The Risk of Taking Risky Decisions: *Democratic Alliance v President of the Republic of South Africa*

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I Introduction

In *Democratic Alliance v President of the Republic of South Africa ('Simelane'* or *'Democratic Alliance CC')*,[1] the Constitutional Court ('CC'), under the new stewardship of Chief Justice Mogoeng Mogoeng,[2] was asked to conclude that the President knowingly acted irrationally in making a major constitutional appointment. Yacoob ADCJ, writing for a unanimous Court, found that the decision to appoint Mr Menzi Simelane as National Director of Public Prosecutions (NDPP) was irrational and had to be set aside. This decision, made under a recently appointed head of the Court, assuages previously held concerns that a differently constituted CC carried the risk of being more deferential to the executive in the application of the principle of legality. The judgment formulates a test for establishing irrationality (part of the doctrine of legality), and comprehensively explains why and how the President and the executive erred so grievously in making this particular appointment. Beyond refining the doctrine of rationality, the judgment is likely to have a much broader impact. The judgment reaffirms and extends accepted constitutional constraints on the exercise of executive power.

The political practice of palming off controversial issues to commissions of enquiry, not acting on their findings, and then allowing the recommendations to sit idle in the belief that they have no consequence, will now have to be reappraised. The findings of the Ginwala Commission of Enquiry ('Ginwala Commission') were the centrepiece of the reasoning of both the Supreme Court of Appeal ('SCA') and the CC.[3] The government's disdain for the Ginwala Commission – because it was not a court of law and its deliberations were therefore of little significance – can be contrasted with the copious references made in both the

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[1] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24, 2013 (1) SA 248 (CC), 2012 (12) BCLR 1297 (CC)(*'Democratic Alliance CC'* or *'Simelane'*).

[2] The Chief Justice's appointment had attracted unprecedented criticism and concern, and this 'political' case was viewed by some as a test of his judicial independence.

[3] Some attention, though rather limited, was paid to the fact that the Department of Justice and Constitutional Development received qualified audits from the Auditor-General during Mr Simelane's tenure as director-general, a General Council of the Bar probe into his fitness as an advocate (occasioned by the findings of the Ginwala Commission) and criticism of the manner in which the Competition Commission went about its business during Mr Simelane's tenure.

SCA and CC judgments to the Commission's proceedings and to its findings. The Ginwala Commission, which was appointed by President Mbeki to determine the weighty matter of whether Mr Vusi Pikoli was suitable to hold the office of NDPP, directly called the integrity of Mr Simelane into question in its final report.[4] The Commission's views regarding Mr Simelane's capacity to discharge his duties ought to have been considered and interrogated by the President when considering whether or not to appoint Mr Simelane as NDPP. Finally, Chapter 9 Institutions – the SAHRC, the Public Protector and Auditor-General – that are empowered to investigate and to report on matters within their respective mandates may benefit from the seriousness which the SCA and CC afforded the Ginwala Commission's conclusions.[5]

The *Simelane* judgments buttress the conclusion that although the findings of Chapter 9 Institutions are not to be treated with the same deference as a court of law, they do have demonstrable consequences. (For example, findings by the Public Protector surrounding Nkandla misappropriations, by the Special Investigations Unit regarding systemic police corruption, and the Auditor-General with respect to systemic pathologies in municipal and provincial expropriation should be expected to form the factual predicate of formal court proceedings.) If these Institutions or Commissions issue reports with adverse findings with respect to state officials or against a particular government department, sufficient to draw a conclusion that they acted contrary to the Constitution or against specific statutory provisions, then these reports ought to become material to litigation on related subject matter and the more general capacity of an official or department to discharge other constitutional responsibilities and obligations. The learning of *Simelane* is that disdain, dismissal and disregard is no longer an option.

Those seeking Mr Simelane's appointment obviously calculated that the benefits, either political or otherwise, of having him in the position outweighed the disadvantages that would flow from a successful court challenge to his appointment. They miscalculated. In so doing, they assisted in the creation of precedent that clearly cabins the President's powers of appointment.

II The Political Context

The National Prosecuting Authority (NPA) is a body in a credibility crisis. The brief précis of *Simelane* above tells us why.

The NDPP, in addition to possessing the requisite legal qualifications, must be a fit and proper person having regard to his or her integrity, experience and conscientiousness.[6] This statutory standard gives effect to FC s 179(4). (FC s 179(4) requires that national legislation be enacted to ensure that the prosecuting authority exercise its functions without fear, favour or prejudice.) Navsa JA, writing for the SCA in *Simelane*, concluded that all of the institutions listed in

[4] *Democratic Alliance CC* (note 1) at paras 50 and 51.

