CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 01/07
[2007] ZACC 20

BILLY LESEDI MASETLHA Applicant

versus

THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA First Respondent

MANALA ELIAS MANZINI Second Respondent

Heard on : 10 May 2007

Decided on : 3 October 2007

---

JUDGMENT

---

MOSENEKE DCJ:

*Introduction*

[1] This case raises intricate questions on the constitutional validity of two decisions of the President of the Republic. He first suspended and later terminated Mr Masetlha's employment as head and Director-General of the National Intelligence Agency (the Agency). The President did so by unilaterally amending his term of office so that it expired within two days of the notice and just over 21 months earlier than the original term. The termination of employment was accompanied by an offer to pay Mr Masetlha his full monthly salary, allowances and benefits for the unexpired

period and other moneys that may be due to an incumbent at the expiry of a term of office.

[2] Mr Masetlha has impugned the decisions as constitutionally impermissible. He has declined the financial pay-out and presses on with the claim to be re-instated to his post.

[3] These issues reach us by way of an application for leave to appeal directly to this Court against the decision of Du Plessis J sitting in the Pretoria High Court. That Court dismissed two review applications brought by Mr Masetlha against the President on the grounds that his dismissal from employment constituted lawful executive action and that the dispute over the suspension had been rendered moot by the dismissal.

[4] In this Court, Mr Masetlha seeks a declarator that the President has no power to suspend him from his post or to alter unilaterally his terms of employment. In the alternative, he asks for an order setting aside the two decisions as irregular. It must be said that Mr Masetlha does not concede that the decision of the President to change the terms of his appointment in effect amounts to his dismissal as head of the Agency. Nonetheless, at its core, his claim is for specific performance. It is a claim to be re-instated as Director-General and head of the Agency.

[5] Mr Masetlha asks, in the alternative, that, should this Court not find in his favour on the disputes that are not capable of resolution on motion papers, the factual averments underpinning the disputes should be referred to oral evidence. Three of the four grounds relate to the suspension decision and one to the decision to alter his term of office or to dismiss him. All the grounds are directed at the state of mind of the President when he made the impugned decisions and in particular: (a) whether he or the Minister for Intelligence Services (Minister) made the decision to suspend; (b) if the President did, whether in so doing he properly applied his mind; and (c) whether both decisions were actuated, not by a lawful reason but by an ulterior purpose.

[6] The President is the first respondent and opposes the relief the applicant contends for. Mr Manzini has been joined as the second respondent. This follows from his subsequent appointment by the President as the acting Director-General of the Agency. He abides the decision of this Court.

*The facts*

[7] Mr Masetlha became Director-General and head of the Agency on 14 December 2004 through a presidential appointment. The letter of appointment informs that the President has appointed him to the post in terms of the provisions of section 3(3)(a) of the Intelligence Services Act[1] (ISA) read with section 3B(1)(a) of the Public Service Act[2] (PSA) for a period of three years.

[1] Act 65 of 2002.

[2] Act 103 of 1994.

[8] I deal with these legislative provisions later.[3] Let it suffice for now to say that ISA is the legislation that regulates the establishment, administration, organisation and control of three intelligence agencies, one of which is the Agency. Section 3(3)(a) of ISA provides that "[t]he President must appoint a Director-General for each of the Intelligence Services." On the other hand, section 3B of the PSA regulates, amongst other matters in the public service, the "[h]andling of appointment and other career incidents of heads of department". The head of the Agency is a head of department under section 3B(1)(a) of the PSA.

[9] On 31 August 2005 the so-called "Macozoma affair" broke into the public domain. Mr Macozoma is a businessman. At issue were the circumstances under which he came to be placed under surveillance by agents of the Agency. It is common cause that the surveillance was a clumsy blunder by field operatives of the Agency. The applicant insists that, as head of the Agency, he had not authorised and was not aware of the surveillance until the field operatives were exposed and Mr Macozoma had lodged a complaint with the Minister. The complaint reached the Minister on the 5 September 2005. The Minister had not been informed before then that Mr Macozoma was under surveillance.

[10] The Minister requested Mr Masetlha to account formally on the surveillance operation. Mr Masetlha reported in writing that the surveillance did occur but that it was done without his knowledge and in error, attributable to Mr Njenje, the deputy

[3] See para [31] below on the applicable constitutional and legislative framework.

Director-General of the Agency, and certain field operatives under Mr Njenje's command. The Minister proclaimed himself dissatisfied with explanations given to him by Mr Masetlha and instructed the Inspector-General of Intelligence (Inspector-General)[4] to investigate the circumstances that gave rise to the surveillance.

[11] On 17 October 2005, the Inspector-General prepared a written report in which he informed the Minister that the surveillance of Mr Macozoma was unauthorised and unlawful and that it had not been undertaken for the reasons given by the Agency operatives but for another purpose. The report notes that Mr Masetlha had deliberately sought to mislead the Inspector-General's investigation team and the Minister in this regard. In addition, the Inspector-General recommended that disciplinary steps be taken against the applicant for failing to exercise the required degree of management and oversight on the surveillance operation. On the same day, the Minister convened a meeting attended by the Inspector-General and the applicant. At the meeting, the Minister read out the outcome of the investigation by and recommendations of the Inspector-General and he advised that he had made certain recommendations to the President for his consideration.

[12] For the sake of completeness, I record that after receiving the report of the Inspector-General, the Minister suspended and thereafter dismissed Mr Njenje and

[4] The powers and duties of the Inspector-General of Intelligence are prescribed by section 7(7) of the Committee of Members of Parliament on and Inspectors-general of Intelligence Act 40 of 1994 (Intelligence Services Oversight Act). Important powers and duties include, inter alia, monitoring compliance by any intelligence service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence; reviewing the intelligence and counter-intelligence activities of any intelligence service and performing functions designated to him or her by the President or any Minister responsible for a service. The Agency is an intelligence service as defined in section 1 of this Act.

another senior member of the Agency, Mr Mhlanga, for their reported role in the "Macozoma affair". Following his suspension, Mr Njenje threatened to institute legal proceedings.

[13] Within two days of the disclosure of the Inspector-General's report and meeting with the Minister, on 19 October 2005, the applicant was summoned to a meeting with the President and the Director-General within the Presidency, Reverend Chikane. At that meeting, the President urged the applicant to persuade Mr Njenje to stall his intended court case until the President had met with him. Mr Masetlha, in turn, raised his concerns regarding the suspension of two of his subordinates. A further meeting, which would include the Minister and the Inspector-General, was arranged for the following day at the official residence of the President. Mr Masetlha explains that he left the meeting of 19 October 2005 with the distinct impression that the President wanted to reach an amicable arrangement with Mr Njenje and Mr Mhlanga. According to him, the President appeared to understand the concerns raised that the investigation by the Inspector-General had been flawed.

[14] The following day, on 20 October 2005, Mr Masetlha attended the planned follow-up meeting at the official residence of the President. Also present at this meeting were the Minister and the Inspector-General. The President said that it was no longer necessary to proceed with matters raised the previous day. He urged the applicant to listen to the Minister, who had something to say. The Minister read out a letter dated 20 October 2005 and addressed to the applicant. It bore the signature of

the Minister and informed Mr Masetlha that he was suspended from his position as the Director-General of the Agency. At no stage during the meeting did the Minister or the President suggest that the decision to suspend Mr Masetlha had been taken by the President.

[15] Three weeks later, on 12 November 2005, the applicant launched an urgent application in the High Court against the Minister and the President, seeking to review and set aside the suspension as unlawful.[5] However, three days later, on 15 November 2005, the President recorded, as his own decision, the suspension of the applicant with effect from 20 October 2005. This he did by way of a Presidential Minute. The Constitution requires that a decision by the President, if it is to have legal consequences, must be in writing.[6] The Presidential Minute was therefore an indispensable step to give legal significance to the suspension as a decision of the President.

[16] The applicant, however, does not accept that it is the President who made the suspension decision. He says that the Presidential Minute of 15 November 2005, which purported to record the decision of the President taken 35 days earlier, on 20

[5] The applicant did not proceed with this application. Its remaining relevance is that the papers in that application were incorporated by reference to the papers before the High Court in the second suspension application.

[6] Section 101 of the Constitution provides:

> "(1) A decision by the President must be in writing if it–
>
> (a) is taken in terms of legislation; or
>
> (b) has legal consequences.
>
> (2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member."

October 2005, is a belated effort by the President to legalise the Minister's unauthorised suspension decision in order to save him political embarrassment.

[17] On 10 March 2006, the applicant initiated a fresh application directed at setting aside the suspension at the President's instance. The founding papers carried attacks on the integrity of the President. He also accused the President of lying. On 20 March 2006 and before filing an answering affidavit to the second suspension application, the President amended the applicant's term of office so that it expired on 22 March 2006. This meant that the term of office was to expire within two days of the notice and 21 months and nine days earlier than the original term.

[18] In making the decision, the President asserted that the relationship of trust between him, as head of state and of the national executive, and Mr Masetlha, as head of the Agency, had disintegrated irreparably. The President said that the Minister of Public Service and Administration (Minister Fraser-Moleketi) would communicate with the applicant regarding benefits that would be due to him and conditions attached to the expiry of his term of office. The letter also made the point that the applicant would be remunerated in terms of section 37(2)(d) of the PSA[7] for the remainder of his term of office before its amendment. The section simply provides for the granting

[7] Section 37 of the PSA provides for the remuneration of officers and employees. Section 37(2) states the following:

> "Subject to such conditions as may be prescribed—
>
> . . . .
>
> (d) any special service benefit may be granted to a head of department or class of heads of department before or at the expiry of a term contemplated in section 12(1)(a) or (b), or any extended term contemplated in section 12(1)(c), or at the time of retirement or discharge from the public service."

of "any special benefit" to a head of department before or at the expiry of a term of office or any extended term or at a time of retirement or discharge from the public office.

[19] In a letter dated 22 March 2006, Minister Fraser-Moleketi informed the applicant that he would be paid his full monthly remuneration for the remaining 21 months and nine days as well as specified benefits due at the expiry of the term of office. The financial tender also contained specified conditions related to the expiry of his term of office.

[20] Consistent with his stance that the President had not lawfully terminated or amended his term of office, Mr Masetlha declined the cumulative salary, allowances, benefits and conditions tendered by Minister Fraser-Moleketi. Although he did not dispute the appropriateness of the quantum of the offer, he repaid to the government the amount that Minister Fraser-Moleketi had caused to be deposited into his banking account.

[21] On 27 March 2005, the applicant initiated another application in which he sought a declaratory order that the President had no power to amend his term of office unilaterally and that he remains the head of the Agency. In the alternative, the applicant asked for an order re-instating him as Director-General of the Agency. The suspension and the amendment applications were consolidated and heard together.

*In the High Court*

[22] The High Court dismissed both review applications. It found that section 3(3)(a) of ISA, the legislative provision which provides for the appointment of the head of intelligence services, simply echoes section 209(2) of the Constitution, which is the original source of the power to appoint the head of the Agency and that, although the power to appoint is provided for in legislation, it remained located in the Constitution itself. It is perhaps convenient to recite now the provision of section 209(2) of the Constitution:

> "The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of Cabinet to assume that responsibility."

[23] The High Court considered the crucial inquiry to be whether the dismissal of the applicant is an exercise of executive power, particularly because the Constitution and applicable legislative provisions are silent on the dismissal of a head of an intelligence service. The Court found that the power to appoint includes the power to dismiss. The power to dismiss is implicit in section 209(2) of the Constitution and is an executive power in terms of section 85(2)(e) of the Constitution. The Court reasoned that the authority to dismiss is therefore not susceptible to judicial review under the provisions of the Promotion of Administrative Justice Act (PAJA).[8] However, it observed, this did not mean that the President's decision is beyond the reach of judicial review on any basis. The decision of the President to dismiss must

[8] Act 3 of 2000.

conform to the principle of legality. Therefore, the power to dismiss may not be exercised in bad faith, arbitrarily or irrationally.

[24] On the facts, the Court found that, in order for the President to fulfil his role as head of the national executive, he must subjectively trust the head of a national intelligence service. Therefore the irreparable break-down of the relationship of trust between the President and the head of the Agency constituted a lawful and rational basis for the dismissal. Having concluded that the dismissal was constitutionally justifiable, the Court found that the disputes on the suspension decision had become academic and, on that basis, dismissed the application challenging the validity of the suspension.

*The issues*

[25] There are five main issues that we are called upon to decide. First, whether leave to appeal should be granted. The second issue is whether the presidential decision to amend the applicant's term of office or to dismiss him is constitutionally permissible. The third issue raises the validity of the decision to suspend the applicant from his post. The fourth issue relates to the appropriate remedy, if any. Lastly, there is the question whether any aspects of this case should, at the request of the applicant, be referred to oral evidence.

[26] The High Court found that if the appeal against the amendment or dismissal decision were to fail, the suspension decision would become moot. I think that this is

correct. It is plain that if an order for the re-instatement of the applicant is not granted, the determination of the suspension dispute would have no practical value. I can find nothing that would, in that event, impel us to decide the validity of the suspension decision. We have not been shown nor am I aware of any public interest or any factor in the interests of justice that would nonetheless require us to adjudicate the decision to suspend the applicant from his post when the resultant court order will have no practical value or effect as far as the parties are concerned.[9] In addition, the issues are essentially fact-dependant and their determination would have little, if any, precedential value. For that reason I am constrained to decide first the issues related to the amendment or dismissal decision. Before I do so, I have to consider whether leave to appeal against the decision of the High Court should be granted.

*Should leave to appeal be granted?*

[27] It is by now trite that whether leave to appeal should be granted involves a determination of whether the issues raised are constitutional matters and whether it is in the interests of justice to adjudicate upon the dispute raised. It was contended somewhat half-heartedly on behalf of the President that leave to appeal should be

[9] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at fn 18, the following was held:

> "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."

In *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11, this Court held that it retains a discretion to decide issues on appeal even if they no longer present existing or live controversies, having regard to what the interests of justice require. The question is whether a judgment will have a practical effect on the parties or on others. See also *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15; and *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as* Amicus Curiae*)* 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) at para 30.

refused because the application is, in essence, a claim for re-instatement, which does not raise any constitutional matter of broader significance and does not seek to test the constitutional validity of any legislative provision. There is no merit in this submission.

[28] We are here confronted with an enquiry into the constitutional and legislative source and reach of the power of the President to appoint or dismiss a state functionary, in this case being the head of the Agency. The enquiry will compel us to probe whether the power to amend a term of employment or to dismiss is located within section 209(2) of the Constitution, read with section 3(3)(a) of ISA and section 12(2) of the PSA or within all of these provisions read together, and whether the provisions are capable of being construed harmoniously. Clearly, the task at hand calls for a construction of the constitutional provisions and legislation that give effect to them.[10] Whatever the origin or contours of the public power in issue, we are also called upon to decide whether the authority is executive power or administrative action reviewable under PAJA. It seems to me beyond contestation that important constitutional issues fall to be resolved in this application.

[29] On whether it is in the interests of justice to hear this matter and in particular whether the applicant should be permitted to appeal directly to this Court, it must first

[10] The interpretation of the Constitution and legislation enacted to give effect to the Constitution give rise to constitutional issues. See, for example, *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 23; *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 14-15; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* CCT 69/06, 6 June 2007, as yet unreported, at para 31.

be said that his term of office was due to expire on 31 December 2007. Thus, there is urgency and merit in having the suspension and dismissal disputes determined before that date. If the applicant were to appeal to the full bench of the provincial division or to the Supreme Court of Appeal, a possible further appeal to this Court would be frustrated because, on expiry of his term of office, his claim for re-instatement would become academic well before the appeal found its way to this Court.

[30] As I have intimated earlier, the constitutional matters that arise do not involve the development of the common law but rather turn on the direct application of the Constitution. In these particular circumstances, it cannot be said that the benefit that may be derived from a judgment by the Supreme Court of Appeal outweighs the disadvantage of rendering any further appeal to this Court moot. I am of the clear view that it is in the interests of justice that leave to appeal directly to this Court should be granted.

*Constitutional and legislative setting*

[31] The operative constitutional and legislative scheme looms large in the resolution of this matter. It is thus expedient to render a brief account of its main features before deciding each of the issues I have to confront.

[32] A collective pursuit of national security is integral to the primary constitutional object of establishing a constitutional state based on democratic values, social justice and fundamental human rights. Chapter 11 of the Constitution recognises the

importance of national security and to that end contains principles and other provisions that govern national security in the Republic. The first of these principles is cast in evocative language and bears repetition:

> "National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life."[11]

[33] The security services of the Republic consist of a single defence force; a single police service and any intelligence services established in terms of the Constitution and must be structured and regulated by national legislation.[12] Predictably, one of the important principles prescribed is that national security must be pursued in compliance with the law[13] and security services must act and teach and require their members to act in accordance with the Constitution and the law.[14] Besides the rule of law imperative, this constitutional injunction is also inspired by and deeply rooted in a repudiation of our past in which security forces were, for the most part, law unto themselves; they terrorised opponents of the government of the day with impunity and often in flagrant disregard of the law.

---

[11] Section 198(a) of the Constitution.

[12] Section 199 of the Constitution provides:

> "(1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.
>
> . . . .
>
> (4) The security services must be structured and regulated by national legislation."

[13] Section 198(c) of the Constitution provides: "National security must be pursued in compliance with the law, including international law."

[14] Section 199(5) of the Constitution provides:

> "The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic."

