcobo J; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 12 BCLR 1197 (CC) para 375, per Ngcobo J.

92 Roederer "Founding provisions" 139–13–10 states as follows: "While no case has yet outlined the parameters of this concept, a number of cases have drawn from the 'grab-bag' of values found within this 'system'. ... What is clear is that the notion of an 'objective normative value system' functions, like the founding values, as a measuring standard for all governmental conduct; as a set of values that influence the interpretation of the Final Constitution, the Bill of Rights and other legislation; and as a set of values that influences both whether and how the common law is to be developed."

93 An indication of the Court's emphasis on a formal interpretation of the rule of law can be gleaned from Sachs J's remark in *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) para 35: "Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE [the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998] treats these values as interactive, complementary and mutually reinforcing." The judge seems to imply that "rule of law" has to do with formalities, and "the achievement of equality" with content.

94 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC); 1999 1 SA 374 (CC) – hereafter *Fedsure Life Assurance Ltd*.

95 *Fedsure Life Assurance Ltd* paras 58–59.

96 *Interim Constitution of the Republic of South Africa Act 200 of 1993*.

97 *Fedsure Life Assurance Ltd v para 58.*

confirmed by the Court in *Pharmaceutical Manufacturers Association*⁹⁸ and *Affordable Medicines Trust*.⁹⁹ A further facet of the rule of law as formal legality was highlighted in the judgment of *Dawood*,¹⁰⁰ in which the Court noted that the rule of law required laws to be stated in a clear and accessible manner.¹⁰¹ This was subsequently confirmed in the *Affordable Medicines Trust*¹⁰² and *Kruger*¹⁰³ judgments.

A more substantive interpretation of the rule of law is evident from the Court's interpretation of rationality and non-arbitrariness as aspects of this foundational value. The discussion of the theory above indicated that Raz insists on a narrow interpretation of this requirement, which only proscribes clear, baseless exercise of power for personal gain as arbitrary. The South African Constitutional Court has opted for a somewhat "thicker" interpretation of the rationality requirement. In *New National Party v Government of South Africa*,¹⁰⁴ the Court identified rationality as the first constraint in relation to Parliament's power to pass legislation.¹⁰⁵ This requires that there "must be a rational relationship between the scheme which it [Parliament] adopts and the achievement of a legitimate governmental purpose".¹⁰⁶ In this judgment, the Court identified the purpose to be served by the legislation as constitutionally defensible with reference to the voting rights protected in Chapter 2 of the Constitution. As such, the rationality consideration incorporated substantive standards set by a specific right. In *Pharmaceutical Manufacturers Association*, the Court explained the requirement of rationality and non-arbitrariness somewhat differently. Rationality, the minimum requirement for the exercise of any public

98 *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 3 BCLR 241 (CC); 2000 2 SA 674 (CC) paras 19–20, 44, 50 – hereafter *Pharmaceutical Manufacturers Association*.

99 *Affordable Medicines Trust v Minister of Health* 2005 6 BCLR 529 (CC); 2006 3 SA 247 (CC) paras 48–50 – hereafter *Affordable Medicines Trust*.

100 *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC); 2000 3 SA 936 (CC) – hereafter *Dawood*.

101 *Dawood* para 47.

102 *Affordable Medicines Trust* para 108.

103 *Kruger v President of the Republic of South Africa* 2009 1 SA 417 (CC) paras 64–67.

104 1999 5 BCLR 489 (CC); 1999 3 SA 191 (CC) – hereafter *New National Party*.

105 *New National Party* para 19.

106 *New National Party* para 19. This interpretation was followed in *United Democratic Movement* para 55, *Kaunda* para 78 (here the Court also mentioned exercise of power in bad faith). See also *Affordable Medicines Trust* paras 74–75.

power,¹⁰⁷ requires, according to the Court, an objectively assessed rational relationship between the exercise of power on the one hand, and the purpose for which the power was given on the other hand.¹⁰⁸ In the absence of such a rational relationship, the exercise of power is irrational, arbitrary and thus unlawful. This enquiry requires the Court to determine the purpose for which power was conferred without necessarily considering specific rights or the standards set by specific rights. This determination still requires the consideration of substantive standards in relation to a particular context, such as, for example, public health and the regulation of medical substances as in *Pharmaceutical Manufacturers Association*.¹⁰⁹ While this consideration does not require the Court to determine the standards imposed by specific rights, it nonetheless requires the Court to consider substantive standards relevant to the particular context.