[5] For instance, s 184(2) of the Constitution empowers the SAHRC to investigate and to report on the observance of human rights. These general powers are amplified by the Human Rights Commission Act 54 of 1994. The Act grants SAHRC the power to subpoena, and to hear witnesses and submit reports.

[6] Section 9(1)*(b)* National Prosecuting Authority Act 32 of 1998 (NPA Act).

Chapter 8 of the Constitution – ie, courts, the Judicial Service Commission (JSC) and the NPA, must operate independently of political pressure in order to serve our constitutional democratic order and to preserve the rule of law.[7] Accordingly, the professionals operating within the NPA must necessarily be people of the utmost integrity.[8]. Navsa JA, turning to the mise-en-scène, warns the parties before the court (and beyond) against the dangers of using prosecutions to settle political scores.[9]

This line of reasoning accords with decisions from foreign courts which emphasise that the decision to institute or to stop a prosecution should be made by persons fully independent from the political pressures of the government.[10] It also appears, and it is natural that it does, that much depends on the character of the person occupying the highest office in the prosecution authority.[11] The High Court expressed similar views in *Pikoli*: prosecutorial independence embraces not just the formality, but also 'liv[ing] out in practice the requirements of prosecutorial independence'.[12] The findings of the CC in *Simelane* endorse this sentiment.

Neither President Mbeki nor President Zuma has advanced the cause of NPA independence. With the benefit of both hindsight and the findings of the Ginwala Commission, we can now say that both the decision by President Mbeki to suspend Mr Pikoli and thus prevent him from functioning in terms of his prosecutorial mandate, an act that lacked adequate justification, and the decision by President Zuma to appoint Mr Simelane to replace Mr Pikoli, without interrogating the concerns raised about Mr Simelane's integrity, were irrational and unconstitutional.[13]

As a more general matter, it is significant that the institutions listed in Chapter 8 are the courts, the JSC and the NPA. The Bangalore Principles of Judicial Conduct – independence, impartiality, integrity, propriety, equality, competence

[7] *Democratic Alliance v President of the Republic of South Africa* [2011] ZASCA 241, 2012 (1) SA 417 (SCA), 2012 (3) BCLR 291 (SCA)('*Democratic Alliance SCA*') at para 70.

[8] Ibid at para 72.

[9] Ibid at para 80.

[10] Ibid at paras 85–88.

[11] Ibid at paras 79 and 83.

[12] *Pikoli v President of the Republic of South Africa* [2009] ZAGPPHC 99, 2010 (1) SA 400, 406 (GNP).

[13] It is perhaps not entirely coincidental that Mr Pikoli and Mr Simelane had very different views on the independence of the NPA from the executive. Mr Pikoli was clear that the then Minister of Justice and Constitutional Development (Minister), Ms Bridget Mabandla, was not entitled to give him instructions on how to deal with the erstwhile and embattled Commissioner of South African Police Service, Mr Jackie Selebi, who was later (in 2010) found guilty of corruption (specifically, for taking bribes from drug dealers). The Minister had instructed Mr Pikoli not to proceed with the arrest of Mr Selebi until she had satisfied herself that it was in the public interest to do so. Mr Pikoli, however, continued with the arrest. The CC was unequivocal, vindicating Mr Pikoli in the process: The letter sent by Minister Mabandla (incidentally drafted on her behalf by Mr Simelane) directing the NDPP not to proceed against Jackie Selebi until she was satisfied that such a course was in the best interest of the public, amounted to improper interference with, as well as hindrance of, the NDPP. *Democratic Alliance CC* (note 1 above) at para 56. Thus the woes of Mr Pikoli started when he insisted on acting in accordance with his constitutional responsibilities, contrary to the demands of the Minister, her director-general and, it appears, President Mbeki. Mr Simelane, by way of contrast, took the acquiescent view that the NPA was ultimately accountable to the Department of Justice and Constitutional Development.

and diligence – are undeniably indispensable attributes of a competent judiciary in a constitutional democracy. The question that we need to interrogate, however, is whether the same standard should be applicable to the NPA or whether a lesser standard is acceptable.

Requiring a government to act in accordance with the principle of legality and the rule of law in a democracy premised on constitutional supremacy is an axiomatic part of South African jurisprudence. The now accepted standard is that (a) the state can exercise no power and perform no function beyond that conferred by law, (b) its power must not be misconstrued, and (c) its decisions must be rationally related to the purpose for which the power is conferred.[14] Scrutiny on the basis of rationality is generally a non-exacting standard which the various spheres of government and the legislature should easily satisfy. The message is that a democratically elected government acquires its legitimacy from the people and the dictates of the Constitution. *Simelane* shows us that the more questionable the legal pedigree of an executive decision, the greater the risk of it being set aside for failure to meet even the legality doctrine's or rule of law doctrine's rather relaxed desiderata.