[34] Whilst located within Chapter 11 of the Constitution, the provisions of section 209(1) are narrowly tailored to establish and regulate intelligence services other than an intelligence division of the defence force or the police service, which may be established only by the President and only in terms of national legislation.[15] Section 209(2) provides for the President's power to appoint a head of each intelligence service. He must either assume political responsibility for the control and direction of any of those services or designate a member of the cabinet to assume that responsibility.[16] It is noteworthy that section 209 is silent on the power of the President to suspend or dismiss a head of an intelligence service.

[35] The national legislation envisaged in section 209(1) of the Constitution is ISA. It came into operation during February 2003 but has transitional provisions that preserve the link and continuity with past intelligence services.[17] ISA establishes and regulates three intelligence services, one of which is the Agency. Section 3 provides for the continued existence of intelligence services established under previous legislation.[18] Section 3(3)(a) of ISA provides that the President must appoint a

---

[15] Section 209(1) of the Constitution provides:

> "Any intelligence service, other than any other divisions of defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation."

[16] The full text of section 209(2) of the Constitution appears in para [22] above.

[17] The Intelligence Services Act 38 of 1994 preceded ISA. ISA had the effect of repealing certain provisions of, inter alia, the PSA; the Labour Relations Act 66 of 1995; the Basic Conditions of Employment Act 75 of 1997; the Employment Equity Act 55 of 1998 and the Medical Schemes Act 131 of 1998.

[18] Section 3 of ISA provides:

> "(1) The National Intelligence Agency and the South African Secret Service continue to exist and consist of the persons—

Director-General for each of the intelligence services, including the Agency. Section 3(3)(b) of ISA makes it clear that the Director-General is the head and accounting officer of the intelligence service. However, ISA makes no express provision for the suspension or alteration of the terms of employment or dismissal of the head of an intelligence service, including the Agency.

[36] This position may be contrasted with the powers conferred on the Minister by the same legislation. Section 4 of ISA requires the Minister to create, in consultation with the President, the posts of deputy Director-General within the Agency. The Minister also bears the responsibility to create posts of assistant Director-General, all directorates, divisions and other lower post structures. Section 37(1) of ISA gives the Minister the power to make regulations, which include a power to regulate suspension and dismissal from the Agency. Regulations[19] (referred to by the applicant as the secret Regulations) appear to govern the suspension of members of the Agency. It is however clear from the provisions of ISA[20] that the Minister may regulate the

---

(a) who became members in terms of the Intelligence Services Act, 1994 (Act No. 38 of 1994), whose names appear on the personnel list;

(b) appointed as members in terms of the Intelligence Services Act, 1994, after its commencement;

(c) appointed as members in terms of this Act after its commencement.

(2) A former member of a non-statutory service may apply to have his or her years of service in a non-statutory service recognised for purposes of pension benefits, subject to the provisions of the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), if he or she became a member of the Agency or the Service between 1 January 1995 and 31 March 2004.

(3) (a) The President must appoint a Director-General for each of the Intelligence Services.

(b) A Director-General is the head and accounting officer of the Intelligence Service in question."

[19] Intelligence Services Regulations, published under GN R1505 in GG 25592 of 16 October 2003.

[20] Section 8 of ISA provides:

suspension and dismissal of the deputy Director-General and members of the Agency of a lower rank but has no similar power in relation to the Director-General and head of the Agency.

[37] The head of the Agency is part of the public service for the Republic. The basic values and principles governing public administration are in turn prescribed by Chapter 10 of the Constitution. Within the public administration there is a public service. Section 197 of the Constitution stipulates that the public service must be structured in terms of national legislation and its terms and conditions of employment must also be regulated by national legislation, which in this case is the PSA.[21]

[38] The terms of employment of the head of an intelligence service, including the Agency, are regulated by both the PSA and ISA. Regrettably, the interplay between the provisions of these two statutes in this particular context is complex and less than clear. The starting point for understanding this interplay should be section 2(3) of the PSA which provides:

---

> "(1) The Minister may, subject to this Act—
>
> (a) appoint any person as a member of the Intelligence Services or the Academy;
>
> (b) promote, discharge, demote or transfer any member:
>
> Provided that such appointment, promotion, discharge, demotion or transfer in respect of a Deputy Director-General or equivalent post may only be effected in consultation with the President.
>
> (2) A prescribed document signed by the Minister and certifying that any person has been appointed as a member is prima facie proof that such person has been so appointed."

[21] The PSA took effect in 1994 and was passed under the interim Constitution. The definition of "Constitution" was substituted by section 1(d) of Public Service Laws Amendment Act 47 of 1997. In terms of this section, references to the Constitution in the PSA were made to relate to the final Constitution, ensuring its continued validity.

> "Where persons employed in the . . . Agency . . . are not excluded from the provisions of this Act, those provisions shall apply only in so far as they are not contrary to the laws governing their service, and those provisions shall not be construed as derogating from the powers or duties conferred or imposed upon the . . . Agency . . . "

[39] It follows that the provisions of the PSA apply to the conditions of service of a head and members of the Agency when they are not at odds with the provisions of ISA. There are a few such relevant provisions in the PSA that apply to the head of the Agency and are not contrary to the provisions of ISA. These are section 3B(1)(a) and sections 12(2), (3) and (4). Section 3B provides generally for the appointment and "other career incidents" of heads of national departments. The relevant portion reads:

> "(1) Notwithstanding anything to the contrary contained in this Act, the appointment and other career incidents of the heads of departments shall be dealt with by, in the case of–
>
> (a) a head of a national department or organisational component, the President . . ."

Although the definition of "head of department" in paragraph 1 read with Schedule 1 of the PSA makes it clear that the conditions of service of the head of department of the Agency are also regulated under the PSA, section 3B(1)(a) does not grant specific power to appoint the head of the Agency. The source of the power to appoint heads of intelligence agencies is located in section 209(2) of the Constitution and that competence is echoed in section 3(3)(a) of ISA.

[40] Section 12(2) of the PSA does not seek to regulate the power to appoint but the manner or process of appointment. Section 12(2)(a) stipulates that a head of

department shall be appointed "in the prescribed manner, on the prescribed conditions and in terms of a prescribed contract" between the relevant executing authority for a period of five years or such shorter period as the executing authority may approve. In terms of section 1 of the Act, "prescribed" means prescribed by or under the PSA. The Public Service Regulations[22] prescribe that contracts that are to be concluded between an executing authority and a head of department in terms of section 12(2) shall be as set out in the Regulations.[23] It may include matters referred to in subsections 12(4)(a) to (c) of the PSA. In terms of the Regulations, the executing authority shall provide the Minister of Public Service and Administration with a copy of the contract shortly after its conclusion.

[41] In terms of section 12(4) of the PSA, the contract of employment of a head of department:

> ". . . *may* include any term and condition agreed upon between the relevant executing authority and the person concerned as to—
>
> . . . .
>
> (c) the grounds upon, and the procedures according to which, the services of the head of department may be terminated before the expiry of his or her term of office . . . ." (Emphasis added.)

[22] Employment contracts for heads of departments are provided for in section B.2 contained in Part VII of Chapter 1 of the Regulations, made under section 41 of the PSA by the Minister of Public Service and Administration and published as the Public Service Regulations under GN R1 in GG 21951 of 5 January 2001, with effect from 1 January 2001, unless otherwise indicated.

[23] The prescribed contract form is set out in Part 1 of Annexure 2 of the Regulations.

It appears plain that, in the case of the head of the Agency, the President is the relevant executing authority.[24] In other words, the manner in which the term of office of the head of the Agency may be amended or indeed terminated before its expiry may form part of the service agreement between the executing authority and the head of the Agency.

[42] It is, however, significant that outside this possible contractual process of termination, the PSA does not make provision for dismissal of the Director-General of the Agency. Section 17(2) of the PSA provides for discharge of officers but expressly excludes members of the Agency. Simply put, the PSA seems to make no provision for the termination of the service contract or dismissal of a head of an intelligence service, including the Agency. Another point of difference is that a discharge of an officer or employee under the PSA is subject to the applicable provisions of the Labour Relations Act.[25] On the other hand, section 2(b) of the Labour Relations Act[26] and section 3(1)(a) of the Basic Conditions of Employment Act[27] expressly exclude members of the Agency from the scope of their application.

*The decision to amend conditions of service or to dismiss*

[24] The text of section 3B(1)(a) is contained in para [39] above. Section 3B(2) refers to the President, as indicated in section 3B(1)(a), as the relevant executing authority.

[25] Act 66 of 1995.

[26] Section 2(b) of the Labour Relations Act states that this Act is not applicable to members of the Agency.

[27] Act 75 of 1997. Section 3(1) of this Act states:

> "This Act applies to all employees and employers except—
>
> (a) members of the National Defence Force, the National Intelligence Agency and the South African Secret Service . . . ."

[43] In this Court, the applicant put up a rather spirited criticism of the decision of the High Court on two main grounds, each with several strands. The first is that the decision to dismiss or to alter was not taken under section 209(2) of the Constitution. The applicant contends that the President purported to take the decision in terms of section 12(2) of the PSA which does not confer express authority on the President or on anyone else to do so. The kernel of the argument is that the dismissal was done without lawful authority. However, if section 12(2) of the PSA confers implied authority to amend or dismiss, then its exercise is the implementation of legislation and thus falls to be reviewed and set aside under PAJA as procedurally unfair.

[44] The second main contention is that section 209(2) of the Constitution, even if read together with section 3(3)(a) of ISA, does not vest in the President the power to reduce or end the period of office of the head of the Agency. To this main argument, there are several strands.

[45] First, is that the invocation of section 209(2) of the Constitution, as a provision which confers the requisite power on the President, is an afterthought and a belated and impermissible attempt to re-characterise his decision after the event. Second, these provisions do not confer on the President the implied power to dismiss. Third, even if the power to dismiss is to be implied, it must be sourced, not from the Constitution but from section 3(3)(a) of ISA, which vests in the President the power to appoint the head of the Agency. Since the exercise of such power would be the implementation of legislation, it would amount to administrative action for the

purposes of PAJA. Fourth, if any implied power to dismiss is conferred by section 209(2) of the Constitution, it is, in any event, subject to the procedural fairness requirement. And, lastly, the manner in which the power to dismiss under section 209 was exercised is inconsistent with the principle of legality. I now turn to look at these arguments closely.

*Did the President rely on sections 12(2) and (4) of the PSA to amend the applicant's term of office?*

[46] It is correct, as the applicant contends, that on his own version, the President purported to act in terms of section 12(2) read with section 12(4) of the PSA to amend the applicant's term of office in a manner that brought it to an end. The President chose this manner of termination on the advice of Minister Fraser-Moleketi because it would have the most humane financial impact for the applicant and his family. Minister Fraser-Moleketi explains on affidavit that she urged the President to amend the applicant's term of office. This is because a head of department, who is not dismissed but rather whose term of office expires, has greater entitlements such as payment of his full remuneration for the whole of the remaining period of his term of office; added pensionable service; continued medical assistance; and resettlement benefits according to the Regulations on conditions of service made under ISA.[28]

[47] Counsel for the President sought to persuade us that despite these facts, the President did not take the decision to amend on the strength of section 12 of the PSA

[28] See Intelligence Services Regulations above n 19.

because: (a) the President's letter of amendment does not refer to section 12 of the PSA; (b) it is the affidavit of Minister Fraser-Moleketi which refers to section 12 and not that of the President; (c) the Minister concerned made it clear that when the President sought her advice, he had already made the decision to relieve the applicant of his duties; and (d) the President could not have relied on section 12 of the PSA for discharging the applicant from his duties because section 17 of the same legislation specifically excludes the discharge of members of the Agency.

[48] These contentions advanced on behalf of the President bear no merit. First, at a factual level, the President, in his affidavit, states that he has read the affidavit of Minister Fraser-Moleketi and confirms the correctness of its contents.[29] In this way, the President embraced the option not to dismiss the applicant but to amend his term of office under section 12(2) for reasons of financial compassion advanced by Minister Fraser-Moleketi. Another important consideration is that the import of the text of the President's letter dated 20 March 2006, addressed to the applicant, is not open to doubt. In it the President states:

> ". . . I have decided to amend your current term of office as head of the said Agency to expire on 22 March 2006. You will be remunerated, in terms of section 37(2)(d) of the Public Service Act, 1994, for the remainder of your term of office before its amendment."

[29] In the President's answering affidavit in the High Court, he deemed it in the best interests of the applicant and the state, for the reasons that appeared in the affidavit of Minister Fraser-Moleketi, that the applicant's benefits should, as far as legally permissible, be maintained as if his contract of employment had run its full course.

[49] Second, the President's letter seeks to amend the term of appointment and does so in deliberate terms in order to achieve a compassionate financial outcome for the applicant. This it achieves by making the term of office expire prematurely. The truth of the matter is that, in substance, the amendment brings to an end the appointment and is accompanied by an offer to place the applicant in the same financial position he would have been in had his contract of service run its full course. To that extent, the applicant is right that this was the outcome that the President sought to reach through the mechanics of an alteration of the period of office under sections 12(2) and (4) of the PSA.

[50] Third, the argument relating to section 17 of the PSA does not help the cause advanced on behalf of the President because the provision does not apply to a head of a department. In any event, the President did not rely on section 17 but on section 37(2)(d) of the PSA, which is applicable to any special service benefit which may be granted to a head of department before or at the expiry of a term contemplated in section 12(1) of the PSA.

[51] In my view, it is beyond question that the President was advised and he accepted as appropriate the form of dismissal under the provisions of sections 12(2) and (4) read with section 37(2)(d) of the PSA by amending the applicant's term of office so that it would expire some two days later on 22 March 2006.

[52] It is however beyond doubt that, although the decision is couched in the language of an alteration of conditions of service, it is in effect a decision to bring to an end the applicant's term of office or to dismiss him. The blatant effect of the amendment of the term of office is to extinguish it. This is particularly true because this fatal amendment is accompanied by a financial offer to place the applicant in the same financial position he would have been in but for the termination of his appointment. This does not however change the fact that the President sought to use the provisions of the PSA and, in particular, sections 12(2) and (4) read with section 37(2)(d), as a manner of terminating the term of office. The sharp question is whether these provisions of the PSA alone or together with other constitutional and legislative provisions authorise the dismissal of the head of the Agency. It is to that question that I now turn.

*Do sections 12(2) and (4) of the PSA authorise the President to amend the applicant's terms of service?*

[53] The high-water mark of the applicant's case is that the President acted without lawful authority because sections 12(2) and (4) do not confer on him the power to amend the term of office of the head of a department so as to reduce the term. He may do so, not unilaterally and not by the exercise of an unspecified statutory power, but only, the applicant argues, consensually in terms of a contract of service. In other words, absent the consent of the head of department, whatever the circumstances, the President cannot shorten or terminate his or her term of service.

[54] This argument compels us to look closely at the provisions of sections 12(2) and (4) of the PSA in order to ascertain whether its primary purpose is to be a source of the power to appoint or dismiss a head of an intelligence service such as the Agency. These subsections state the following:

> "(2) As from the date of commencement of the Public Service Laws Amendment Act, 1997—
>
> (a) *a person shall be appointed in the office of head of department in the prescribed manner, on the prescribed conditions and in terms of the prescribed contract between the relevant executing authority and such a person for a period of five years from the date of his or her appointment, or such shorter period as that executing authority may approve*;
>
> (b) the term of office as head of department of such a person may be extended at the expiry thereof in accordance with the terms and conditions of the contract or a further contract, as the case may be, concluded between that executing authority and such a person for a period or successive periods of not less than twelve months and not more than five years, as that executing authority may approve;
>
> (c) the term of office as head of department of any person referred to in subsection (1), or any extended term thereof, may be extended at the expiry of the term of office or extended term, as the case may be, in the prescribed manner for a period of not less than twelve months and not more than five years, as the relevant executing authority may approve, provided the said person concludes the prescribed contract with that executing authority, whereupon any further extension of his or her term of office shall, subject to the provisions of paragraph (b), take place in accordance with the terms and conditions of that contract or a further contract, as the case may be.
>
> . . . .
>
> (4) *Notwithstanding the provisions of subsection (2), a contract contemplated in that subsection may include any term and condition agreed upon between the relevant executing authority and the person concerned as to—*
>
> (a) any particular duties of the head of department;

(b) the specific performance criteria for evaluating the performance of the head of department;

(c) *the grounds upon, and the procedures according to which, the services of the head of department may be terminated before the expiry of his or her term of office or extended term of office, as the case may be*; and

(d) *any other matter which may be prescribed*." (Emphasis added.)

[55] By now we know that the President appointed the applicant by a letter of appointment that cites the power to appoint the head of the Agency under section 3B(1) of the PSA and section 3(3)(a) of ISA and not under section 12 of the PSA. The period of appointment is for a period less than the five years envisaged in section 12(2) of the PSA. This is permitted by the section that provides that the authority to agree to a shorter period is that of the President as the executing authority. We also know that no written or prescribed contract, as envisioned in section 12(2)(a) of the PSA, was concluded between the executing authority and the applicant as head of department. There is no explanation of this omission on the papers.

[56] It is so that the President and Mr Masetlha did not agree on "any grounds upon, and the procedures according to which the services of the head of department may be terminated before the expiry of his or her term of office . . . ."[30] Also, it is clear that the provisions of section 12(4) of the PSA are permissive and not peremptory. Additional terms may be concluded on particular tasks and performance criteria of the head of department. Similarly, the termination procedure, before the expiry of the

[30] The text of section 12(4) of the PSA is contained in para [54] above.

term of service, may be agreed upon as an additional provision to the prescribed contract under section 12(2).