In those instances in which the consideration of procedural fairness is a requirement of the rule of law, the Court has opted for a context-sensitive, thus more substantive, interpretation of the rule of law. This is evident from the judgment of the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*.¹¹⁰ The Court made it clear that the power of the President to appoint a commission of enquiry was constrained by, *inter alia*, legality and the fact that the President is to act in good faith and that he is not to misconstrue his powers.¹¹¹ In elaborating on the constitutional constraints, the Court held:

The requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. ... What procedural fairness requires depends on the circumstances of each particular case.¹¹²

A few of the Court's judgments also comment on the link between the rule of law and specific human rights, which is indicative of a more substantive interpretation of this

107 *Pharmaceutical Manufacturers Association* para 90.

108 *Pharmaceutical Manufacturers Association* para 85.

109 *Pharmaceutical Manufacturers Association* paras 60–88.

110 1999 10 BCLR 1059 (CC); 2000 1 SA 1 (CC) – hereafter SARFU.

111 SARFU para 148.

112 SARFU para 219.

value as discussed above. In *Chief Lesapo v North West Agricultural Bank*,¹¹³ Mokgoro J held that the principle against self-help is an aspect of the rule of law.¹¹⁴ Legislation that allows self-help does thus not contravene the right of access to court alone, but also violates "a deeper principle ... under[lying] our democratic order".¹¹⁵ In *Modderklip*,¹¹⁶ this link was confirmed,¹¹⁷ and perhaps even developed by Langa ACJ:

The obligation on the state [imposed by the rule of law and the right of access to court] goes further than the mere provision of the mechanisms and institutions [for dispute resolution] referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the state's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case.¹¹⁸

It is noteworthy that the Constitutional Court's substantive interpretation of the rule of law has focused on the right of access to court and the law as a dispute resolution mechanism.

This overview of the Court's interpretation of the rule of law demonstrates that the Court applies this founding value as a formal constraint in some instances and as setting content standards in others. At a minimum, the Court has viewed the rule of law as requiring the exercise of power to be *intra vires*. The Court's interpretation of the rule of law as setting substantive standards is multifaceted. This is evident from its determination that the rule of law requires rationality and non-arbitrariness and procedural fairness as determined by context, and by the direct connection it has identified between the rule of law and the right of access to court.

113 1999 12 BCLR 1420 (CC); 2000 1 SA 409 (CC) – hereafter *Chief Lesapo*.

114 *Chief Lesapo* paras 1, 11.

115 *Chief Lesapo* para 16. See also paras 17, 19. See also *Zondi v MEC for Traditional and Local Government Affairs* 2005 4 BCLR 347 (CC); 2005 3 SA 589 (CC) para 82.

116 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC) – hereafter *Modderklip*.

117 *Modderklip* para 39.

118 *Modderklip* para 43.

Where does *Masethla* fit in? Is the majority judgment in accordance with earlier pronouncements and is it defensible considering the context of the particular matter?

5 ***Masethla*: analysis**

Moseneke DCJ's interpretation of the rule of law is narrower (and more positivistic) than that of his colleague, Ngcobo J. The point of departure for both judges was that of legality in that the President could only exercise a power conferred upon him by law. Both judges held that the power to dismiss was incidental to the power to appoint. This formal interpretation of the rule of law is in accordance with the Court's earlier pronouncements on this concept. However, when it came to the consideration of further, more substantive constraints imposed by the rule of law, the judges parted ways.

Moseneke DCJ's interpretation of rationality as an aspect of the rule of law included both formal and substantive elements, combining these aspects in a way not dissimilar to previous interpretations by the Court. For Moseneke DCJ, the requirement of rationality meant that a rational connection must exist between the exercise of power and the purpose for which that power was given. But an important consideration for the judge was the nature of the power exercised; and herein is the difficulty with this judgment. Moseneke DCJ's judgment can be read to exclude procedural fairness in all respects of the exercise of all executive powers. It is true that Moseneke DCJ relied on the context of national security in coming to his conclusion, but in doing so, he repeatedly stated that the executive power of the President was constrained only by legality and rationality; constraints which in his view excluded the procedural fairness requirement. In the view of Moseneke DCJ, legality, rationality and procedural fairness are separate from one another as constraints on the exercise of power. This approach does not accord with the earlier pronouncements of the Court and could, if not read in context and with care, set a perilous precedent reducing the constraints on the exercise of executive power significantly and potentially eroding the supremacy of the Constitution in that respect.