III *SIMELANE*

The facts in *Simelane* clearly demonstrate the risk taken in this case – risks taken against the backdrop of high political drama involving three different Presidents and the toppling from power of one of them. Mr Simelane, the then Director-General of the Department for Justice and Constitutional Development under President Mbeki, prepared the government's case against Mr Pikoli before the Ginwala Commission. The Ginwala Commission had been set up in October 2007 by President Mbeki after he had suspended Mr Pikoli as NDPP. Its function was to enquire into Mr Pikoli's fitness to hold office. The Ginwala Commission's findings questioned Mr Simelane's honesty and impugned his integrity.[15]

[14] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374 (CC); *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 33; *Affordable Medicines Trust & Others v Minister of Health & Another* [2005] ZACC 3, 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC)(*'Affordable Medicines'*) at paras 24, 108 ('The legality principle or the rule of law doctrine apparently encompasses a restriction on the permissible 'vagueness' of statutory authorizations for official action.') See also *Masetlha v President of the Republic of South Africa* [2007] ZACC 20, 2008 (1) SA 566 (CC). See, further, C Hoexter *Administrative Law in South Africa* (2nd edition, 2012) 121; F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution'; S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2006) Chapter 11. Michael Bishop and Alistair Price have recently developed legality or rule of law jurisprudence in sophisticated ways that take their cue from Professor Michelman's work. See Michael Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in S Woolman & D Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy on the South African Constitution* 1; Alistair Price 'The Content and Justification of Rationality Review' in S Woolman & D Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy on the South African Constitution* 37. See, in addition, H Botha 'The Legitimacy of Legal Orders (3): Rethinking the Rule of Law' (2001) 64 *THRHR* 523.

[15] Specifically, the Ginwala Commission stated that Mr Simelane had made baseless, spurious and ill-motivated accusations against Mr Pikoli, reflecting *inter alia* the former's 'disregard and lack of appreciation and respect for the import of [a Commission of Enquiry]', cited in *Democratic Alliance SCA* (note 7 above) at para 24.

President Motlanthe succeeded President Mbeki after the latter had been recalled. The succeeding Minister appointed by President Motlanthe, Enver Surty – concerned about the finding relating to Mr Simelane – referred this issue to the Public Service Commission (PSC). The PSC recommended that disciplinary proceedings be instituted against Mr Simelane. However, when President Zuma succeeded President Motlanthe, a new Minister, Mr Jeff Radebe, referred the matter back to the PSC. The referral insisted that the PSC hear representations from Mr Simelane. The PSC refused. Minister Radebe – despite the findings of the Ginwala Commission and PSC, decided not to institute disciplinary proceedings. After Mr Pikoli reached a settlement with the government, Mr Simelane was installed as NDPP.

The issue raised by the Democratic Alliance was whether, given Mr Simelane's record, President Zuma's decision to appoint Mr Simelane as NDPP was in accordance with the principle of legality,[16] and s 9(1)*(b)* of the NPA Act. Both the SCA and the CC unanimously concluded that the President had acted irrationally in appointing Mr Simelane as NDPP, and set the decision aside. (NB: A total of 16 judges concluded that the government had failed to meet the non-exacting standard of rationality required by the rule of law doctrine and the principle of legality.)

Before the SCA, the respondents' case, as made by the President and the Minister, was that the President had 'firm views' on appointing Mr Simelane and that the President followed these 'firm views'.[17] They considered the Ginwala Commission's report to be irrelevant, as its central mandate was to investigate whether Mr Pikoli was suitable for office and not whether Mr Simelane lacked the integrity required for the position and whether he should be disqualified from future appointments.[18] By not interrogating the concerns raised about Mr Simelane's integrity, material errors of fact and law were made by the government in the process leading up to the appointment of Mr Simelane. The SCA concluded: 'In failing to take the [Ginwala Commission Enquiry] into account, the President took a decision in respect of which he ignored relevant considerations. By doing so he misconstrued his powers and acted irrationally.'[19]

However, the SCA may have shifted far too readily from finding that there were errors in law and fact to concluding that these errors amounted to a breach of the principle of legality. This approach strongly replicated the test for reviewability of *administrative action* established by the Appellate Division in *Wits Nigel*. *Wits Nigel* required only that an applicant show that the President (or other relevant administrator) 'failed to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice'.[20] The *Wits Nigel* grounds for review and reversal ran contrary to existing Constitutional Court

[16] It is trite that the decision by the President to appoint the NDPP is an executive act, as the authority is sourced directly from the Constitution. See *Democratic Alliance SCA* (note 7 above) at para 92.

[17] *Democratic Alliance SCA* (note 7 above) at paras 35 and 45.

[18] *Democratic Alliance SCA* (note 7 above) at para 109.

[19] *Democratic Alliance SCA* (note 7 above) at para 112.