[57] The fact of the matter is that no prescribed contract was entered into and no agreement concluded, as envisioned in section 12(4)(c) of the PSA, on the procedure for ending the term of office before its expiry. It is, however, common cause that there was a contract of employment for three years, between the executing authority and the applicant, initiated by the letter of appointment. In fact, the very cause of action of the applicant rests on the existence of that service contract initiated by the President's letter of appointment. From this, the applicant urges us to construe the provisions of sections 12(2) and 12(4)(c) to mean that, whatever the circumstances, the President, has no power, express or implicit, to terminate the service contract of the head of the Agency, except with his or her consent. On this argument, the employment relationship is a matter regulated by principles of the law of contract. The subtext of this contention is that section 12(2) is silent about the power to amend or dismiss and because section 12(4)(c), in particular, provides for the possibility of an agreed expiry procedure, a unilateral ending of the service contract is impermissible.

[58] In my view, this contention of the applicant is unsound on several grounds. It omits to make a necessary distinction between the substantive power to appoint and dismiss a head of an intelligence service, on the one hand, and the resultant contract of employment which is regulated by the provisions of section 12 of the PSA. The operative constitutional and legislative framework does make that distinction. The

power, if any, to appoint and dismiss a head of an intelligence service is located in section 209(2) of the Constitution, read with section 3(3) of ISA and section 3B(1)(a) of the PSA. However, these provisions in themselves do not regulate how the appointment to and termination of office should happen. The manner and form of appointment that the legislature has chosen is a contract of service which, in the case of the head of the Agency, is regulated by sections 12(2) and (4) of the PSA.

[59] In my view, the applicant seeks to put the provisions of sections 12(2) to (4) of the PSA to a use not intended for. He is searching for a power to appoint or dismiss in these provisions. But their purpose is much more limited and is principally focussed on the terms and conditions of employment. It seems to me that the purpose of section 12(2) is not to create or confer on the executing authority the power to appoint or to end a term of office or to dismiss its incumbent. Its purpose is to elect or prescribe, at a general level, a manner through which a head of department shall be appointed or dismissed. They are suited to regulating terms and conditions of an existing contract of service, which is open to several options.

[60] For instance, whilst section 12(2) of the PSA requires that the head of department shall be appointed in the prescribed manner, on the prescribed conditions and in terms of the prescribed contract, it is permissive of which provisions may or may not be included in a service contract. The contract may be the prescribed one or a customised one. But the prescribed form of contract too has several open spaces to be completed and permits variations and adaptation. For instance, the term may be

anything between 12 months and five years. The term may be extended at expiry and may be further extended at the end of the extended period, if the executing authority permits it. Section 12(4) in particular anticipates a number of optional provisions on the job specification, specific performance criteria and grounds and procedure of termination before the expiry of the term of office, all of which may be included in a service contract. Section 12(4)(d) also makes it clear that the contract may provide for "any other matter which may be prescribed."

[61] But even more importantly, nothing in the wording of section 12 of the PSA compels the parties to agree on any terms of the service agreement beyond the essential elements thereof, as it is the case between the President and Mr Masetlha. It seems to me therefore that the section provides for a contractual framework for the manner of appointment of the head of department under section 12(2) and also implicitly for the termination of his or her term of office, even in the absence of a specific and agreed procedure contemplated in section 12(4)(c) of the PSA.

[62] In other words, if the alteration or termination of the service contract is not regulated by an express contractual provision, it would be regulated by implied contractual terms.[31] This means that neither contracting party may change the agreement unilaterally. Once a person is appointed, a contract of employment arises as envisaged and regulated by section 12 of the PSA. Here, no written contract was

[31] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA); [2005] 3 All SA 425 (SCA) at para 18; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531E-532A; *Pan American World Airways Incorporated v SA Fire Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 175C.

entered into but nevertheless the effect of the appointment of Mr Masetlha is that a contract of employment for a fixed period of three years arose between him and the government. Given that no terms were agreed upon for termination of the employment and that the Labour Relations Act[32] does not apply to this class of employment contract, the ordinary rules of contract of employment will apply to termination. The contract of employment is for a fixed period of three years. Therefore, it may not be terminated as a matter of contract before the expiry of the period unless there is material breach of the contract by the employee.

[63] As I have said earlier, the power to appoint and the power to dismiss, if any, is not located in section 12(2) of the PSA. Section 12 provides only for the manner and form of the service contract once the appointment or dismissal has occurred. It is therefore unsound to search for the power of the President to end a term of office of the head of the Agency in section 12(2). The power and indeed obligation of the President to appoint the head of an intelligence service is not sourced from a private law relationship. It is a public law power. In other words, this dispute between the parties is not merely about a breach or wrongful termination of an employment contract. It is rather about whether public authority has been exercised in a constitutionally valid manner. That much is quite apparent from the very claim and relief that the applicant is pursuing.

[32] Above n 25.

[64] The public power at stake derives from Chapter 11 of the Constitution and the operative legislation, which are intended to advance national security through the control and establishment of intelligence services. In particular, the provisions of section 209 of the Constitution regulate a specific element of the security forces, being intelligence services. Section 209(2) enjoins the President to appoint a woman or a man as head of an intelligence service and section 210 requires that national legislation must regulate the object, powers and functions of the intelligence service. As we have shown earlier, that national legislation is ISA. Again its provisions echo the original source of the power in section 209(2) of the Constitution when it provides that the President must appoint a Director-General for the Agency.

[65] Thus, the procedural and permissive requirements of sections 12(2) and (4) of the PSA must not be read alone, but in conjunction with the constitutional and operative legislative scheme that I have described at length.[33] It seems to me plain that the President may enter into a service contract with the head of the Agency only if he or she has the power to appoint. The source of that power is not section 12(2) of the PSA. It is section 209(2) of the Constitution, which is mirrored in the specific provision dealing with the appointment of the head of an intelligence service in section 3(3) of ISA. Of course, section 3B of the PSA also gives the general power of appointment of a head of department to the President.

[33] See para [31] above. It should be noted further that the PSA does not claim to cover the entire field. On its own terms, its application, however complementary, is subject to other legislative provisions which establish the Agency.

*Does the power to appoint under section 209(2) of the Constitution and section 3(3)(a) of ISA imply a power to dismiss?*

[66] The next question is whether the power to appoint implies the power to dismiss or to amend the terms of office so as to end it. The applicant sought to persuade us that, even if the power to appoint exists in section 209(2) of the Constitution or section 3(3)(a) of ISA, it does not incorporate a power to dismiss because the Constitution has omitted the power deliberately, as it is unnecessary. The Constitution requires that the establishment of an intelligence service may be done only through national legislation. Therefore, the appointment and dismissal of heads of security services were to be regulated by national legislation and not by implying provisions in the Constitution. The power to dismiss is only found in the context of a contract, envisaged in section 12(4)(c) of the PSA, or may be implied in section 3(3)(a) of ISA. And because the power to dismiss can be found only in a statute, its exercise is administrative action and is therefore susceptible to judicial scrutiny under PAJA.

[67] This argument has a number of pitfalls. Firstly, I have already held that the power to appoint or dismiss is not to be found in the context of sections 12(2) and 12(4)(c) of the PSA. Secondly, if the Constitution does not confer implicit power on the President to dismiss, what would be the source of such power in national legislation such as section 3(3)(a) of ISA? Why would it be competent to imply the power in legislation but not in the empowering constitutional provision? I cannot

accept that the power to dismiss has been deliberately omitted from the Constitution or that it is unnecessary.

[68] The power to dismiss is necessary in order to exercise the power to appoint. The High Court is right that the power to dismiss a head of the Agency is a necessary power without which the pursuit of national security through intelligence services would fail. Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the constitutional pursuit of the security of this country and its people. That is why the power to dismiss is an essential corollary of the power to appoint and the power to dismiss must be read into section 209(2) of the Constitution. There is no doubt that the power to appoint under section 209(2) of the Constitution and the power under ISA implies a power to dismiss.

[69] Of course, section 3(3)(a) of ISA is the legislation contemplated in section 209(1) of the Constitution. It is couched in terms similar to section 209(2) and it too is silent on the power to dismiss. However, that power must be present because it is implied in and flows from the empowering constitutional provision. But that does not alter or destroy, as the applicant will have us accept, the constitutional character of the power to dismiss a head of the Agency. I cannot find any valid reason why, as the applicant suggests, the power to dismiss may be inferred from the provisions of section 3(3) of ISA but not from those of section 209(2) of the Constitution.

[70] It follows that the power that the respondent utilised to dismiss the applicant is located in section 209(2) of the Constitution read with section 3(3)(a) of ISA. The applicant pressed on us the argument that the respondent should not be permitted to rely on section 209(2) because it is an afterthought. The applicant argues that the President dismissed him under section 12(2) of the PSA and now seeks to rely belatedly on section 209(2) of the Constitution. He argues that allowing the President to change the nature of the decision he took would violate the principle of certainty, a subset of the rule of law, which does not permit an organ of state to communicate that it is doing one thing to the detriment of another person when, in actual fact, it is doing something else.[34]

[71] The difficulty which confronts this argument is that section 12(2) of the PSA is not a source of the power to dismiss but regulates contractual terms in employment agreements of certain members of the public service. It is clear from the facts that both the President and Minister Fraser-Moleketi were concerned about the manner in which the term of office should be terminated and not with whether the President had the power to dismiss. I can find no suggestion from the facts that they ever disavowed reliance on section 209(2) of the Constitution as the original source of the power to appoint or end his term of office. If anything, express reference to section 209(2), as the source of the President's power to appoint the applicant, appears at least four times in the answering affidavits in the termination application. This was long before the

[34] *Minister of Education v Harris* 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) at para 18.

matter was ripe for hearing. Therefore, the complaint of the applicant that he would have formulated his case differently, if he was told that the President relied and continues to rely on section 209(2), is indeed misplaced.

[72] I have no doubt that, in all the circumstances, the President had the requisite power under section 209(2) of the Constitution read with section 3(3)(a) of ISA and was entitled to take a decision to bring to an end the appointment of Mr Masetlha as Director-General of the Agency. However, as will become apparent later, the power to employ and to dismiss the Director-General of the Agency should not be conflated with the contractual implications of terminating his fixed term employment contract prematurely.

*Is the decision of the President reviewable on any basis?*

[73] In sum, I have found that section 209(2) of the Constitution does confer on the President an implied power to dismiss a head of the Agency and that the power includes the power to amend the term of office of the incumbent of the Agency in such a manner as to end the term. I have also found that section 3(3)(a) of ISA contains a similar implied power to dismiss. I do not agree with the argument that the power to dismiss the head of the Agency must be sought only in national legislation and that that legislation is section 12 of the PSA. I have instead found that the purpose of section 12 of the PSA is not to confer the power to appoint but to regulate the manner of appointment and of dismissal. I have consequently rejected the

argument that the only manner in which the services of the head of the Agency may be terminated is by his or her consent, whatever the cause of the dismissal.

[74] The question then is whether the power to appoint and the correlative power to dismiss a head of the Agency as conferred by section 209(2) of the Constitution is subject to a requirement of procedural fairness. The unfairness that the applicant complains of lies in the President not affording him an opportunity to be heard before the impending dismissal. The applicant argues that the dismissal falls to be reviewed and set aside on the grounds of procedural unfairness. The gist of this contention is that nothing in section 209(2) expressly excludes the common law right on the part of the head of the Agency to be heard before dismissal.[35] For this proposition the applicant relied on the seminal passage to be found in *Administrator, Transvaal, and Others v Traub and Others*:[36]

> "The maxim [*audi alteram partem*] expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter . . .), unless the statute expressly or by implication indicates the contrary."[37]

[35] Hoexter in *Administrative Law in South Africa* (Juta and Co, Cape Town 2007) at 326 describes this right as being "concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions."

[36] 1989 (4) SA 731 (A).

[37] Id at 748G. See also *Minister of Health, KwaZulu, and Another v Ntozakhe and Others* 1993 (1) SA 442 (A); *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A); *Administrator, Natal and Another v Sibiya and Another* 1992 (4) SA 532 (A); and *Van Coller v Administrator, Transvaal* 1960 (1) SA 110 (T), in which the audi maxim was applied to a public employee before he or she was dismissed.

[75] It is so that the audi principle or the right to be heard, which is derived from tenets of natural justice, is part of the common law. It is inspired by the notion that people should be afforded a chance to participate in the decision that will affect them and more importantly an opportunity to influence the result of the decision. It was recognised in *Zenzile*[38] 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. In my view however, the special legal relationship that obtains between the President as head of the national executive, on the one hand, and the Director-General of an intelligence agency, on the other, is clearly distinguishable from the considerations relied upon in *Zenzile*. One important distinguishing feature is that the power to dismiss is an executive function that derives from the Constitution and national legislation.

[76] Section 85(2)(e) of the Constitution, in particular, stipulates that the President exercises executive authority by performing "any other executive function provided for in the Constitution or in national legislation." Furthermore, it is important to understand that section 1 of PAJA expressly excludes, from the purview of "administrative action", executive powers or functions of the President referred to in section 85(2)(e). In other words, presidential decisions which constitute the exercise of executive powers and functions under section 85(2)(e) are clearly not susceptible to

[38] *Zenzile* id at 34B-D, 34J-35B, 35H–36A, 37G.

administrative review under the tenets of PAJA even if they otherwise constitute administrative action.[39]

[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 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. In *Premier, Mpumalanga*,[40] this Court has had occasion to express itself on whether to impose a requirement of procedural fairness in the following terms:

[39] The national powers and functions specifically excluded from the definition of PAJA are listed in section 1 with reference to relevant constitutional provisions. The President's powers under section 85(2), particularly those included in section 85(2)(e) of the Constitution, are expressly excluded in section 1(i)(aa) of PAJA. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at paras 141-143 *(SARFU)*, this Court distinguished between executive and administrative action. It held that the power in question was conferred upon the President and that it was an original power, derived directly from the Constitution. Hoexter above n 35 at 212 argues that the meaning of "executive" in section 1(i)(aa) of PAJA has the effect of excluding "only distinctively political decisions and not characteristically administrative tasks such as implementing legislation." See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 78; and *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at para 27.

[40] *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC).

> "In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly."[41]

[78] This does not, however, mean that there are no constitutional constraints on the exercise of executive authority. The authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution.[42] Procedural fairness is not a requirement. The authority in section 85(2)(e) of the Constitution is conferred in order to provide room for the President to fulfil executive functions and should not be constrained any more than through the principle of legality and rationality.

[79] It is appropriate to recall what this Court had occasion to observe in *SARFU*:

> "[T]he exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the President's power."[43] (Footnotes omitted.)

[80] Although within the context of ministerial regulation-making power, Ngcobo J restates the rationality test in the following terms:

---

[41] Id at para 41.

[42] See *Pharmaceutical Manufacturers* above n 39 at para 85 and *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

[43] *SARFU* above n 39 at para 148.

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.
>
> . . .
>
> The exercise of such power must be rationally related to the purpose for which the power was given.
>
> . . .
>
> As long as the regulation of the practice, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere simply because it disagrees with it or considers the legislation to be inappropriate."[44] (Footnotes omitted.)

[81] It is therefore clear that the exercise of the power to dismiss by the President is constrained by the principle of legality, which is implicit in our constitutional ordering. Firstly, the President must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.

[82] Reverting to the present case, I agree with the High Court that ordinarily a dismissal of a head of an intelligence service on the basis of irretrievable loss of trust on the part of his principal, in this case the President, would not be arbitrary or

[44] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at paras 49, 75 and 77.

irrational. Of course, the facts in a particular case may demonstrate irrationality, arbitrariness or bad faith on the part of the person who makes the dismissal decision. In this case, nothing suggests that the President acted arbitrarily or without sufficient reason.

[83] Even if procedural justice was a requirement for the exercise of the power to dismiss, it seems to me that, on the facts, Mr Masetlha has had ample occasion to respond to the allegations that were made against him in relation to the "Macozoma affair". It will be remembered that after the unauthorised surveillance was exposed, he had had at least two meetings with the Minister, at which he was called upon to provide an explanation about the surveillance and his role in it. At the request of the Minister, he submitted a written report in which he sought to explain his complicity, if any, in the surveillance. He participated in and made submissions regarding the investigation process set up by the Inspector-General. Once the report of the Inspector-General was available, the Minister explained the adverse recommendations made against him and the fact that they were given to the President.

[84] Before his dismissal, he had audience with the President at which he expressed his views on the "Macozoma affair" and dissatisfaction with the findings of the Inspector-General's investigation, including recommendations that disciplinary proceedings be taken against him. Although the President did not ask the applicant for his views at the point of dismissing him, he had the benefit of the view of the applicant on all material issues that led to the dismissal.

[85] The President dismissed the applicant because the relationship of trust between them has broken down irreparably. The applicant admits to this and blames the President for the break-down of the trust and contends that it could be restored if the President makes appropriate amends for the harm the President has caused to Mr Masetlha's reputation.

[86] It cannot be forgotten that the duties of the applicant are to head, exercise command over and control the Agency.[45] The functions of the Agency itself include the duty to gather, evaluate and analyse domestic intelligence in order to identify any threat or potential threat to the security of the Republic or its people. This duty extends to national counter intelligence responsibilities, which includes gathering and co-ordinating counter intelligence, in order to identify any threat or potential threat to the Republic or its people. And importantly, the Agency bears the responsibility to inform the President of any such threat. It follows that in order to fulfil his duty in relation to national security, the President must subjectively trust the head of the intelligence services. Once the President had apprised himself of the facts from the Minister; the report of the Inspector-General; the various reports of the applicant himself; the meetings he had with the applicant; the attacks on his integrity and accusations of falsehoods contained in the papers on suspension proceedings, the President concluded that he had lost trust in the applicant and that it was in the

[45] Section 10(1) of ISA states:

> "The Director-General concerned or the Chief Executive Officer must, subject to the directions of the Minister and this Act, exercise command and control of the Intelligence Services or the Academy, as the case may be."

national interest to terminate his appointment as head of the Agency. In my view, that break-down of the relationship of trust constitutes a rational basis for dismissing the applicant from his post as Director-General of the Agency.