Ngcobo J held that procedural fairness is a fundamental requirement of legality and thus the rule of law in respect of the exercise of all public power. The extent of procedural fairness required is determined on a case-by-case basis. The President failed to adhere to the requirements of procedural fairness in this instance and, consequently, his exercise of power fell short of the constitutional standard. This interpretation accords with the approach in SARFU and does not exempt the exercise of executive power by the President from the requirement of procedural fairness in all instances. Ngcobo J's interpretation allows for an interpretation of the rule of law in harmony with the other foundational values of accountability, openness and responsiveness and is, in my view, to be preferred to a limited interpretation of the rule of law that places the minimum of constraints on the exercise of executive power.

Before concluding, it is important to mention the context relating to national security that informed both judgments. National security concerns fall within the domain of the executive and it is generally accepted that the executive should be given a relatively free reign in its decisions relating to such concerns.¹¹⁹ However, this does not mean that national security issues are exempt from constitutional standards or judicial scrutiny for compliance with such standards.¹²⁰ The exercise of all public power is subject to constitutional constraints. The facts and context of a particular case may demand tailoring of those constraints. Should the facts of a case concern particular aspects of national security, the executive is to place adequate information before the court to enable it to determine the extent of the constraints that exist in relation to the exercise of power concerning national security issues.¹²¹

119 See, for example, the remark of Lord Parker of Waddington in *The Zamora* [1916] 2 AC 77 107: "Those who are responsible for the national security must be the sole judges of what the national security requires." See also *Council of Civil Service Unions v the United Kingdom* [1987] ECHR 34 and Jowell "The rule of law today" 17.

120 See Arden 2007 SALJ 57, 61 and 69, in which the author is at pains to demonstrate that constraints exist that limit the exercise of executive and legislative authority with regard to national security issues.

121 Arden 2007 SALJ 73–75. In cases in which a clash between national security interests and human rights arises, the author proposes that courts engage in a proportionality analysis by considering national security interests (supported by adequate information) on the one hand, and the rights of individuals on the other.

In *Masethla*'s case, both Moseneke DCJ and Ngcobo J considered national security interests generally without interrogating specific aspects of this notoriously complicated and complex concept.¹²² The facts of the matter demanded a broad consideration of the concept only, as it concerned the subjective trust relationship between the head of the NIA and the President rather than a particular aspect of national security.

6 Conclusion

The Constitutional Court has interpreted the rule of law as a foundational value to place important formal and substantive constraints on the exercise of all public power. The majority judgment of the Court in *Masethla* could be read to restrict the rule of law significantly. Future interpreters of this judgment should take adequate notice of the context within which the judgment was given so as not to reduce the rule of law to a minimal constraint on the exercise of executive power. The rule of law as a foundational value means more than that in the South African constitutional democracy.

122 On the complexity of the concept, see Forcese 2006 *Alberta LR* 963, 965–967.
487/508

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List of abbreviations

Alberta LR	Alberta Law Review
Columbia LR	Columbia Law Review
BULR	Boston University Law Review
LQR	Law Quarterly Review
NIA	National Intelligence Agency
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review

THE SOUTH AFRICAN CONSTITUTIONAL COURT AND THE RULE OF LAW: THE MASETHLA JUDGMENT, A CAUSE FOR CONCERN?

R Krüger*

Summary

The rule of law as a foundational constitutional value constrains the exercise of public power but the precise limits of the constraints it sets are not well defined. In *Masethla v President of the Republic of South Africa*,¹ the majority of the Constitutional Court opted for an interpretation of this value that frees the President from adherence to the demands of procedural fairness when exercising certain constitutional powers. This note will investigate the soundness of that interpretation against the background of theoretical expositions of the rule of law and earlier Constitutional Court judgments.

Keywords

Rule of law; founding values; executive power; procedural fairness; legality; rationality; non-arbitrariness; Masethla; pharmaceutical manufacturers.

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¹ 2008 1 BCLR 1 (CC).