[20] *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132, 152 (A).

precedent. The Constitutional Court in *Simelane* reversed the Supreme Court of Appeal's verdict as a matter of law: the power of the President to appoint the NDPP is not regulated by the common-law administrative-law principles of *Wits Nigel*.[21]

The respondents argued before the CC that the SCA had journeyed beyond review for rationality and that it had, in effect, tested the decision of the President against the much more demanding standard of reasonableness.[22] The reasonableness standard is traditionally only applicable to administrative action and is not applicable to, and arguably inappropriate for, the review of executive action. The respondents also criticised the SCA for not taking adequate cognisance of factors pointing to Mr Simelane being a fit and proper person.[23] They contended that the Ginwala Commission was not a court of law and that Mr Simelane should have been given an opportunity to test its findings.[24]

The first issue addressed by the CC was whether the statutory and constitutional requirement that the appointee be a fit and proper person is a necessary precursor to the appointment. If the President failed to consider objective criteria for a determination of whether a candidate was fit and proper prior to making the decision, then, so the argument goes, he would have failed to meet the preconditions for the lawful exercise of the power. In sum, he would be acting in a manner beyond those powers conferred upon him by the Constitution and the enabling Act.[25]

Based on the doctrine of the separation of powers, the respondent further demanded that the President be given a significant amount of latitude in executive decision-making. This line of reasoning is important. It ostensibly supports the respondent's contentions that the President has a degree of subjective discretion in appointing the NDPP.[26] This subtle shift would mean that an appointment would be lawful if the President was of the opinion that Mr Simelane was a fit and proper person. Moreover, the notion that position of the NDPP was largely a political appointment would ensure that similar appointments made by the President would rarely be successfully reviewed by a court of law.

Both arguments were rejected by the CC.

Before dealing with the CC's finding that the appointment of the NDPP is not dependent on the exercise of the President's subjective discretion, it is worth noting that the CC was unwilling to endorse the view suggested by the SCA that rationality review would be the same whether the decision-maker was applying objective or subjective criteria. As Yacoob J remarked: 'Questions as to whether and how the rationality requirement would apply if the criteria were merely subjective are, to my mind, complex.'[27] Cora Hoexter suggests that if the assessment is subjective, the court should understand that the legislature intended

[21] *Democratic Alliance CC* (note 1 above) at para 39.
[22] Ibid at para 8.
[23] Ibid at para 9.
[24] Ibid at para 34.
[25] C Hoexter *Administrative Law in South Africa* (2nd Edition, 2012) 290.
[26] *Democratic Alliance CC* (note 1 above) at para 8.
[27] *Democratic Alliance CC* (note 1 above) at para 14.

to grant the executive greater deference in his decision-making and that such deference also curtails the ambit of rationality review.[28] Political appointments reflect, by definition, subjective discretion. In our constitutional arrangement, a greater measure of deference should be shown by the courts when reviewing decisions where the President is making purely political appointments and choices as opposed to instances where the President is appointing persons to occupy positions that require the incumbent to be as independent as possible from other branches of government. Bishop suggests the most deferential application of the rationality standard would simply require the conduct to do no more than further the purpose for which the power is conferred in some minor way.[29] 'Mere' rationality, on this account, will rarely result in interference by the courts.

However, from the perspective of accountable and proper governance, the band of decisions involving the exercise of subjective discretion should be kept as narrow as possible. The CC thus agreed with the SCA that in this matter the President was bound by objective requirements and not by his subjective discretion,[30] and made the concomitant finding that the appointment of the NDPP was not a political appointment.[31] The *Simelane* Court's analysis demonstrates that very few categories of decision will be deemed to fall within the subjective discretion of the President.

The CC laid down several factors to be considered when determining whether a decision is objective or subjective. The CC also clarified a tricky grey area surrounding 'value judgments' – holding that the fact that the decision involves the appraisal of a candidate's integrity and suitability does not mean that the decision becomes immune from objective scrutiny.[32]

In determining whether a particular executive decision involves the exercise of a subjective or objective discretion, a composite and comprehensive analysis has to be undertaken. Firstly, the Constitution prescribes that the NDPP be appropriately qualified and requires the enabling Act to provide further criteria. It was not left to the President to formulate further criteria for appointment and then determine whether the putative appointee has met them:[33] such oversight was bequeathed to the legislature. An important and positive feature of law-making in South Africa is that open-ended and unfettered discretion is rarely granted and most statutes indicate criteria and objectives that guide the discretion of the decision-maker. The existence of these binding criteria suggests that the decision is objective rather than subjective. Secondly, an important indication that the discretion is not subjective is that the appointee is required either by the Constitution or by the enabling Act to be independent. In *First Certification Judgment*,[34] s 179 of the New

[28] Hoexter (note 25 above) at 302.