*The underlying contract of employment*

[87] As we have seen earlier, the President had the requisite power to make the decision to dismiss the applicant or to amend his term of office so as to end it. I can find no cause to hold that the exercise of that power is not in accordance with the law. This does not however mean that a contract of employment between Mr Masetlha and the government comes to naught. The question is what the legal consequences are of the premature termination of the underlying contract of employment.

[88] Although it is clear that there has been a break-down in trust, that alone is not a sufficient ground to justify a unilateral termination of a contract of employment. It must however be said that the irretrievable breach of trust will be relevant for purposes of remedy. The ordinary remedies for breach of contract are either re-instatement or full payment of benefits for the remaining period of the contract.[46] In my view, even if the contract of employment were terminated unlawfully, Mr Masetlha would not be entitled to re-instatement as a matter of contract. Re-instatement is a discretionary remedy in employment law which should not be

[46] In essence, the applicant in this matter is seeking specific performance of a service contract. Christie in *The Law of Contract* 4 ed (Butterworths, Durban 2001) at 606 defines specific performance as, inter alia, an order to perform a specific act or to pay money in pursuance of a contractual obligation. Analogously, section 193 of the Labour Relations Act contemplates re-instatement, re-employment or compensation for dismissals that are found to be unfair. See also *Schierhout v Minister of Justice* 1926 AD 99 and *Rogers v Durban Corporation* 1950 (1) SA 65 (D).

awarded here because of the special relationship of trust that should exist between the head of the Agency and the President.[47]

[89] On any version of the facts, trust between the head of the Agency and the President has broken down. The President says that the break-down is irretrievable. In his papers, Mr Masetlha has impugned the integrity of the President and has accused him of lying. He agrees that relationship of trust has disintegrated but says that it is not irretrievable and may be restored if the President were to make amends to his reputation. In my view, a relationship of trust between a President and the head of an intelligence service is indispensable. Trust goes to the very root of the special arrangement between a President, as head of state and of the national executive, and the head of an intelligence agency; without which the interest of national security cannot be best served. If anything, national security would be severely prejudiced.

[90] Whether trust has irretrievably dissipated is a matter of fact, which falls to be decided on the facts of each case. In this case, the absence of trust is mutually acknowledged. It has not been suggested that, in taking the decision, the President acted irrationally nor am I able to find that he did.

[91] As we have observed earlier, when a fixed term contract of employment is terminated the applicant may claim re-instatement or full payment of benefits for the remaining period of the contract. It is however plain that, in the context of this case,

[47] Christie id at 614. See also *Schierhout* id at 107 and *Rogers* id at 65.

the re-instatement of Mr Masetlha would be inappropriate. To the extent that the mainstay of his claim is to be re-instated as Director-General of the Agency, his claim must fail. From that must follow that Mr Masetlha's residual or alternative remedy is full payment of salary, allowances and benefits of his post for the remaining period of his contract.

*Is it still necessary to decide the suspension dispute?*

[92] Given the conclusion I have reached, it is unnecessary to decide the suspension dispute. It will be remembered that the first respondent tendered costs of the suspension application on the ground that there was no longer a live controversy between the parties. Then the applicant took an opposite view and declined the costs tender and the offer to place him in the same financial position as he would have been in had his term of office run its full course. I would accordingly dismiss the appeal and uphold the decision of the High Court that the suspension dispute has been rendered moot by the decision on the dismissal of the applicant.

*Should any of the disputes between the parties be referred to oral evidence?*

[93] The applicant thinks that certain issues should be remitted to the High Court for the hearing of evidence. These issues are related to the complaint of the applicant that in suspending and dismissing him, the President acted with an ulterior purpose. The applicant says that he was obliged to proceed by way of application and to adopt a procedure that would allow the President not to have to testify in relation to the performance of his official duties unless it was necessary for the resolution of the

dispute between the parties. For this attitude, the applicant relied on the unanimous decision of this Court in *SARFU*.[48]

[94] The applicant is the initiator of the suspension and termination applications and has elected motion proceedings. The duty is on him to seek an order for referral to oral evidence if he is of the reasonable view that genuine disputes of fact may require resolution through oral evidence.[49] Ordinarily the election is not done on appeal. In any event, all but one of the causes of action relate to the suspension dispute that is now moot.

[95] The last issue is premised on a claim that the President dismissed the applicant for an ulterior motive to protect the Minister from political embarrassment. On the other hand, the President refutes this allegation and avers that he has taken the decision to dismiss the applicant in the public interest. I do not think that this marginal dispute, in the overall scheme of this case, weighs heavier than the need for finality in this matter. Even if the motive, at a certain stage, had been to remedy the fact that the wrong power had been used to effect dismissal, this would not constitute an ulterior motive. What is important is that the trust between the parties had irretrievably broken down. The disputed issues of fact relate to matters peripheral to the basic legal questions.

---

[48] *SARFU* above n 39 at paras 240-245.

[49] Id at para 20. See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-I and *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162. See also *Pereira and Others v First Rand Bank Ltd and Others* [2002] JOL 10121 (W); and *Shoprite Holdings Ltd v Oblowitz and Others* [2006] 3 All SA 491 (C) at 500F-501H.

[96] In this regard, we will do well to remember the words of this Court in *SARFU* on a similar issue:

> "Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of State and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that courts are not impeded in the administration of justice."[50]

In all the circumstances, I would not grant an order to refer any issue to oral hearing.

*Remedy*

[97] In its bare bones, the relief asked for by Mr Masetlha is to be re-instated as Director-General of the Agency. I have come to the conclusion that the President was entitled to dismiss him but, given the underlying contract of employment between Mr Masetlha and the government, it was open to him to claim specific performance in the form of re-instatement or full payment of salary, allowance and benefits that attach to his post for the unexpired term of the contract. For reasons that I have advanced, I hold that this is not an appropriate case to order re-instatement. I must immediately add that even if the applicant had otherwise succeeded in this Court, this would not be a case for ordering re-instatement.

[98] This is so because it would not be proper to foist upon the President a Director-General of an important intelligence agency he does not trust. Nor would the public

[50] *SARFU* above n 39 at para 243.

interest be served by a head of an intelligence service who says that he has lost trust and respect for his principals, being the President and the Minister. Before this Court, it was submitted on behalf of the applicant that he persists in seeking re-instatement more for personal vindication of his reputation than to be returned to his previous office. I have understanding for this personal quest to protect and restore his reputation. It is neither frivolous nor a matter which does not engage the cardinal constitutional value of dignity. At the inner heartland of our rights culture is human dignity. This has implications for the manner in which public power is exercised. Public power, even though properly conferred, must be exercised in a manner that would not violate the human dignity of those concerned including reputation, which is an incident of one's sense of self worth.

[99] The financial tender that was made to the applicant was intended to place him in the same financial position that he would have been in but for the early termination of his services. The applicant returned the tendered lump sum to the state. The appeal of the applicant has failed and therefore this Court has not made an order declaring that the conduct of the President is inconsistent with the Constitution and invalid as envisioned in section 172(1)(a) of the Constitution. The question is whether this Court has the power to make an order that is just and equitable as envisioned in section 172(1)(b) of the Constitution when it has not declared any law or conduct inconsistent with the Constitution.[51]

[51] Section 172(1) of the Constitution provides:

"When deciding a constitutional matter within its power, a court—

[100] This does not arise. Absent an order for the re-instatement of Mr Masetlha, the state remains duty-bound to place Mr Masetlha in exactly the same position as he would have been had he served his full term as Director-General of the Agency. It is quite clear that Mr Masetlha declined the tender in order not to prejudice his claim for re-instatement as Director-General. Now that that claim has failed, there is no reason in law why he should not be paid the amount and benefits which the state had detailed in the letter from Minister Fraser-Moleketi to him dated 22 March 2006 and marked "AR3" in the application papers.

[101] Another additional consideration is that, during the hearing before us, counsel for the President conceded that the government had the duty to honour the tender to Mr Masetlha. To that extent, the order I intend making does not only arise from the obligation of the government arising from the contract of employment but also the consent of the government. However, the one remaining difficulty is that Mr Masetlha has never signified whether the tender is a true equivalent of the remuneration and benefits he would have been entitled to had his term of office not been interrupted. For that reason, I plan to make an order which will allow the parties to approach this Court or any other court of competent jurisdiction, on supplemented

---

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

papers, for a speedy resolution regarding the extent of the applicant's remuneration and benefits owing.

*Costs*

[102] The applicant has raised important constitutional issues about the validity of certain decisions made by the President. Although his appeal is unsuccessful, we have required the President to place the applicant in exactly the same financial position as he would have been, but for the premature termination of his term of office. At the hearing, counsel for the President did not seek an order of costs against the applicant, nor do I find it appropriate to make an adverse order of costs against the applicant in this Court.

[103] One additional matter remains. The High Court dismissed the consolidated application with costs including the costs of two counsel, but excluding the costs of the founding papers in that case. Having considered all the circumstances, I have come to the conclusion that that costs order should not stand. The applicant sought to vindicate important constitutional guarantees and should not be unduly mulcted in costs for attempting to do so. I will accordingly set aside the costs order of the High Court and make no order as to costs in this Court.

*Order*

[104] The following order is made:

1. The application for leave to appeal is granted.

2. The application to refer certain disputes of fact in the termination application and the suspension application for determination by oral evidence is refused.

3. The appeal against the decision of the High Court, in which it dismissed the consolidated application, is refused.

4. The order made by the High Court is set aside and is replaced with the following order:

   "The consolidated application is dismissed with no order as to costs."

5. No order as to costs is made.

6. The first respondent is ordered to pay to the applicant remuneration, allowances, pension and other benefits in terms of section 37(2)(d) of the PSA for the period starting on 22 March 2006 up to 31 December 2007, all of which shall place the applicant in the same financial position that he would have been in but for the termination of his term of office on 22 March 2006.

7. Should any dispute arise between the applicant and the first respondent in relation to the extent of the financial position referred to in paragraph (6) above, either party may approach this Court or any other court of competent jurisdiction, on the same or supplemented papers for adjudication of the dispute.

Langa CJ, Navsa AJ, Nkabinde J, O' Regan J, Skweyiya J and van der Westhuizen J concur in the judgment of Moseneke DCJ.

NGCOBO J:

*Introduction*

[105] This is an application for leave to appeal directly to this Court against the decision of the Pretoria High Court. It raises three questions. The first concerns the authority to suspend the head of the National Intelligence Agency (NIA). It arises out of the suspension of the applicant, who, until the events described below, was the head of the NIA. The second question concerns the power of the President to unilaterally alter the term of office of the head of the NIA so that it ends earlier than the date of its expiry. This question arises out of the decision taken by the President purporting, in terms of section 12(2) read with section 3B(1)(a) of the Public Service Act,[1] 1994 (PSA), to alter the applicant's term of office so that it ended on 22 March 2006 and not on 31 December 2007, which was its original expiry date. The third question, which arises only if the first two questions cannot be resolved on the papers, is whether any unresolved material factual issues should be referred for oral evidence.

[106] Moseneke DCJ holds that: (a) the President has the power under section 209(2) of the Constitution read with section 3(3)(a) of the Intelligence Services Act,[2] 2002

[1] Proclamation No 103 of 1994.

[2] Act 65 of 2002.

(ISA) to dismiss the head of the NIA; and (b) this power includes the power to alter the term of office of the head of the NIA so as to end the term of office earlier than that stipulated in the letter of appointment.[3] These powers, he holds, are implied in both section 209(2) of the Constitution and section 3(3)(a) of ISA. He further holds that in the exercise of these powers the President was not subject to the requirement of procedural fairness because: (a) his conduct amounts to executive action; (b) "[a]lthough the President did not ask the applicant for his views at the point of dismissing him, he had the benefit of the views of the applicant on all material issues that led to the dismissal";[4] and (c) the special relationship that existed between the President and the applicant distinguishes this case from the considerations relied upon in *Zenzile*.[5]

[107] He concludes therefore that the President acted lawfully when he altered the term of office of the applicant. In the light of this conclusion, he finds that the question of the applicant's suspension is moot and that it is not necessary to consider whether to refer any factual issue for oral evidence.

[108] I agree that the power of the President to appoint the head of the NIA includes the power to alter the term of office of the head of the NIA. However, I am unable to agree with the finding that the President has the power to unilaterally alter the term of office of the head of the NIA. In my view, the exercise of the power to alter the term

[3] Paras [66]-[72] of Moseneke DCJ's judgment.

[4] Para [84] of Moseneke DCJ's judgment.

[5] *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A).

of office is constrained by the principle of the rule of law, in particular, the doctrine of legality. The power to unilaterally alter the term of office is inconsistent with the principle of the rule of law. It cannot, therefore, be implied. On the contrary, the President was required to consult with the applicant prior to altering the term of office of the applicant, which he did not do. The conduct of the President was therefore in breach of the principle of the rule of law and thus inconsistent with the Constitution.

[109] However, like Moseneke DCJ, I find that the question of the suspension of the applicant is moot and that it is not necessary to consider whether to refer any factual issues for oral evidence. But I do so for different reasons.

*Factual background*

[110] The applicant was appointed the Director-General of the NIA on 14 December 2004 for a fixed period of three years commencing on 1 January 2005 and ending on 31 December 2007. The appointment was made by the President under section 3(3)(a) of ISA[6] read with section 3B(1)(a) of the PSA.[7] Other than recording the statutory provisions under which the appointment was made and fixing the definite period of the term of office, the Presidential Minute said nothing more. It is common cause that the President and the applicant did not conclude any other agreement setting out other terms and conditions governing the appointment.

[6] See below para [143].

[7] See below para [146].

[111] The present dispute has its genesis in what was described in the papers as the "Macozoma affair". A businessman, Mr Macozoma, was placed under surveillance by the operatives of the NIA. According to the applicant, he did not authorise the surveillance and was not aware of it. He was not aware of it until Mr Macozoma complained about it to the Minister for Intelligence Services (the Minister). On the instructions of the Minister, the applicant investigated this affair and thereafter reported to the Minister. The latter was not satisfied with the report of the applicant, in particular, the circumstances giving rise to the surveillance. He requested the Inspector General of Intelligence (the IGI) to investigate the circumstances giving rise to the surveillance.

[112] Following the report of the IGI to the Minister on 14 October 2005, the Minister suspended and thereafter dismissed the Deputy Director-General of the NIA, Mr Njenje and another senior member of the NIA, Mr Mhlanga. The action taken against these officials was apparently based on their alleged involvement in the "Macozoma affair". Mr Njenje threatened to institute legal proceedings in order to have his name cleared.

[113] On 19 October 2005, the applicant was summoned to a meeting with the President and the Director-General in the office of the President at the official residence of the President. There is a dispute as to what precisely was discussed at this meeting. However, it is undisputed that among the issues discussed was the dismissal of Mr Njenje and his threat to institute legal proceedings as well as the

report of the IGI. It is also not in dispute that the President requested the applicant to intervene and persuade Mr Njenje to hold in abeyance any legal proceedings until the President had had the opportunity to meet with Mr Njenje. A meeting was scheduled for the following day, which presumably was a follow-up to the meeting of 19 October 2005, when both the Minister and the IGI would also be present.

[114] On 20 October 2005, the applicant attended the scheduled meeting at the residence of the President. Apart from the President, the Minister and the IGI were also present at the meeting. At the commencement, the President announced that it was no longer necessary to discuss the matter that had been raised the previous day because the Minister had earlier spoken to him and the Minister had something to say. The Minister then read out to the meeting the contents of a letter of the same date written by the Minister to the applicant. In the letter, the Minister purported to suspend the applicant from his position as the head of the NIA and instructed the applicant not to enter the premises of the NIA without his permission for the duration of the suspension.

[115] The letter reads as follows:

> "[On the letterhead of the Ministry: Intelligence Services Republic of South Africa]
> Dear Director General
>
> I have been provided with the Report of the investigation by the Inspector General into the legality of the NIA surveillance operation on Mr Sakumzi Macozoma.

> The findings of the Inspector General in respect of your knowledge and involvement in this operation - found by the Inspector General to have been unauthorised and unlawful - are serious.
>
> I have asked the Inspector General to extend his investigation to cover issues not covered by the original terms of reference, but which were raised during the course of the initial investigation. Should the Inspector General need to consult with you on any issue during the further course of his investigation, you are requested to co-operate fully.
>
> Given the seriousness of the issues at hand, and my concern at your involvement in what appears at this stage to be an unlawful and un-procedural operation by NIA I have decided to suspend you from your post as Director General with immediate effect until further notice.
>
> You are advised that for the duration of your suspension you are not permitted to enter the premises of the National Intelligence Agency or the South African Secret Services, unless you are duly authorised by me to do so – with the exception of your residence.
>
> Should you wish to advance reasons as to why you should not be suspended, you are to communicate these in writing to my office for my consideration.
>
> Thank You.
> [Signed by R Kasrils, Minister for Intelligence Services]"

[116] The Minister assured the President during the meeting that he had consulted and had established that he, the Minister, had the power to suspend the applicant from his post because this was an internal procedural matter of the NIA, which did not require the intervention of the President. The President enquired from the applicant whether he had anything to say. The applicant replied that he first wanted to read and study the letter. The President thereafter closed the meeting. There was no suggestion

at this meeting either by the Minister or by the President that the decision to suspend the applicant had been taken by the President.