[29] M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rationality Basis Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 19.

[30] *Democratic Alliance CC* (note 1 above) at para 20.

[31] Ibid at para 26.

[32] Ibid at para 23.

[33] Ibid at para 21.

[34] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) at para 146.

Text was deemed to provide a constitutional guarantee of independence to the NPA. The CC in *Simelane* held that it would be incongruence for the President to possess a subjective discretion of appointment when the Constitution expressly requires an objective criterion of independence..[35] Thirdly, the procedure for removing an NDPP supports the contention that he or she does not serve at the pleasure of the President. The President is empowered to remove an NDPP only after a commission of enquiry finds that he or she is not a fit and proper person – unless Parliament adopts a different view. A genuinely subjective discretion for removal would mean that different presidents, or even the same president, could employ different criteria for both removal and appointment. The fact that the President cannot remove the NDPP from office at will indicates that her or his powers in this domain are not subjective.[36]

Neither s 9 of the NPA Act nor any other section implies that the President's views are essential to the decision-making process. On the contrary, the NPA Act, in imperative terms, requires the appointee to be a fit and proper person. The analysis in *Simelane* is a far cry from the pre-Constitutional *dictum* of the Cape High Court in *SA Defence and Aid Fund v Minister of Justice,*[37] when the words of the enabling section were determinative of the nature of the discretion. *SA Defence and Aid Fund* suggested the existence of subjective executive discretion through terms of art such as 'in the opinion of' ... or 'if the Minister is satisfied'. The difference in approach reflects the fact that *SA Defence and Aid* was concerned with interpreting and ascertaining the will of Parliament, while *Simelane* is concerned with interpreting the specific statutory and constitutional provisions in a manner which advances the broader objectives of the Constitution. The current approach to determining whether the decision is a subjective or objective one is much more nuanced and substantive, with regard being had to the nature of the decision, the criteria that regulate the exercise of the discretion, the implications of the enabling legislation, the nature of the duties to be performed by the appointee, the necessity for him or her to be independent, and the importance of the appointment for our democracy. Given that the legislature is also bound by the principle of legality,[38] it would appear that appointments to Chapter 9 Institutions such as the Public Protector and the South African Human Rights Commission can also be tested to ensure that the objective jurisdictional facts are met.[39] Appointments to these institutions are made by the President on the recommendation of the National Assembly.[40] All these constitutional appointments require the incumbent to be independent and a fit and proper person if he or she is to be entrusted with the discharge of important constitutional obligations.

[35] *Democratic Alliance CC* (note 1 above) at para 24.

[36] *Democratic Alliance CC* (note 1 above) at para 25. Furthermore, the Office of the NDPP is fundamental to the proper functioning of a constitutional democracy, as the decision whether or not to prosecute must be apolitical and nonpartisan. *Democratic Alliance* (note 1 above) at para 26.

[37] *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C).

[38] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374 (CC).

[39] Section 193 of the Final Constitution ('FC') requires the Public Protector and members of the various commissions to be fit and proper persons to hold the particular office.

[40] FC s 193(4) and (5).

Given the criteria that have to be considered in determining the nature of the appointer's discretion, the category of subjective decisions will probably be highly circumscribed. An example or two of an unencumbered political discretion will suffice. Had the President appointed Mr Simelane as High Commissioner either to Uganda or India in terms of FC s 84(2), very different considerations would have applied. Similar considerations will apply in respect of appointments and dismissals of cabinet ministers. In neither example do requirements for independence or demanding qualifications for the position exist – even if we might wish it were otherwise such appointments are embedded deeply in the accepted political practices of the Office of the President. While no exercise of public power is beyond the remit of the Constitution, and thus judicial review, courts will be disinclined to reverse these political appointments. Indeed, one might argue that strict adherence to the separation of powers doctrine is necessary if members of the Cabinet (or representatives abroad) are to carry out the President's orders or policies.

Despite the existence of objective jurisdictional facts, the CC did not conclude that Mr Simelane had failed to meet the 'fit and proper person' standard for appointment to the office of NDPP.[41] Had such a finding been made, then the matter could have been disposed of on the basis that the President had acted in a manner beyond his powers. However, the CC chose to deal with the matter on the basis that the decision to appoint Mr Simelane was not rationally related to the purpose for which the power was conferred.

The CC was of the view that rationality review is concerned with 'the relationship, connection or link between the means employed to achieve a particular purpose on the one hand and the purpose or end itself'.[42] The *Simelane* Court distinguishes rationality review from the more exacting standard of reasonableness as follows: Reasonableness is concerned with the substance of the decision, while rationality review turns predominantly on the logical connection between means employed and ends sought (and to a lesser degree on the manner in which the exercise of power distorts means and ends.)[43]

Professor Hoexter suggests that reasonableness should result in actions that accord with reason or within the limits of reason.[44] This approach suggests that a reasonableness standard will embrace a range of feasible policies (and the laws that enable them). In *Bato Star*, the CC reformulated the tautological standard in s 6(2)*(h)* of Promotion of Administrative Justice Act, by simply asking whether the decision is one which a reasonable decision-maker could not reach. O'Regan J went on to list the criteria that are relevant in determining whether a decision is reasonable:

> The nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the

[41] *Democratic Alliance CC* (note 1 above) at 90.
[42] *Democratic Alliance CC* (note 1 above) at para 32.
[43] *Democratic Alliance CC* (note 1 above) at para 33.
[44] Hoexter (note 25 above) at 347.

> competing interests involved and the impact of the decision on the lives and well-being of those affected.[45]

This assessment has to be made contextually and would often require 'a reasonable equilibrium' being struck between the competing considerations that have to be considered by the decision-maker.[46] Professor Hoexter argues that some of the criteria listed such as considering the impact of the decision suggest that if the decision is to be reasonable, then it must also not be disproportionate.[47] She contends that if the decision is 'unnecessarily disproportionate or onerous in its effects', it may well be deemed to be unreasonable. [48] Considering the impact would thus require an assessment of the consequences of the decision.

The CC in *Simelane* confirms comments made in *Albutt* that the courts – when reviewing for rationality – may not interfere with the means selected to achieve the objective, simply because they are of the view that more appropriate means could have been selected to achieve the objective.[49] The role of the court when reviewing for rationality is much more circumspect, as it is simply required to determine whether the means selected are rationally related to the objective. This restricted test is adopted to 'achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other'.[50] Bishop points out that the primary objective of rationality review is to prevent arbitrariness and prejudice.[51] The role of the court is not to pronounce on the wisdom of legislative or executive choices.

Price advances a neat analysis to distinguish between reasonableness and rationality.[52] He contends that a decision will only be reasonable if the reasons for the decision outweigh the reasons against the decision. He distinguishes between perfect and correct decisions on the one hand and reasonable or justifiable decisions on the other hand. A perfect or correct decision is beyond the scope of review for reasonableness.

As I understand the analysis, the reasons for taking a particular decision must defeat the reasons for not taking that decision. It does not require the reasons for the chosen option to always defeat the reasons in favour of another viable option. The latter would come perilously close to assessing whether the correct decision is made.

In assessing whether a decision is reasonable, the court will recognise that there are a number of reasonable choices that could be made from within the permitted

[45] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15, 2004 (4) SA 490 (CC) at para 49.

[46] Ibid.

[47] Hoexter (note 25 above) at 350.

[48] Hoexter (note 25 above) at 350, referring to *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E).

[49] *Democratic Alliance CC* (note 1 above) at 30.

[50] *Affordable Medicines Trust & Others v Minister of Health & Another* [2005] ZACC 3, 2006 (3) SA 247 (CC) at para 83.

[51] Bishop (note 29 above) at 7.

[52] A Price 'The Content and Justification of Rationality Review' in S Woolman and D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 49–51.

range. Price concludes the discussion on the difference between reasonableness and rationality by drawing the following distinction:

> Whereas a law or act is reasonable if the reasons for it defeat the reasons against it, that law or act is merely rational if, notwithstanding the reasons against it, there is at least one reason or rationale for it.[53]

This suggestion would ensure that rational decisions display neither arbitrariness nor naked preferences – thus complying with the rule of law and the principle of legality. In contrast, for a decision to be reasonable – as required in PAJA – a higher onus is required on the person taking the administrative decision to show that the decision is justifiable in the circumstances. As PAJA is generally concerned with the exercise of public power or the performance of a public function when implementing legislation as opposed to formulating policy, this higher standard is warranted.

Drawing on precedents such as *Albutt,*[54] which introduced a procedural component into legality review (at least in specific circumstances), the CC in *Simelane* laid down a framework which permits an executive decision to be set aside on the basis that it was irrational for failing to take relevant considerations into account. The CC held that the purpose of the rationality enquiry is 'whether the means selected are rationally related to the objective sought to be achieved'.[55] In terms of rationality review, the court cannot question whether the means used are the best or most appropriate in the circumstances, and so cannot interfere in this regard. The choice of the means to be used to achieve a constitutional objective still falls within the discretion of the executive. Put somewhat differently, the CC has regularly held that rationality review is a minimum-threshold requirement and any elevation beyond that could have untoward implications for the separation of powers doctrine.