[117] On 27 October 2005, the applicant's legal representatives addressed a letter to the Minister requesting, amongst other things, the statutory provision under which the Minister purported to suspend the applicant as well as the reasons for the suspension. On 31 October 2005, the Minister's legal representatives placed themselves on record as representing the Minister and indicated that they would respond to the applicant's legal representatives once they had received full instructions. In their subsequent letters of 4 and 8 November 2005, the Minister's legal representatives did not address the request for reasons for suspension nor did they furnish the statutory authority for the suspension. They did not deny that the Minister had suspended the applicant either.

[118] It was only on 9 November 2005 that the Minister's legal representatives suggested for the first time that the decision to suspend the applicant had been taken by the President in terms of section 3(3)(a) of ISA. Despite this allegation, however, they went on to furnish reasons for the suspension. One of these reasons was that "[the Minister] was concerned that [the applicant's] continued presence at work during the investigation would be detrimental to [the rest of the letter is redacted]". The allegation that the President had taken the decision to suspend was challenged by the applicant. The Minister's legal representatives responded by saying the President will confirm this.

[119] On 12 November 2005, the applicant then launched an urgent application in the Pretoria High Court challenging the decision to suspend him. He contended that despite the allegations to the contrary by the Minister's legal representatives and the office of the President, the decision to suspend him had been taken by the Minister and that the latter had no authority in law to do so. He further contended that if the decision has been taken by the President, the decision by the President to suspend him would be invalid unless it is in writing and signed by the President.

[120] Three days after the application challenging the suspension was launched, the President purported to reduce to writing the decision to suspend the applicant by executing Presidential Minute number 633 of 15 November 2005. This minute does not purport to be the decision but purports to record a decision ostensibly taken by the President on 20 October 2005. In addition, it purports to operate with retrospective effect to 20 October 2005. There is no explanation in the papers why this minute was only executed on 15 November 2005, almost a month after the decision purporting to suspend the applicant had been taken. Nor is there any indication as to what prompted the minute.

[121] It is not disputed, however, that the applicant was not afforded any opportunity to make representations as to why he should not be suspended either before or after the minute was executed.

[122] On 10 March 2006, the applicant launched another application challenging his suspension in light of Presidential Minute 633. He challenged the decision on various grounds, including that the decision was that of a Minister and not that of the President; alternatively the decision to suspend him that was taken on 20 October was not legally binding because it was not in writing; the decision to suspend him was inconsistent with the principle of legality in that section 3(3)(a) of ISA does not confer on the President the power to suspend nor does it confer the power to suspend with retrospective effect; and that the decision to suspend was taken in breach of section 6(2)(c) of the Promotion of Administrative Justice Act,[8] 2000 (PAJA), in that he was not afforded an opportunity to make representations as to why he should not be suspended or why any suspension imposed should not be withdrawn.

[123] Then on 20 March 2006, ten days after the launching of the second suspension application, the President purported to alter the applicant's contract of employment by reducing his term of office so that it ended on 22 March 2006 instead of 31 December 2007. The letter conveying this to the applicant states:

> "Dear Mr Masetlha
>
> The relationship of trust between me, as Head of State and of the National Executive and you as head of the National Intelligence Agency, has broken down irreparably.
>
> Accordingly, after consultation with the Ministers for Intelligence Services and for the Public Service and Administration, I have decided to amend your current term of office as head of the said Agency to expire on 22 March 2006. You will be

[8] Act 3 of 2000.

remunerated, in terms of section 37(2)(d) of the Public Service Act, 1994, for the remainder of your term of office before its amendment.

The Minister for the Public Service and Administration will communicate with you regarding such benefits as would be due to you, as well as the conditions attached to the expiry of your term of office.

Yours Sincerely,
Thabo Mbeki"

[124] In altering the applicant's term of office, the President purported to act in terms of section 12(2) read with section 3B(1)(a) of the PSA. He did so after seeking and obtaining advice from the Minister for Public Service and Administration. This emerges from the affidavit of the Minister for Public Service and Administration, whose contents are confirmed by the President. She says:

"4. I met the First Respondent who informed me that he had taken a decision to relieve the Applicant of his duties due to a breakdown of the relationship of trust between them. The First Respondent sought my advice on how best to go about this considering laws that apply to service benefits for heads of departments. In particular, the First Respondent was concerned that the decision be effected in a more humane manner considering the Applicant's long service in the Public Service.

5. I advised the First Respondent that the term of office of the Applicant as the head of the National Intelligence Agency (herein referred to as 'NIA') be amended to expire on 22 March 2006 . . .

6. In terms of section 12(2), read with section 3B(1)(a), of the Public Service Act, 1994 (promulgated under Proclamation 103 of 1994), as amended, the President determines the term of office of the heads of national department as their executing authority. NIA is listed in Schedule 1 to Public Service Act.

> The statutory authority to determine the term of office of a head of a national department implies the statutory authority for the President to amend it.
>
> 7. To obtain the most equitable and favourable pension and other benefits for the Applicant upon the termination of his services, I advised the First Respondent to amend his term of office to expire on 22 March 2006 and not to terminate his services on a basis that does not entail an expiry of his term of office as head of NIA."

[125] As indicated in the President's letter, the Minister for Public Service and Administration addressed a letter to the applicant setting out the basis upon which the applicant would be remunerated and the benefits that he would receive which included pension and resettlement benefits. In addition, the letter required the applicant to vacate the official house within three months after the effective date of the termination of his contract. Apparently following this letter, a sum of money representing these benefits and remuneration described in the letter was deposited into the banking account of the applicant. The applicant declined to accept the money and refunded it.

[126] On 27 March 2006, the applicant launched an application to review and set aside the decision to alter his term of office and sought, among other things, an order reinstating him in his post as the head of the NIA.

[127] In terms of the letter from the Minister of Public Service and Administration referred to earlier, the applicant was required to vacate the official house on 23 June 2006. Approximately two weeks prior to that deadline, the second respondent, who had since been appointed the head of the NIA, wrote to the applicant reminding him to

vacate the house by 23 June 2006. Through his attorneys, the applicant resisted vacating the house pointing out that the decision of the President to alter his term of office was being challenged. The State Attorney acting on behalf of the NIA, entered the fray and gave the applicant until 25 June 2006 to vacate the house and threatened legal action if the applicant did not vacate.

[128] The next letter from the office of the State Attorney changed the tone. The threat of securing eviction though the legal process had apparently been abandoned because "further court processes would achieve nothing but the incurring of further legal costs". The State Attorney now threatened to evict the applicant from the house without a court order; this, notwithstanding the dispute as to the lawfulness or otherwise of the termination of the applicant's services. It made this threat notwithstanding the provisions of section 26(3) of the Constitution which requires a court order before anyone can be evicted from one's home.[9] In this regard the State Attorney said:

> "We are advised that, to date Mr Masetlha remains in occupation of the State house despite instructions that he vacate the State house by no later than 23 June 2006. We are also informed that Mr Masetlha and his family have access cards to the State house.
>
> It is our advice to the Minister of Intelligence that further court processes would achieve nothing but the incurring of further legal costs.

[9] Section 26(3) provides:

> "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

> Our instructions are to inform your client that access to the security premises including the State house will be denied to him and his family by **17h00 on the 01st August 2006**.
>
> We are instructed to advise further that unless your client removes his personal belongings from the State house by the time indicated above, the belongings will be put in storage at his cost."

[129] When the applicant's attorney pointed out that the action threatened in the letter of the State Attorney "would amount to spoliation and is clearly unlawful", the State Attorney did not waiver. In the letter of 1 August 2006 the State Attorney expressed the view that preventing the applicant from having access to the state house would not "constitute unlawful spoliation." And it was made clear that "[the NIA] will proceed to preclude access to [the applicant] as stated [earlier]." This prompted the applicant to seek an urgent interdict against the Minister and the Minister for Public Service and Administration in the Pretoria High Court for an order restoring quiet and undisturbed possession of the state house to the applicant. The High Court granted that order.

[130] During oral argument we were informed from the bar by counsel for the President that the second respondent was now occupying the state house.

*The decision of the High Court*

[131] The suspension application and the application challenging the amendment of the term of office were consolidated in the High Court and dealt with together. The High Court dealt first with the challenge to the decision to alter the term of office and held that: (a) the power to dismiss the head of the NIA is implicit in section 209(2) of

the Constitution; (b) the power to dismiss the head of the NIA constitutes an executive decision in terms of section 85(2)(e) of the Constitution;[10] and (c) the power to dismiss is not subject to judicial review under PAJA. It held, however, that in the exercise of the power to dismiss, the President is constrained by the doctrine of legality. He may not, the High Court held, act in bad faith, arbitrarily or irrationally. On the facts, it found that there had been an irreparable breakdown in the relationship of trust between the President and the applicant. It held that this constituted a lawful reason for the dismissal of the applicant. It accordingly concluded that the President had acted lawfully when he altered the term of office of the applicant and dismissed the application with costs.

[132] In the light of this conclusion, the High Court found that the question of the validity of the applicant's suspension is moot and therefore declined to consider it. This conclusion also rendered it unnecessary for the High Court to consider whether there were any issues that should be referred for oral evidence.

[133] The present application for leave to appeal directly to this Court is the sequel.

[134] In the light of the view I take of the powers of the President to unilaterally alter the term of office of the head of the NIA, it will be convenient to first consider the challenge to the decision to alter the applicant's term of office.

[10] Section 85(2)(e) provides:

> "The President exercises the executive authority, together with the other members of the Cabinet, by performing any other executive function provided for in the Constitution or in national legislation."

*The contentions of the parties in this Court*

[135] The applicant challenged the decision to alter his term of office on the ground that section 12(2) of the PSA does not confer on the President the power to alter his term of office and that therefore the President acted in breach of the doctrine of legality. Alternatively, it was contended that if there is an implied power to alter the term of office, the exercise of this power constitutes administrative action and was thus subject to the provisions of PAJA, with which the President did not comply. The applicant further contended that in any event neither section 209(2) of the Constitution nor section 3(3)(a) of ISA confers on the President the power to dismiss. Alternatively, it was contended that the exercise of the power to dismiss constitutes administrative action and was therefore subject to the requirement of procedural fairness envisaged in PAJA.

[136] On behalf of the President, it was contended that the power to dismiss and alter the term of office of the head of the NIA must be sought exclusively in the provisions of section 209(2) of the Constitution read with section 3(3)(a) of ISA. It was submitted that the power to dismiss and to alter the term of office of the head of the NIA is implied in these provisions. And the exercise of these powers does not constitute administrative action within the meaning of PAJA, but amounts to an executive decision within the meaning of section 85(2)(e) of the Constitution, so the argument went. While accepting that there are constitutional constraints upon the President when he exercises these powers, it was submitted that the irreparable

breakdown of the relationship of trust between the President and the applicant was such that it provided the President with a lawful reason for the termination of the services of the applicant.

[137] However, as pointed out earlier, it is clear from the affidavit of the Minister for Public Service and Administration, whose contents were confirmed by the President, that in purporting to alter the applicant's term of office, the President acted in terms of section 12(2) read with section 3B(1)(a) of the PSA. It was asserted that the President has the power under these provisions to determine the term of office of the heads of national departments, which includes the head of the NIA. Based on this, it was asserted that the power to determine the term of office implies the statutory authority to alter the term of office. This line of argument, however, was not pursued in this Court on behalf of the President. Those who represented the President in this Court were content to rest the President's case on section 209 of the Constitution read with section 3(3)(a) of ISA. Contrary to the assertion made by the Minister for Public Service and Administration in her affidavit and confirmed by the President, they submitted that section 3B(1)(a) of the PSA does not implicitly confer on the President the power to dismiss the head of the NIA.

[138] It is necessary to consider the assertion by the Minister for Public Service and Administration because, on the papers, the decision to alter the applicant's term of office was purportedly taken under section 12(2) read with section 3B(1)(a) of the PSA. That is the case that the applicant was called upon to meet.

*The question presented*

[139] The central question for determination in this case is whether the President has the power unilaterally to alter the term of office of the head of the NIA. In particular, the crucial question is whether such power can be implied from the provisions of section 12(2) read with section 3B(1)(a) of the PSA or from the provisions of section 209(2) of the Constitution read with section 3(3)(a) of ISA as contended on behalf of the President in argument. If the power contended for on behalf of the President cannot be implied from these provisions, then the President acted beyond his powers in altering the term of office of the applicant. His conduct would then, as a consequence, be in breach of the principle of legality.

[140] Whether the power contended for can be implied must be determined by construing the provisions in question in the light of constitutional constraints, if any, on the exercise of such power. In order to evaluate the cogency of the contentions by the parties, it is necessary therefore first: (a) to have an understanding of the constitutional and statutory context in which the President may exercise the power to appoint and alter the term of office of the head of the NIA; and then (b) to consider the constitutional constraints on the exercise of this public power.

*The constitutional and statutory context*

[141] The main constitutional and statutory provisions which regulate appointment of the head of the NIA are the provisions of section 209(2) of the Constitution read with

the provisions of section 3(3)(a) of ISA, read further with the provisions of sections 2(3), 3B(1)(a) and 12 of the PSA.

*(a) The Constitution*

[142] Section 209(2) of the Constitution empowers the President to appoint the head of the NIA and provides:

> "The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility."

*(b) The Intelligence Services Act*

[143] Section 3(3)(a) of ISA gives effect to section 209(2) of the Constitution and provides:

> "The President must appoint a Director-General for each of the Intelligence Services."

[144] Neither section 209(2) of the Constitution nor section 3(3)(a) of ISA sets out the terms and conditions that are applicable to the appointment of the head of the NIA. This is dealt with by the PSA.

*(c) The Public Service Act*

[145] The provisions of the PSA are made applicable to the appointment of the head of the NIA by section 2(3) of the PSA which provides:

> "Where persons employed in the Academy, the Agency or the Service are not excluded from the provisions of this Act, those provisions shall apply only in so far as they are not contrary to the laws governing their service, and those provisions shall not be construed as derogating from the powers or duties conferred or imposed upon the Academy, the Agency or the Service."[11]

[146] Section 3B(1)(a) of the PSA provides that the appointment and other matters relating to the heads of department at the national level shall be dealt with by the President. It provides:

> "Notwithstanding anything to the contrary contained in this Act, the appointment and other career incidents of the heads of department shall be dealt with by, in the case of—
>
> (a) a head of a national department or organisational component, the President."

[147] In terms of section 1 of the PSA read with the Schedule to the PSA, a head of department is defined to include the Director-General of the NIA. Thus the provisions of section 3B(1)(a) empower the President to deal with the appointment "and other career incidents" of the head of the NIA as the head of the department. The term "career incidents" is not defined but is wide enough to include other matters relating to the career of the head of department including terms and conditions of employment. In effect, therefore the section empowers the President to determine the terms and conditions of employment applicable to the head of the NIA. This becomes apparent from the provisions of section 12 which authorise the President to enter into a contract with a head of the department.

[11] In terms of section 1 of the PSA read with sections 1 and 3 of ISA, "Agency" means the National Intelligence Agency referred to in ISA.

[148] In relevant part, section 12 provides:

"(2) As from the date of commencement of the Public Service Laws Amendment Act, 1997—

(a) a person shall be appointed in the office of head of department in the prescribed manner, on the prescribed conditions and in terms of the prescribed contract between the relevant executing authority and such a person for a period of five years from the date of his or her appointment, or such shorter period as that executing authority may approve;

(b) the term of office as head of department of such a person may be extended at the expiry thereof in accordance with the terms and conditions of the contract or a further contract, as the case may be, concluded between that executing authority and such a person for a period or successive periods of not less than twelve months and not more than five years, as the executing authority may approve;

(c) the term of office as head of department of any person referred to in subsection (1), or any extended term thereof, may be extended at the expiry of the term of office or extended term, as the case may be, in the prescribed manner for a period of not less than twelve months and not more than five years, as the relevant executing authority may approve, provided the said person concludes the prescribed contract with that executing authority, whereupon any further extension of his or her term of office shall, subject to the provisions of paragraph *(b)*, take place in accordance with the terms and conditions of that contract or a further contract, as the case may be.

. . . .

(4) Notwithstanding the provisions of subsection (2), a contract contemplated in that subsection may include any term and condition agreed upon between the relevant executing authority and the person concerned as to—

(a) any particular duties of the head of department;

(b) the specific performance criteria for evaluating the performance of the head of department;

(c) the grounds upon, and the procedures according to which, the services of the head of department may be terminated before the expiry of his or her term of office or extended term of office, as the case may be; and

(d) any other matter which may be prescribed."

[149] As section 12(2)(a) makes it plain, a head of department such as the applicant is "appointed in the office of the head of department in the prescribed manner, on the prescribed conditions and in terms of the prescribed contract between the relevant executing authority and such a person for a period of five years from the date of his or her appointment, or such shorter period as that executing authority may approve." In terms of section 1 of the PSA the executing authority in relation to the office of the President means the President. And in terms of section 1 of the PSA "prescribed" means prescribed by or under the PSA. Part 1 of Annexure 2 to the PSA contains an "employment contract prescribed in terms of Section 12 of the Public Service Act, 1994 (Proclamation No 103 of 1994), for heads of department" (prescribed contract).

[150] The prescribed contract sets out the general terms and conditions of employment applicable to all heads of department. The PSA contemplates that this is the standard form of contract that will be entered into with heads of department subject to the variations contemplated in section 12(4). It is plain from the provisions of section 12(4) that the legislature contemplates that the President and the head of the NIA may enter into an agreement setting out any additional terms and conditions of service including "the grounds upon, and the procedures according to which, the services of the head of [the NIA] may be terminated before the expiry of his or her term of office . . . ."[12] Consistently with section 12(4)(c), the prescribed contract also contemplates such an agreement. It is common cause that no such agreement was

[12] Section 12(4)(c) of the PSA.

entered into between the applicant and the President. Nor did the President and the applicant sign the prescribed contract.