In *Albutt*, the Constitutional Court held that the President, in pursuit of the broader objective of national reconciliation and nation-building, had acted irrationally in not affording victims an opportunity to be heard when considering applications by political offenders to be considered for pardons. Because the decision was taken without affording the victims an opportunity to be heard, the procedure used was found not to be rationally connected to the objectives sought to be achieved.[56] *Albutt* made it unavoidable for the *Simelane* Court to conclude that both the 'process by which the decision is made and the decision itself must be rational'.[57] Thus it is clearly envisaged that a flawed process may also impact on rationality if the use of the flawed process would not be rationally connected to the objectives to be achieved. However, *Simelane* later refers to executive decisions not being set aside simply because they are procedurally unfair.[58] It would appear that procedural unfairness *per se* is not a ground on which executive action can

[53] Ibid at 49–51.

[54] *Albutt v Centre for the Study of Violence and Reconciliation & Others* [2010] ZACC 4, 2010 (3) SA 293 (CC), 2010 (5) BCLR 391 (CC).

[55] *Democratic Alliance CC* (note 1 above) at para 30, quoting from *Albutt* (note 54 above) at para 51.

[56] *Albutt* (note 54 above) at para 34.

[57] *Democratic Alliance CC* (note 1 above) at para 34.

[58] Ibid at para 4.

be set aside. However, if a flawed process is adopted which renders the decision irrational, then the decision may be set aside. This would mean that the focus would be on the process of arriving at the decision and whether the procedural flaws render the decision irrational as opposed to requiring that the decision itself be irrational. In *Simelane*, the CC did not decide that the appointment of Mr Simelane was irrational per se. It found instead that the President's failure to consider relevant information was irrational – a breakdown between means and ends – that the irrationality of the process caused the ultimate decision to be irrational. As stated earlier, the CC did not conclude that Mr Simelane was not a fit and proper person to be appointed as NDPP. If the serious questions around his integrity were fully addressed and found to be inconsequential, then he could have been appointed. The flaws in the process in appointing him were such that the entire process was tainted with irrationality and the merits or otherwise of the ultimate decision did not matter. The CC in *Simelane* thus appears to uncouple process irrationality which renders the decision irrational, from the merits of the decision itself. If, hypothetically, Mr Simelane is reappointed after the procedural issues are attended to, the appointment could still be reviewed on the basis that the merits of the decision are not rationally linked to the purpose laid down in the empowering provision and in the Constitution.

In an attempt to provide an understandable and workable framework, the *Simelane* Court held that the mere fact that cognisance was not taken of the relevant considerations would not be sufficient to set aside the exercise of executive power. The failure to take relevant considerations into account would only be material if, as a consequence, there was no rational connection between the means used and the objectives of the empowering statute. If the failure impacted on the rationality of the entire process, then the decision may be set aside on the basis of irrationality. Thus a three-part test[59] was formulated to determine whether a failure to take relevant factors into account would render the decision irrational and therefore invalid:

1. Were the factors which were ignored relevant?
2. If so, was the failure to consider the material (the method adopted) rationally connected to the purpose for which the power is conferred?
3. If not, did the failure to consider the material concerned have the effect of rendering the entire process irrational?

Thus, the executive decision will remain valid if the decision to ignore relevant factors does not have the effect of tainting the entire process with irrationality.[60] In effect, the CC in *Simelane* added a third leg to the approach adopted by the SCA. To succeed in a review application of this nature, an applicant must demonstrate firstly, that either the process used or the decision itself is not rationally related to the objectives sought to be achieved by the empowering provision, and secondly, that as a consequence of this irrationality, the entire process is tainted with irrationality. Errors of law and fact on their own will not serve to vitiate an

[59] Ibid at para 39.
[60] Ibid at para 40.

executive decision. However, proof that these errors affected the rationality of the entire process *will* have the effect of invalidating the decision.

The Ginwala Commission directly questioned and expressed concern about the integrity of Mr Simelane, based on issues that emerged during his testimony. The CC found, after an analysis of his testimony at the Commission, that there was sufficient basis for this concern. These 'brightly flashing lights'[61] suggesting dishonesty should have raised serious concerns in the minds of any person considering the appointment of Mr Simelane to the post of NDPP. The President and the Minister of Justice and Constitutional Development, however, decided to ignore the concerns of the Ginwala Commission about Mr Simelane's integrity, and appointed him as NDPP. The CC evaluated the reasons given by the Minister for ignoring the findings of the Ginwala Commission and similar recommendations of the Public Service Commission (PSC) and found them to be unpersuasive.[62] The Minister sought to justify the decision not to follow the recommendations of the Ginwala Commission and the PSC by arguing that Mr Simelane was not heard by the PSC and was not given an opportunity to defend himself at an enquiry. This line of argument was found to be unpersuasive. Mr Simelane was in fact heard by the Ginwala Commission. Furthermore, he was unable to defend himself against the allegations because the Minister himself had decided not to proceed with the recommendation that a disciplinary enquiry be held. The assertion that the Ginwala Commission was about Mr Pikoli and not about Mr Simelane was equally unacceptable, as it implied that dishonesty on the part a senior state official at a commission of enquiry could be disregarded if he or she was not the focus of the enquiry. Equally unconvincing was the argument that the Ginwala Commission was not a court of law and hence its findings were of lesser value. The Court was emphatic that the issue was whether Mr Simelane's integrity was impugned and it did not matter whether a person was being dishonest or devious before a court or a commission of enquiry or to some other legal or quasi-legal fors. The question is whether Mr Simelane was dishonest while giving evidence under oath. The Minister ignored the serious questions raised about Simelane's integrity and failed to explain why these concerns were ignored. Because of the failure to make the connection between Mr Simelane's dishonesty under oath in a public inquiry and the requirement of integrity for the position of NDPP, the method or means used (ignoring relevant factors) were not rationally related to the purpose of the power.

The CC in *Simelane* concluded that relevant considerations were not taken into account and this tainted the entire process – the objective of which was to appoint a fit and proper person of experience, integrity and conscientiousness. Concerns about dishonesty should have been fully interrogated before a decision was made. The net effect was that President Zuma's appointment of Mr Simelane as NDPP was irrational.

[61] *Democratic Alliance CC* (note 1 above) at para 52.
[62] *Democratic Alliance* CC (note 1 above) at paras 80–85.

The judgment of the SCA in *JSC v Cape Bar Council*, was handed down shortly (almost two months) before the CC decision in *Simelane*.[63] It concerned a challenge to the decision of the JSC not to appoint qualified white applicants as judges, and to leave the positions unfilled. The SCA proceeded from the premise that these decisions were subject to rationality review because the JSC was bound by the principle of legality.[64] It found that JSC was bound to give reasons for its decisions. It would be Orwellian to say that a person has a right to rational decisions, but that no obligation was imposed on the review body to provide reasons.[65] Without reasons, an applicant would be unable to determine whether he or she has been treated rationally. The SCA therefore concluded that since the JSC was under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend a candidate for judicial appointment, it was required to support its decision not to do so with reasons.[66] The SCA further concluded – in circumstances where the undisputed facts lead to an inference that the JSC acted irrationally – that a failure to provide reasons in these circumstances will result in confirmation of the inference. It does appear incongruent to require a body to act rationally and not oblige it to provide reasons. In *Simelane*, the full extent of irrationality became apparent after the government's reasons for not following the recommendations of the Ginwala Commission and PSC were assessed and found to be unpersuasive. It was only after an appraisal of the reasons that the conclusion could be drawn that the method or means used were not rationally connected to the purpose, and that the entire process was tainted with irrationality. *Simelane* stands for the proposition – apparently also present in *Judicial Service Commission v The Cape Bar Council* – that assessment on the basis of rationality will only be effective if reasons for the decision are provided.

IV Conclusion

The President appeared steadfastly committed to appointing Mr Simelane as NDPP and sought to find reasons why he was not disqualified from being appointed in terms of the Constitution and the NPA Act. Given the findings made in this case, the Court did not have to determine whether the President had an ulterior purpose in appointing Mr Simelane. As neither President Mbeki nor President Zuma were able legally, on the non-exacting standard of rationality, to justify their decisions to remove Mr Pikoli and to appoint Mr Simelane, respectively, it seems likely that political considerations took precedence over constitutional imperatives in both decisions. The process that ought to have been adopted in appointing the NDPP was to analyse and to appreciate fully the requirements for the job, determine whether the preferred candidate met these requirements, interrogate any concerns that may arise, and only make an appointment if the concerns are appropriately and adequately addressed. Purely political appointments – eg, the appointment of

[63] *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115, 2013 (1) SA 170 (SCA).
[64] Ibid at para 22.
[65] Ibid at para 44.
[66] Ibid at para 51.

ambassadors – have no place when nominees are required by the Constitution to perform their duties independently.

In a constitutional democracy it is imperative that the executive and the administration learn from the cases that they lose, so that mistakes are made just once and are never repeated. Even though two very poor decisions have been made in quick succession in respect of the NDPP, public confidence can be quickly restored by a credible appointee who performs the function competently and with integrity and impartiality.

It was most undesirable not to have had a permanent successor to Mr Simelane for more than 19 months and to have had an acting NDPP for this period. The term of office of the NDPP is limited to a fixed term of 10 years to ensure security of tenure when making difficult decisions. It seems improbable that the constitutional drafters would have sanctioned this office being occupied by an acting appointee, without the necessary security of tenure, for this period of time. *Simelane*, if taken seriously, may arrest this pattern of poor decision-making. South Africa can ill afford executive behaviour that runs counter to the broader constitutional objectives of accountable and responsive governance.