[151] Notwithstanding these provisions of the PSA, it was contended on behalf of the President that the power of the President to alter the term of office must be sought exclusively in the provisions of section 209(2) of the Constitution and section 3(3)(a) of ISA. I am unable to agree with this contention.

[152] Section 209(2) of the Constitution empowers the President as the head of the National Executive to appoint the head of the NIA. Section 3(3)(a) of ISA does no more than repeat the language of section 209(2), saying "[t]he President must appoint a Director-General for each of the Intelligence Services." Neither section 209(2) nor section 3(3)(a) deals with the terms and conditions of appointment of the head of the NIA. These provisions contemplate that the term of office and other terms and conditions of employment pertaining to the head of the NIA will be regulated by the provisions of the PSA. This much is apparent from the provisions of ISA and the PSA, in particular the provisions of the PSA discussed below which were amended by ISA.

[153] First, the PSA specifically deals with the head of the NIA. It defines the head of department to include the Director-General of the NIA.[13] Subsections (2) and (3) of section 7 establish the NIA as a national department and designate the head of the

[13] See section 1 read with Schedule 1 of the PSA.

NIA as the head of the department.[14] Section 8 of the PSA defines the public service as consisting "of persons who . . . hold posts at a fixed establishment . . . in the Academy, the Agency or the Services."[15] The head of the NIA is part of the public service because he or she holds a post at a fixed establishment.[16] What is significant is that the present subparagraph (iii) of section 8(1)(a) was introduced into the PSA by ISA.[17] In addition, section 6(1) of ISA, which deals with the appointment of the head of the South African National Academy of Intelligence, requires the President to appoint the head of the Academy "in accordance with the Public Service Act, 1994".[18]

---

[14] Section 7 of the PSA provides:

> "Public service, departments and heads of departments—
>
> . . . .
>
> (2) For the purposes of the administration of the public service there shall be national departments and provincial administrations mentioned in the first column of Schedule 1, provincial departments mentioned in the first column of Schedule 2 and the organisational components mentioned in the first column of Schedule 3.
>
> (3)(a) Each department shall have a head of department who as an officer shall be the incumbent of the post on the fixed establishment bearing the designation mentioned in the second column of Schedule 1 or 2 opposite the name of the relevant department, or the officer who is acting in that post."

[15] Section 8(1)(a)(iii) of the PSA provides:

> "The public service shall consist of persons who hold posts on the fixed establishment in the Academy, the Agency or the Service . . ."

[16] See section 7 read with section 8 of the PSA.

[17] Section 40(1) of ISA provides:

> "The laws mentioned in the Schedule are hereby repealed or amended to the extent indicated in the third column thereof."

Item 3 of the Schedule to ISA under the heading "laws repealed or amended" provides:

> "Proclamation 103 of 1994 Public Service Act 1994
>
> . . .
>
> (3) The amendment of section 8 by the substitution in subsection (1)(a) for subparagraph (iii) of the following subparagraph:
>
> "(iii) in the **[Agency or the Service]** Intelligence Service or the Academy".

[18] Section 6(1) provides:

> "The President must in accordance with the Public Service Act, 1994 (Proclamation No. 103 of 1994), appoint a head of the Academy who is also the Chief Executive Officer, principal and accounting officer of the Academy."

[154] Second, section 2(3) of the PSA, makes it plain that the provisions of the PSA apply to all persons employed in the Academy, the Agency or the Service unless those persons are excluded from its provisions.[19] What is important in this regard is that subsection (3) of section 2 was introduced by ISA. Section 40(1) of ISA repealed, among other provisions, section 2 of the PSA by substituting for the old subsection (3) the present subsection (3).[20]

[155] Third, in terms of section 3B(1)(a) of the PSA, the appointment and other career incidents of a head of the department, must be dealt with by the President.[21] The head of the NIA is the head of the department. Neither this provision nor section 3(3)(a) of ISA determines the term of office or conditions of service. It is section 12(2) of the PSA which does so. It provides that the term of office shall be "a period of five years . . . or such shorter period as [the President] may approve." This provision further prescribes the conditions that govern the contract of employment of the head of the NIA. This is apparent from the reference to the appointment of a head

[19] See above para [145].

[20] Section 40(1) of ISA provides:

> "The laws mentioned in the Schedule are hereby repealed or amended to the extent indicated in the third column thereof."

Item 2 of the Schedule to ISA under the heading "laws repealed or amended" provides:

> "Proclamation 103 of 1994 Public Service Act 1994
>
> . . .
>
> (2) The amendment of section 2 by the substitution for subsection (3) of the following subsection '(3) Where persons employed in the **[Agency or Service]** Intelligence Services or the Academy are not excluded from the provisions of this Act, those provisions shall apply only in so far as they are not contrary to the laws governing their service, and those provisions shall not be construed as derogating from the powers or duties conferred or imposed upon the **[Agency or Service]** Intelligence Services or the Academy.'"

[21] See above para [146].

of department "on the prescribed conditions and in terms of the prescribed contract . . . ." Section 12(4) permits the President and the head of the NIA to agree upon additional terms and conditions, including those that will govern the termination of the services of the head of department prior to its expiry and the procedure to be followed in doing so.

[156] Finally, the provisions of sections 3B(1)(a), 12(2) and 12(4) of the PSA are not inconsistent with the provisions of ISA. In addition, as indicated above, ISA has amended some of the provisions of the PSA in order to bring the head of the NIA within the provisions of the PSA.[22] It is apparent from the provisions of ISA and the PSA that the manifest purpose of ISA is that the provisions of the PSA would apply to the head of the NIA to the extent that they are not inconsistent with the provisions of ISA. Indeed, this is expressly provided for in section 2(3) of the PSA which was introduced by ISA. The provisions of section 3B(1)(a) and sections 12(2) and 12(4) of the PSA therefore supplement and complement the provisions of section 3(3)(a) of ISA. Together, these provisions therefore give effect to the provisions of section 209(2) of the Constitution. Indeed the President relied upon section 3(3)(a) of ISA read with section 3B(1)(a) of the PSA when he appointed the applicant to the post. He acted properly in doing so.

[157] In my judgement the provisions of section 3(3)(a) of ISA, section 3B(1)(a) and sections 12(2) and 12(4)(c) of the PSA must be read together as governing the

[22] See above para [153].

appointment and the terms and conditions of the employment of the head of the NIA. I am therefore unable to agree with the view expressed by Moseneke DCJ[23] that sections 12(2) and 12(4) of the PSA are limited in their scope of application to manner and form of appointment. In my view, the limited scope ascribed to these provisions is not warranted by both the text and the context in which these provisions occur. It follows from this that the contention on behalf of the President that the power of the President to alter the term of office of the head of the NIA must be sought exclusively from section 209(2) of the Constitution and section 3(3)(a) of ISA, cannot be upheld.

[158] The effect of the conduct of the President in purporting to alter the applicant's term of office is to remove the applicant from his post prior to the expiry of the term of office which is 31 December 2007. In the light of the consequences of the President's conduct, the applicant contended that the President does not have the power to remove him from his post as the head of the NIA or to alter his term of office so as to bring his term of office to an end prior to its expiry date. I propose to address this submission first.

[159] It must be stressed that in these proceedings we are concerned only with the power to alter the term of office so as to terminate the appointment earlier than its original expiry date. This has the effect of removing the head of the NIA from office.

[23] Para [58] of Moseneke DCJ's judgment.

[160] The constitutional power of the President to appoint the head of the NIA is given effect to by section 3(3)(a) of ISA. This provision, in terms identical to section 209(2) of the Constitution, confers on the President the power to appoint the head of the NIA. In addition, section 3B(1)(a) of the PSA confers on the President the power to appoint the head of the NIA. This provision, however, goes further. It empowers the President to deal with "other career incidents of the heads of department". Career incidents no doubt includes terms and conditions of the appointment as head of the NIA.

*The power of the President to remove the head of the NIA from office*

[161] Section 84(2)(e) of the Constitution confers on the President the power to make "any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive". The powers of the President include "those necessary to perform the functions of Head of State and head of the national executive".[24] As head of the national executive, the President has the power to "appointment a woman or a man as head of each intelligence service" established under the Constitution.[25] The Constitution also invests the President with the "political responsibility for the control and direction of any of those services" established under the Constitution.[26] Under these constitutional provisions, therefore the President has the constitutional authority to appoint the head of the NIA, which is one of the Intelligence Services contemplated in section 209(2) of the Constitution.

[24] Section 84(1) of the Constitution.

[25] Section 209(2) of the Constitution.

[26] Id.

[162] As section 84(1) makes plain, in addition to the powers expressly conferred on the President, he has those powers that are necessary to perform his functions as Head of State and head of the national executive. The power to appoint the head of the NIA must necessarily carry with it the power to enter into an agreement with the head of the NIA which regulates the term of office and other conditions of appointment. This power is essential to the power to appoint. The provisions of section 3B(1)(a) read with section 12(2) of the PSA expressly recognise this and confer this power on the President. As pointed out earlier, section 3B(1)(a) empowers the President to deal with terms and conditions of appointment of the head of the NIA. For its part, section 12 empowers the President to enter into a contract of service with the head of the NIA.

[163] Neither the provisions of the Constitution nor the governing legislation expressly confer on the President the power to remove the head of the NIA from office prior to the expiry of the term of office. And, notwithstanding the provisions of section 3B(1)(a) read with sections 12(2) and 12(4) of the PSA, the President and the applicant did not enter into any agreement setting out the terms and conditions of the applicant's appointment. All there is, is a Presidential Minute appointing the applicant as the head of the NIA for a fixed period from 1 January 2005 to 31 December 2007. Section 12(2)(a) of the PSA contemplates a fixed term of office and provides that the term of office shall be "a period of five years . . . or such shorter period as [the President] may approve".

[164] It was contended on behalf of the applicant that the President neither has the power to remove the head of the NIA from office nor the power to alter the term of office of the head of the NIA with the result that it brings the period of the appointment to an end earlier than that agreed upon. It is true, neither the Constitution nor the relevant legislation expressly confers on the President these powers. The existence and scope of these powers depends on whether, in the first place, they are necessary for the performance of his executive function to appoint the head of the NIA and therefore incidental to the power to appoint the head of the NIA, and, in the second place, if they are incidental to the power to appoint, whether there are any constitutional constraints on the exercise of these powers.

[165] Under section 84(1) of the Constitution, in addition to the powers expressly conferred on the President, the President has those powers that are "necessary to perform the functions of Head of State and head of the national executive". When the President appoints the head of the NIA, he does so as head of the national executive.[27] The question which falls to be determined therefore is whether the power to remove the head of the NIA from office is incidental to the power to appoint.

[166] If the President cannot remove the head of the NIA from office during the term of office, even though there may be a need to do so, this may well affect the ability of the President to perform effectively his executive functions as Head of State including the power to appoint the head of the NIA. Indeed, without the power to remove the

[27] Section 209(2) of the Constitution. See above para [142].

head of the NIA, the President cannot effectively "assume political responsibility for the control and direction of [the Intelligence Service]" envisaged in section 209(2) of the Constitution. The President must place in the head of the NIA implicit faith. The moment he loses confidence in the ability, judgment or loyalty of the head of the NIA, he must have the power to remove him or her. Otherwise he cannot effectively perform his functions as Head of State and head of the national executive. The power to remove the head of NIA from office is, in my view, incidental to the power to appoint. Indeed, the power to remove is pre-existent in the power to appoint because the power to remove is essential to the power to appoint and without the power to remove, the power to appoint cannot be exercised.

[167] One of the functions of the President as head of the national executive is to declare a state of national defence.[28] In executing these responsibilities the President acts on information placed before him by, amongst others, the Minister on the strength of intelligence communicated to the Minister by various services including the NIA. For the effective performance of these and other important national security functions, the President relies on the intelligence communicated by the head of the NIA. In these circumstances the President must have complete trust in the head of the NIA. When that trust, which is the foundation of the relationship between the President and the head of the NIA is eroded, the President must have the power to remove the head of

[28] Section 203(1) of the Constitution reads as follows:

> "The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of—
>
> (a) the reasons for the declaration;
>
> (b) any place where the defence force is being employed; and
>
> (c) the number of people involved."

the NIA from office. Otherwise the President's ability to perform these vital functions as head of the national executive may be severely compromised to the detriment of the country. In these circumstances the power of the President to remove the head of the NIA from office or to alter his or her term of office so as to bring the appointment to an end earlier than its expiry date, is necessary for the effective performance of his functions as head of the national executive and is therefore incidental to the power to appoint.

[168] It seems to me to be a sound principle of constitutional or statutory construction that, in the absence of constitutional or statutory provisions to the contrary, the power to remove must be considered to be incidental to the power to appoint. As a matter of constitutional construction therefore, the power to appoint the head of the NIA carries with it the power to remove the head of the NIA from office when there are lawful reasons to do so. This principle is foreshadowed in section 84(1) of the Constitution which provides that the powers expressly conferred on the President include the powers that are necessary to perform his functions as Head of State and head of the national executive.

[169] The same must be true of the power of the President to alter the term of office of the head of the NIA. This power is incidental to the power to appoint.

[170] It follows therefore that the contention by the applicant that the President neither has the power to remove the head of the NIA from office nor the power to alter

the term of office of the head of the NIA, must be rejected. It does not follow from this that there are no constraints in the exercise of these powers. This brings me to the alternative contentions advanced on behalf of the applicant.

[171] In the alternative, the applicant contended that the exercise of the power to remove the head of the NIA from office or alter his or her term of office is subject to certain constitutional constraints. It was submitted that the exercise of these powers is subject to the rule of law and the requirements of PAJA. Implicit in reliance upon PAJA is the submission that the exercise of these powers constitutes administrative action under section 33 of the Constitution. It is therefore necessary to consider the constitutional constraints applicable to the exercise of the power to remove from office of the head of the NIA or to alter the term of office of the head of the NIA by the President.

*Constitutional constraints on the exercise of public power*

[172] Under our constitutional order the exercise of all public power, including the exercise of the President's powers under section 84(2) of the Constitution, is subject to the provisions of the Constitution which is the supreme law.[29] The Constitution

[29] Section 1(c) of the Constitution provides:

> "The Republic of South Africa is one sovereign, democratic state founded on the following values:. . . [s]upremacy of the Constitution and the rule of law."

Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

See also *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 28; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 38.

regulates the exercise of public power in different ways. These include the application of the Bill of Rights and other specific provisions of the Constitution which regulate and control the exercise of particular powers. The right to just administrative action is one of the constitutional constraints on the exercise of public power. The applicability of the right to just administrative action as a constitutional constraint depends upon whether the exercise of the power in question amounts to administrative action within the meaning of section 33 of the Constitution.

[173] Another source of constraint on the exercise of public power is the rule of law which is one of the foundational values of our constitutional democracy.[30] The rule of law principle requires that the actions of all those who exercise public power must comply with the law, including the Constitution. It is central to the conception of our constitutional order that those who exercise public power including the President, are constrained by the principle that they may exercise only those powers and perform only those functions which are conferred upon them by the law.[31] Their sole claim to the exercise of lawful authority rests in the powers allocated to them under the law. The common law principle of ultra vires is now underpinned by the constitutional doctrine of legality which is an aspect of the rule of law.[32] Thus what would have been ultra vires under the common law by reason of a public official exceeding a statutory power is now invalid according to the doctrine of legality.

[30] Section 1(c) of the Constitution.

[31] *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.

[32] Id at para 59; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20.

[174] In *Affordable Medicines Trust*,[33] we sketched the role of the rule of law as a form of constitutional control on the exercise of public power as follows:

> "Our constitutional democracy is founded on, among other values, the '(s)upremacy of the Constitution and the rule of law'. The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'. And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.
>
> The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."[34] (Footnotes omitted.)

[175] In *Pharmaceutical* we had occasion to consider the reach of the principle of the rule of law as a form of constraint on the exercise of public power by the President. The issue arose in the context of the President's decision to bring an Act of Parliament into force in circumstances where the regulatory base necessary for the operation of the Act was not in place and other essential regulations contemplated by the Act had not been made. The question for decision was whether a court has the power to

[33] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

[34] Id at paras 48-49.

review and set aside a decision by the President to bring an Act of Parliament into force.

[176] In these cases, we held that it is a requirement of the rule of law that the exercise of public power by the President, who is part of the executive branch of government, should not be arbitrary.[35] In order to pass constitutional muster, the exercise of public power must not be arbitrary. We further held that a decision that is not rationally related to purpose for which the power was given is in effect arbitrary and inconsistent with the rule of law. We expressed the principle as follows:

> "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."[36] (Footnote omitted.)

[177] In *Pharmaceutical* we were of course concerned with the decision of the President to bring a statute into operation. We were not concerned with the procedure followed by the President in bringing the statute into operation. In this case, we are concerned with the decision to alter the term of office of the head of the NIA – which in effect amounts to removing the head of the NIA from office – and the manner in which the President made that decision. The question which arises for determination

[35] *Pharmaceutical* above n 32 at para 85; *Affordable Medicines Trust* above n 33 at para 75.

[36] *Pharmaceutical* above n 32 at para 85.

in this case is whether a court has the power to review and set aside a decision made by the President on the basis of the manner in which the decision was made.

[178] I have already concluded that the President, in my view, has the power to remove the head of the NIA from office where there are lawful reasons to do so. The question presented here is whether the principle of the rule of law, in particular, the doctrine of legality, imposes constraints on how and when the President may exercise the power to remove the head of the NIA from office or alter the term of office of the head of the NIA in a manner that terminates the appointment earlier than the date of its expiry. The crisp question for decision is whether the rule of law, in particular, the doctrine of legality, has a procedural component.

[179] In the context of our Constitution, the requirement of the rule of law that the exercise of public power should not be arbitrary is not limited to non-rational decisions. It refers to a wider concept and a deeper principle: fundamental fairness. It does not only demand that decisions must be rationally related to the purpose for which the power was given. The Constitution requires more; it places further significant constraint on how public power is exercised through the Bill of Rights and the founding principle enshrining the rule of law. Section 33 of the Constitution for example requires that administrative action must, amongst other things, be procedurally fair. Section 34 of the Constitution contemplates a public hearing that is fair. The right to a fair hearing contemplated in section 34 affirms the rule of law.[37]

[37] *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening*) 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) at para 11; *National Director of*

[180] It is clear from the provisions of section 33 and 34 that our Constitution does not immunise from constitutional review decisions which have been arrived at by a procedure which was clearly unfair. But does our Constitution adopt a different attitude when it comes to the exercise of executive powers and sanction the making of decisions arrived at by procedures that are clearly unfair? To my mind, the answer to this question must be in the negative. It is a fundamental principle of fairness that those who exercise public power must act fairly. In my view, the rule of law imposes a duty on those who exercise executive powers not only to refrain from acting arbitrarily, but also to act fairly when they make decisions that adversely affect an individual.

[181] One of the goals that we have fashioned for ourselves in the Constitution, is the establishment of "a society based on democratic values, social justice and fundamental human rights". The preamble declares that the Constitution lays the "foundations for a democratic and open society". Section 1 of the Constitution which establishes the founding values of the state, includes as part of those values "multi-party system of democratic government, to ensure accountability, responsiveness and openness". And it is apparent from the Constitution that the democratic government that is contemplated is a participatory democracy which is accountable, transparent and requires participation in decision-making.

---

*Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at paras 36-38.

[182] Consistently with the values of accountability, responsiveness and openness, the legislature is required to facilitate public involvement in its law-making processes.[38] Section 34 requires the judiciary and other tribunals that resolve disputes through the application of the law to conduct their proceedings in a fair manner. Institutions of public power whose actions constitute administrative action are required by the right to administrative action to comply with the requirement of procedural fairness. In my view, it would be incongruous to free the executive and other functionaries who exercise public power but whose conduct does not amount to administrative action from values of accountability, responsiveness and openness.

[183] The power must be exercised in a fair manner. Our "Constitution is not merely a formal document regulating public power", it is a document which "embodies . . . an objective, normative value system."[39] This normative value system is "a fundamental constitutional value for all areas of law [and it] acts as a guiding principle and stimulus for the legislature, executive and judiciary."[40] The requirement to act fairly is part of this objective normative value system and must therefore guide the exercise of public power. It imposes a duty on decision-makers to act fairly.

---

[38] Sections 59(1), 72(1) and 118(1) of the Constitution. See also *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) at paras 135-146; 2006 (12) BCLR 1399 (CC) at 1447E-1451F.

[39] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54.

[40] Decision of the German Constitutional Court in 39 *BVerfGE*, 1 at 41 cited with approval in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 94 and *Carmichele* above n 39 at para 54.

[184] Acting fairly provides the decision-maker with the opportunity to hear the side of the individual to be affected by the decision. It enables the decision-maker to make a decision after considering all relevant facts and circumstances. This minimises arbitrariness. There is indeed an inter-relationship between failure to act fairly and arbitrariness. In this sense, the requirement of the rule of law that the exercise of public power should not be arbitrary, 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 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 from review. A reasonable balance must, however, be maintained between the need to protect the individual from decisions unfairly arrived at by officials exercising public power and the contrary desirability of avoiding undue judicial interference in their administration.

[185] In *First National Bank of South Africa Ltd*, this Court, albeit in a different context, recognised that the meaning of "arbitrary" is not limited to non-rational deprivation, in the sense that there is no rational connection between the means and the ends.[41] This case concerned the meaning of the word "arbitrary" as used in section

[41] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 65.

25 of the Constitution.[42] The Court held that "context is all-important" when considering the meaning of this word.[43] It held that in the context of section 25(1) it refers to "a wider concept and a broader controlling principle that is more demanding than an enquiry into a mere rationality."[44] Commenting on the procedural aspect the Court held that:

> "*De Waal et al* are of the view that a deprivation 'is arbitrary' for purposes of section 25(1) 'if it follows unfair procedures, if it is irrational, or is for no good reason'. The protection against unfair procedure has particular relevance to administrative action – which protection is provided for under s 33 of the Constitution – but it could also apply to legislation and be relevant to determining whether, in the light of any procedure prescribed, the deprivation is arbitrary."[45] (Footnote omitted.)

After a consideration of foreign jurisprudence, the Court concluded:

> "Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair."[46]

[186] There is further support for the view that in the context of our Constitution, arbitrary includes failure by the executive and other functionaries to act fairly. The duty on the executive and other functionaries not to use power in an arbitrary manner flows from the doctrine of legality, which is an aspect of the rule of law. But the

---

[42] Section 25(1) of the Constitution provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[43] *First National Bank* above n 41 at para 63.

[44] *First National Bank* above n 41 at para 65.

[45] *First National Bank* above n 41 at para 67.

[46] *First National Bank* above n 41 at para 100.

common law principle of the rule of law is much broader. It has a substantive as well as a procedural component. In *Pharmaceutical*, this Court recognised that under the constitutional principles of the common law the principle of the rule of law "had a substantive as well as a procedural content".[47] The Court[48] quoted with approval the following passage from the work of *De Smith*, *Woolf* and *Jowell*:

> "The rule of law is another such principle of the greatest importance. It acts as a constraint upon the exercise of all power. The scope of the rule of law is broad. It has managed to justify—albeit not always explicitly—a great deal of the specific content of judicial review, such as the requirement that laws as enacted by Parliament be faithfully executed by officials; that orders of court should be obeyed; that individuals wishing to enforce the law should have reasonable access to court; *that no person should be condemned unheard*; and that power should not be arbitrarily exercised."[49] (Emphasis added.)

[187] The procedural aspect of the rule of law is generally expressed in the maxim *audi alteram partem* (the audi principle). This maxim provides that no one should be condemned unheard. It reflects a fundamental principle of fairness that underlies or ought to underlie any just and credible legal order.[50] The maxim expresses a principle of natural justice.[51] What underlies the maxim is the duty on the part of the decision-maker to act fairly. It provides an insurance against arbitrariness. Indeed, consultation prior to taking a decision ensures that the decision maker has all the facts

---

[47] *Pharmaceutical* above n 32 at para 37.

[48] *Pharmaceutical* above n 32 at para 39

[49] De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5 ed (Sweet and Maxwell, London 1995) at 14-15.

[50] *Minister of the Interior v Bechler and Others; Beier v Minister of the Interior and Others* 1948 (3) SA 409 (A) at 451.

[51] *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 750D-I and the cases referred to therein.

prior to making a decision. This is essential to rationality, the sworn enemy of arbitrariness. This principle is triggered whenever a statute empowers a public official to make a decision which prejudicially affects the property, liberty or existing right of an individual.[52]

[188] The new constitutional order incorporates common law constitutional principles and gives them greater substance. The rule of law is specifically declared to be one of the foundational values of the new constitutional order. The content of the rule of law principle under our new constitutional order cannot be less than what it was under the common law. It is also clear from section 39(3) of the Constitution[53] that "the Constitution was not intended to be an exhaustive code of all rights that exist under our law".[54] That they go beyond those expressly mentioned in the Constitution is patently clear from section 39(3). The common law constitutional principles supplement the provisions of the written constitution but derive their force from the Constitution. These principles must now be developed to fulfil the purposes of the Constitution and the legal order that it establishes. And these common law principles must "evolve within the framework of the Constitution consistently with the basic norms of the legal order that [the common law] establishes".[55] That is why section

[52] *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 25; *R v Ngwevela* 1954 (1) SA 123 (A) at 127E-F; *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 10G-I.

[53] Section 39(3) provides:

> "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[54] *Pharmaceutical* above n 32 at para 49.

[55] *Pharmaceutical* above n 32 at para 49.

39(2) requires that the common law must be developed and interpreted to promote the "spirit, purport and objects of the Bill of Rights".[56]

[189] To sum up therefore, when exercising public power the executive and other functionaries have a duty to act fairly. This is a requirement of the rule of law which requires that the exercise of public power should not be arbitrary. In the exercise of his power to remove the head of the NIA from office or to alter the term of office of the head of the NIA, the President is constrained by this requirement.

[190] Fairness, by its very nature, is a relative concept. What the dictates of fairness demand will depend on the facts of each particular case. The very essence of the requirement to act fairly is its flexibility and practicability. The precise form and occasion for respecting it are matters of flexibility and sensibility and ought to conform maximally to the exigencies and practicalities of the circumstances. In *Zondi*, we said the following of and concerning procedural fairness:

> "Procedural fairness, by its very nature, imports the element of fairness. And fairness is a relative concept which is informed by the circumstances of each particular case. In each case the question is whether fairness demands that steps be taken to trace the identity of the person against whom a decision is to be made. It is therefore neither possible nor desirable to attempt to define the circumstances where the dictates of fairness will require the decision-maker to take steps to ascertain the identity of the livestock owner.
>
> The question whether fairness requires the decision-maker to take some steps to ascertain the identity of the person against whom the decision is to be made must be

[56] See *Pharmaceutical* above n 32 at para 49.

> determined with due regard to the circumstances of each case. The overriding consideration will always be what does fairness demand in the circumstances of a particular case. The availability of information which, with the exercise of reasonable diligence, renders it possible to ascertain the identity of a person is a relevant consideration. So is the urgency required in making the decision."[57]

[191] Against this background, I now turn to consider the contentions of the parties. It will be convenient at this stage to deal with the argument on behalf of the President that the power to unilaterally alter the term of office of the head of the NIA is implied in the Constitution.

*Is the duty to act fairly reconcilable with the implied power to act unilaterally?*

[192] This Court has adopted the view that "words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands".[58] In addition, such implication must be necessary in order to "realise the ostensible legislative intention or to make the [legislation] workable".[59] Similarly, where the surrounding circumstances point to the fact that words were deliberately omitted or if the implication would be inconsistent with the provisions of the Constitution or the statute, words cannot be implied. To this must of course be added the settled principle of constitutional construction which is this: where a statute is capable of more than one reasonable construction, with the one construction leading to constitutional invalidity, while the other not, the latter

[57] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 113-114.

[58] *Mohamed* above n 37 at para 48 quotes *Rennie NO v Gordon NNO* 1988 (1) SA 1 (A) at 22E-F adopted in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 105.

[59] *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) at 749B-C adopted in *Bernstein* above n 58 at para 105.

construction, being in conformity with the Constitution, must be preferred to the former, provided always that such construction is reasonable and not strained.[60]

[193] In my view, there are powerful considerations which militate against implying the power to unilaterally alter a fixed term of office of the head of the NIA that had been agreed upon. First, the asserted implied power to unilaterally alter a fixed term of office is inconsistent with the requirement not to act arbitrarily, an aspect of the rule of law. Second, the power to alter unilaterally the term of office is not necessary for the exercise of the power to appoint in the sense that without it effect cannot be given to the power to appoint. The exercise of the power to alter the term of office of the head of the NIA after affording him or her a prior hearing on the reasons for the proposed alteration of his or her term of office and on conditions that will be applicable to the proposed alteration, cannot render the power to appoint unworkable. The essence of the duty to act fairly is its flexibility and adaptability. As pointed out earlier, what fairness requires of a decision-maker depends on the facts of the particular case, including the urgency required in making the decision.[61]

[194] Finally, it is evident from the provisions of section 12(4)(c) of the PSA that the framers of the PSA were alert to the fact that there may be a need to have the term of office of a head of department altered so as to terminate the contract prior to its original expiry date. Consideration was given to the grounds upon, and the procedure

[60] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22-24.

[61] See above para [190].

according to which the services of the head of the department may be terminated before its expiry. The legislature, however, decided that this is an aspect which should be regulated consensually by the President and the head of a department in terms of an agreement. Section 12(4)(c) implicitly, if not explicitly contemplates an agreement between the head of the NIA and the President on the grounds on which the term of office may be altered and on the procedure to be followed in establishing firstly whether those grounds exist and secondly on the conditions that will be applicable to the alteration. This is inconsistent with the unilateral power to alter the term of office.

[195] In order to terminate the services of the head of department prior to their expiry date, section 12(4)(c) contemplates that the President and the head of department will follow some form of procedure and that the termination will be based on some ground. Under our constitutional order which is founded on the rule of law, the reference to a ground for termination implies the existence of a lawful reason for the termination of services of a head of department and thus the requirement of rationality. The reference to procedure implies a procedure that is fair and thus a duty to act fairly in making a decision to alter the term of office so as to terminate the appointment earlier. This would, at a bare minimum, entail informing the head of department of the proposed action and the reasons for it and allowing the head of department to comment on these matters.

[196] In my judgement, in envisaging some form of procedure to be followed in terminating the contract prior to its original expiry date, section 12(4)(c), at a bare minimum, contemplates that there will be consultation between the President and the head of the NIA on whether the term of office should be altered in the first place, and secondly, if it has to be altered, the extent of the alteration and the terms and conditions to be applicable to such alteration.

[197] What must be stressed here is that we are not concerned with the case where the President and the applicant attempted to reach the agreement contemplated in section 12(4)(c) but were unable to agree. Nor are we concerned with a case where the President sought to reach such agreement but the applicant adopted an obstructive attitude and refused to cooperate. We are concerned with a case where the President without any prior notice or warning simply took a decision to unilaterally alter the terms of office of the applicant and terminated the contract prior to its expiration date. It is not necessary therefore to consider what are the remedies that are available to the President where the head of a department refuses to enter into the agreement contemplated in section 12(4)(c) of the PSA. That question does not arise here.

[198] It is true that the relationship between the President and the head of NIA has a contractual aspect. In exercising the power to dismiss the head of the NIA or alter the term of office, the President acts as the head of a constitutional State and not as a private employer who need not listen to any representations and is entitled to act arbitrarily as he pleases, so long as he does not break the contract or has a lawful

reason to dismiss or to alter the term of office. The President receives his powers from the Constitution and the applicable statutes and can only act within the constraints expressed or implied by the provisions of the Constitution and the applicable provisions of ISA and the PSA. The contractual element in the powers of the President must therefore not be allowed to obscure the fact that the President's powers are derived from the Constitution and the provisions of the applicable statutes and therefore subject to constitutional constraints in their exercise.

[199] Nor should the fact that the President, when he removes the head of the NIA from office, exercises executive power be allowed to relieve him of the duty to act fairly. The reality is that the President enters into a contract of service with the head of the NIA under the provisions of ISA read with the provisions of the PSA. Under common law, an employer is not permitted unilaterally to alter the terms of a service contract with an employee. This would constitute a breach of contract: the employee has an election either to withdraw from the contract and sue for damages or hold the employer to the contract. In the context of labour law, an employer may not unilaterally change the terms and conditions of employment as this constitutes unfair labour practice. Even in circumstances where the employer has to effect a change required by operational requirements, our labour laws require an employer to consult with the employees prior to effecting such changes.[62] It would indeed be incongruous

[62] Section 64 of the Labour Relations Act 66 of 1995 provides:

> "(4) Any *employee* who or any *trade union* that refers a *dispute* about a unilateral change to terms and conditions of employment to a *council* or the Commission in terms of subsection 1*(a)* may, in the referral, and for the period referred to in subsection 1*(a)*—
>
> *(a)* require the employer not to implement unilaterally the change to terms and conditions of employment; or

to permit a public official who exercises executive powers to alter unilaterally the terms and conditions of employment of an employee with whom he or she has entered into a contract of service.

[200] For all these reasons the power to unilaterally alter the term of office of the applicant cannot therefore be implied as contended on behalf of the President. On the contrary, in my view, the President was obliged to comply with the duty to act fairly in making the decision to alter the term of office of the applicant. It now remains to consider what the duty to act fairly in this case entailed and whether the President complied with that duty.

*Did the President act fairly in making his decision?*

[201] The President altered the term of office because in his view an irreparable breakdown of the trust relationship had occurred. The President's subjective view was based on the events that unfolded after the discovery of the "Macozoma affair". These events were evolving. It is clear from the papers that once the President had formed the view that the relationship between him and the applicant had broken down and had decided to relieve the applicant of his duties, he sought advice from the Minister for Public Service and Administration "on how best [to] go about this considering laws that apply to service benefits for heads of departments." The

---

*(b)* if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of *service* of the referral on the employer."

President did this because he "was concerned that the decision be effected in a more humane manner considering the Applicant's long service in the Public Service."

[202] But where the President went wrong was in failing to consult the applicant on these issues. Manifestly, these are the very issues on which the applicant should have been consulted. The duty to act fairly requires that these issues should have been explored with the applicant. Indeed these are matters which section 12(4)(c) of the PSA contemplates would be agreed upon between the President and the applicant. The President had ample opportunity to consult the applicant. There is no suggestion in the papers that promptitude was essential.

[203] Compliance with the duty to act fairly required the President to convey to the applicant that he was of the view that the relationship of trust between him and the applicant had broken down irreparably and that for that reason he was contemplating altering the applicant's term of office so as to terminate the appointment earlier. The applicant should have been given an opportunity to comment on these matters. The applicant had had a long service in the Public Service. As the President was rightly concerned, the decision to remove him from office had to be "effected in a more humane manner" considering the applicant's long service in the Public Service. These very same concerns, in my view, triggered the duty to act fairly in making the decision to remove the applicant from office.

[204] The applicant should have been consulted not only on the question whether the relationship of trust has broken down but also on the terms and conditions that would apply to the termination of the contract. The fact that the applicant may have had little or nothing to urge in his own defence is a factor alien to the enquiry whether he is entitled to a prior hearing. It cannot be an answer therefore to suggest that a fair hearing could not have made a difference to the result. The duty to act fairly is a vital one. As this Court pointed out in *Zondi*:

> "It is a fundamental element of fairness that adverse decisions should not be made without affording the person to be affected by the decision a reasonable opportunity to make representations. A hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explained. The reasonable opportunity to make representations can generally be given by ensuring that reasonable steps are taken to bring the fact of the decision-making to the attention of the person to be affected by the decision."[63] (Footnote omitted.)

[205] The fact that the applicant had ample occasion to respond to the allegations that were made against him in relation to the "Macozoma affair" and that prior to the termination of the contract the applicant had audience with the President where the President expressed his views on the "Macozoma affair" and his dissatisfaction with the findings of the IGI investigation, does not, in my view, meet the requirement of the audi principle as Moseneke DCJ suggests.[64] What was required was for the President, once he had formed a subjective view to alter the term of office of the applicant, at that point in time to afford the applicant the opportunity to make

[63] *Zondi* above n 57 at para 112.

[64] Para [84] of Moseneke DCJ's judgment.

representations firstly on whether the term of office should be altered and, if so, the terms and conditions that should be applicable to that alteration of his term of office. This he failed to do. And in doing so, the President fell foul of the duty to act fairly which is an aspect of the rule of law.

[206] I am mindful of the fact that there may be special circumstances which would justify a public official, acting in good faith, to take action even if the person affected by the decision has not been afforded an opportunity to correct or controvert any prejudicial information. A special circumstance which comes to mind is when a decision has to be given as a matter of urgency, when promptitude is essential. So too is a situation where the conduct of the person to be affected is obstructive. There was no suggestion in this case that there was an urgent need to act, nor is there is any evidence on record to that effect. In addition, there is nothing to show that the applicant was obstructive.

[207] Accordingly, I hold that the President had no power to unilaterally alter the applicant's term of office so as to terminate the employment contract prior to its expiry date. On the contrary, the President was required by the duty to act fairly to consult the applicant prior to taking the decision to alter the term of office of the applicant. In all the circumstances, the President acted beyond his powers conferred by provisions of section 209(2) of the Constitution and section 3(3)(a) of ISA read with sections 3B(1)(a) and 12(2) and 12(4)(c) of the PSA and therefore in breach of

doctrine of legality. His conduct was therefore inconsistent with the Constitution and falls to be declared as such in terms of section 172(1)(a) of the Constitution.

[208] In view of this conclusion, it not necessary to consider the further argument on behalf of the applicant based on PAJA.

[209] It now remains to consider the appropriate remedy.

*Remedy*

[210] The powers of this Court when deciding a Constitutional matter are set out in section 172(1) of the Constitution which provides:

> "When deciding a constitutional matter within its power, a court—
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including—
>  (i) an order limiting the retrospective effect of the declaration of invalidity; and
>  (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[211] Pursuant to section 172(1)(a), it follows therefore that an order must be made declaring the conduct of the President inconsistent with the Constitution and thus invalid.

[212] In terms of section 172(1)(b) of the Constitution, this Court may "make any order that is just and equitable" as part of the relief. The requirement of just and equitable means that the remedy must be fair and just in the circumstances of the particular case.[65] Fairness in this case requires a consideration of a triad consisting of the interests of the applicant, the interests of the President as the head of the national executive and the public interest.[66] All these interests converge in the requirement of trust which is fundamental to the relationship between the head of the NIA and the President, who is the Commander-in-Chief of the defence force.[67] What is required is a careful balancing of these various interests.

[213] In a different but relevant context, in *Hoffmann*, we said the following:

> "The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source'."[68] (Footnote omitted.)

[214] The applicant is entitled to the most effective remedy that will place him in the same position that he would have been but for the conduct that is inconsistent with the

[65] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 42.

[66] See *Hoffman* above n 65 at para 43.

[67] Section 202(1) of the Constitution.

[68] *Hoffmann* above n 65 at para 45.

Constitution. Ordinarily, that remedy is re-instatement in his former position as the Director-General of the NIA. But is re-instatement a just and equitable order in the circumstances of this particular case?

[215] Factors that are relevant to this question include the nature of the relationship between the President and the applicant as head of the NIA; whether the President and the applicant can still work together; the balance of the contract period; the desirability of re-instating the applicant in his former position; and the need to place the applicant in the same position that he would have been but for the violation of the Constitution. This involves the balancing of all these factors bearing in mind that the ultimate goal is to make an order that is just and equitable.

[216] Now the President is the Commander-in-Chief of the defence force.[69] And as head of the national executive he may declare a state of national defence.[70] He executes this constitutional responsibility on information placed before him by, among others, the Minister on the strength of intelligence, communicated to the Minister by various intelligence services including the NIA. In the performance of these functions the President therefore may have to rely on the intelligence communicated by the head of the NIA. He may have to exchange highly sensitive information with the head of the NIA. In these circumstances the President must have complete trust in the head of the NIA. The same goes for the head of the NIA. There should be an absolute trust between the President and the head of the NIA. Otherwise, the security of our country

[69] Section 202(1) of the Constitution.

[70] Section 203(1) of the Constitution.

may be compromised. Trust is therefore fundamental to the relationship between the President and the applicant.

[217] Regrettably, on the record before us, the relationship between the President and the applicant has deteriorated at least since the "Macozoma affair" broke out. One need only have regard to the allegations and counter allegations made in the papers. The subjective views of the President on the state of the relationship between him and the applicant bear testimony to this. The applicant, while accepting that the relationship between him and the President has deteriorated nevertheless believes it may still be repaired. This implicit acknowledgement of the breakdown in the relationship by the applicant serves to confirm the state of the relationship. Viewed objectively therefore the relationship of trust between the applicant and the President, which is fundamental to the relationship between the head of the NIA and the President, has dropped to its lowest ebb. And in my view, it has broken down irreparably. It is not necessary to consider who is responsible for this breakdown. It is sufficient to hold that, viewed objectively, the relationship has indeed broken down.

[218] Given this state of relationship, it would be too much to expect of human nature to require that the applicant and the President must again work together in the context of a relationship which demands mutual trust. On the record, nothing suggests that the applicant and the President can again restore mutual trust. Building trust in one another is a process. Even if the mutual trust between the President and the applicant could be restored, that would require time. Having regard to the state of relationship

between the President and the applicant at present, I doubt whether the few months that are remaining before the contract expires will be sufficient for that process. This too, is a matter that cannot be ignored in determining what is just and equitable.

[219] In all the circumstances, re-instatement will neither serve the interests of the applicant nor those of the President. Nor will it serve that of the public which has an interest in the mutual trust between the President and the applicant.

[220] There are further considerations which are relevant in this regard. The applicant through no fault of his has been out of office since about 20 October 2005. What is more, his term of office expires in a few months. The second respondent, has been in office for some time now. While these factors standing alone are no reason to refuse re-instatement to the applicant, they acquire some significance when viewed in the context of the relationship of trust which has admittedly irretrievably broken down.

[221] On the other hand, the applicant is entitled to be afforded a relief that will address the violation that has occurred. The most effective manner to achieve this is to put the applicant in the same position that he would have been but for the unconstitutional conduct.

[222] Balancing all these factors, and bearing in mind that the ultimate goal is to make an order that is just and equitable, the appropriate order to make is not to re-

instate the applicant in his former position but to put him in the same financial position that he would have been had his contract run until 31 December 2007. What this entails is that he must receive the monetary equivalent of all the benefits that he would have received if he had remained physically in employment until 31 December 2007. These benefits must include benefits that he received in kind such as the benefit of occupying the official residence. The benefits that are in kind can be converted into monetary value. In the event of any dispute as to the monetary value of any benefit that were offered to him in kind, such a dispute can be resolved by a court of competent jurisdiction.

[223] Before concluding this judgment, there are two matters that remain to be considered. The first relates to the applicant's suspension, the other is whether there are any factual issues that should be referred for oral evidence. In view of the conclusion that I have reached on the challenge to the alteration of the term of office, and the order I propose to make in that regard, the question of the applicant's suspension has become moot. In addition, it becomes unnecessary to consider whether there are any factual issues that should be referred for oral evidence.

*Costs*

[224] This is a case in which costs should follow the event. Such costs of course must include those that are consequent upon the employment of two counsel.

*Order*

[225] In the event I would have made the following order:

(a) Leave to appeal against the decision of the Pretoria High Court is granted.

(b) The appeal is upheld and the order of the High Court is set aside and is replaced with the order set out below.

(c) The decision of the President to alter the term of office of the applicant which had the effect of terminating the applicant's contract of employment on 22 March 2006 is declared inconsistent with the Constitution and therefore invalid.

(d) It is not just and equitable that the applicant be re-instated in his former position as the head of the National Intelligence Agency.

(e) The applicant must be placed in the same position financially in which he would have been had his contract expired on 31 December 2007.

(f) For the purposes of the order in paragraph (e) any benefits that the applicant enjoyed by reason of his employment as the head of the National Intelligence Agency which were paid in kind must be converted into monetary value.

(g) In the event of any dispute as to the monetary value of any benefit that the applicant enjoyed, any party may refer the dispute to a court of competent jurisdiction.

(h) No order is made on the application to set aside the suspension of the applicant.

(i) The President is ordered to pay the costs of these proceedings including the costs consequent upon the employment of two counsel.

Madala J concurs in the judgment of Ngcobo J.

SACHS J:

[226] I support the order proposed by Moseneke DCJ and much of his reasoning. I agree that the power both to appoint and to dismiss the head of the National Intelligence Agency (NIA) is derived from the Constitution. I differ, however, in relation to the extent to which his judgment applies ordinary incidents of contract law to the consequences of the breakdown of the relationship between the President and Mr Masetlha. To my mind, the relationship between the President and the head of the NIA is at all times suffused with a constitutional dimension. I do not believe that the scant contractual details in this matter govern the issues raised, but rather that the case must be decided in the context of a constitutionally-controlled public power having been exercised.

[227] The relationship at issue is different from that which the President would have with, say, his private secretary, or his gardener, where the ordinary incidents of contract law within a public administration legal regime could play a major role. It is

a relationship created in a constitutional setting; its fundamental content is dictated by performance of identified constitutional responsibilities; its possible modes of termination are governed by constitutional criteria; and, I believe, the consequences of termination should be regulated by constitutional requirements. In this respect, I agree with the broad approach to legality adopted by Ngcobo J, though I do not accept his finding that the contract with Mr Masetlha was unlawfully terminated because of a lack of prior consultation.

[228] The starting point of my enquiry is the sui generis (of its own special kind) nature of the relationship between the President and the head of the NIA. The Constitution expressly empowers the President, as the head of the national executive, directly to appoint three functionaries, each with a leading role to play in security: the National Director of Public Prosecutions,[1] the National Commissioner of Police[2] and the head of the NIA.[3] It will be noted that in contrast to the President's power in relation to Cabinet Ministers, the power to appoint these three functionaries is not coupled with an express power to dismiss.[4] This suggests a qualitative distinction

[1] Section 179(1)(a) of the Constitution provides:

> "There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive".

[2] Section 207(1) of the Constitution provides:

> "The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service."

[3] Section 209(2) of the Constitution provides:

> "The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility."

[4] Section 91(2) of the Constitution provides:

based on the fact that the three are not purely political appointees placed in positions of governmental leadership. Rather, they are important public officials with one foot in government and one in the public administration. Members of Cabinet know that they are hired and can be fired at the will of the President; and if fired, they can mobilise politically, go to the press, even demonstrate outside Parliament, and hope to muster support for themselves at the next congress of their party.

[229] As public officials the three special appointees do not have any equivalent political remedies. Nor can they invoke the Promotion of Administrative Justice Act (PAJA),[5] which excludes them from its reach.[6] The Labour Relations Act (LRA)[7] shuts out the members of the NIA from its protection.[8] Presumably it would be regarded as invidious in their case to employ the processes concerning unjust administrative action or unfair dismissal under the LRA; secrets of state would be in jeopardy of being uncovered. The provisions of the Intelligence Services Act (ISA),[9] and regulations made under them, appear not to be helpful. Many of the regulations

---

> "The President appoints the Deputy President and Ministers, assigns their powers and functions, and *may dismiss them*." (Emphasis added.)

[5] Act 3 of 2000.

[6] Section 1(i)(aa) of PAJA excludes from its operation "the executive powers or functions of the National Executive, including the powers or functions referred to in sections . . . 85(2)(b), (c), (d) and (e) . . . of the Constitution".

Section 85(2)(e) of the Constitution provides:

> "The President exercises the executive authority, together with the other members of the Cabinet, by performing any other executive function provided for in the Constitution or in national legislation."

[7] Act 66 of 1995.

[8] Section 2(b) provides that the LRA is not applicable to members of the NIA.

[9] Act 65 of 2002.

are in fact so secret that even a court of law would not ordinarily have access to them.[10]

[230] Depending on how it is used, the Public Services Act (PSA)[11] might or might not provide some protection against arbitrary dismissal. The PSA allows for terms and conditions of appointment to be prescribed, without laying down what these must be.[12] In the present case the reality is that no terms and conditions were prescribed. Not even a skeleton. All that existed was a letter of appointment for an identified post for a fixed term. Yet it cannot be that in a constitutional state, the secret service is so secret that its functioning takes place outside the realm of law. Our Constitution eschews autocracy, and it is unthinkable that a senior public figure straddling the divide between the public administration and government, and expressly commanded

[10] Intelligence Services Regulations, GN R1505, GG 25592, 16 October 2003 (referred to by the applicant as "the secret regulations").

[11] Act 103 of 1994.

[12] The relevant part of section 12 of the PSA provides:

> "(2) As from the date of commencement of the Public Service Laws Amendment Act, 1997—
>
> (a) a person shall be appointed in the office of head of department in the prescribed manner, on the prescribed conditions and in terms of the prescribed contract between the relevant executing authority and such a person for a period of five years from the date of his or her appointment, or such shorter period as that executing authority may approve;
>
> . . .
>
> (4) Notwithstanding the provisions of subsection (2), a contract contemplated in that subsection may include any term and condition agreed upon between the relevant executing authority and the person concerned as to—
>
> (a) any particular duties of the head of department;
>
> (b) the specific performance criteria for evaluating the performance of the head of department;
>
> (c) the grounds upon, and the procedures according to which, the services of the head of department may be terminated before the expiry of his or her term of office or extended term of office, as the case may be; and
>
> (d) any other matter which may be prescribed."

to work within the law,[13] should be obliged him- or herself to function in a legal void without any rights at all.

[231] Moseneke DCJ would fill the vacuum by invoking the ordinary principles of contract law. In my view, however, the equivalent of terms and conditions should be inferred in each case from the special nature of the specific relationship between the President and the appointees established by the Constitution, in this case the head of the NIA. At the very heart of the special relationship is the need for confidence on the part of the President in the dependability of the intelligence passed on to him. Once the basis of that reliance evaporates, the whole foundation of the relationship disappears. Extremely delicate matters of state might be involved. Decisions on matters of great public moment could depend on the value of the intelligence provided. A great deal of subjective discretion is therefore necessarily built in to the appreciation by the President of the work of the head of the NIA. Absent the trust, the core of the relationship is negated.[14]

[232] The issue presented by this case, then, is not based on something on which the President did not rely, namely, an allegation of breach of contract by Mr Masetlha.

---

[13] The relevant part of section 198 of the Constitution provides:

> "The following principles govern national security in the Republic:
>
> . . .
>
> (c) National security must be pursued in compliance with the law, including international law.
>
> . . . ."

[14] I expressly refrain from dealing with the factors that would justify terminating the appointments of the National Director of Public Prosecutions and the National Commissioner of the Police where different constitutional and statutory considerations apply.

The basic question is whether the substratum of the relationship had vanished, entitling the President to terminate the appointment because its primary purpose and raison d'être (reason for coming into existence) had been obliterated. In my view, the facts show that it had, entitling the President to revoke the appointment.

[233] In the circumstances, then, I would hold that the President was lawfully entitled to amend the terms of the appointment to bring it to an immediate end. This does not mean that Mr Masetlha had been without any protection at all. He never lost his right to a fair labour practice. Though the mechanisms established by the LRA were not available to him, he was still entitled under section 23 of the Constitution to be treated fairly.[15] Fairness in the circumstances was largely dictated by the nature of the work to be performed and the wide discretion given to the President to determine whether the requisite degree of trust had been destroyed. Had the loss of trust been based on wholly irrational factors unrelated to functions or performance, such as phobic horror at seeing a functionary wearing brown shoes with a dark suit, the dismissal would have been manifestly arbitrary and unfair. But short of such irrational motivation, the fairness of the termination itself must be seen as having flown from the fact that the basic confidence that the President needed for the relationship to continue had been irretrievably lost. Revocation of the appointment in these circumstances was accordingly not unfair, and the President could then lawfully terminate the relationship.

[15] Section 23(1) provides: "Everyone has the right to fair labour practices."

[234] I would hold, then, that painful as it was for Mr Masetlha, and aggrieved as he felt that he had not had sufficient opportunity to present his side of the matter, the President acted within his powers in ending Mr Masetlha's stewardship of the NIA, even if he did so in a rather summary way. I should add, however, that had the President relied on misconduct or other forms of breach of the relationship, then, absent extreme urgency, fairness would have dictated that an appropriate form of prior hearing be given. But he did not base the termination on breach, and in this respect I differ from Ngcobo J's assessment that the principle of a right to a prior hearing applied in the circumstances of this case.

[235] Fairness of the termination, however, is not the end of the enquiry. Fairness required that in the absence of fault being alleged and established, Mr Masetlha should not be deprived of the material benefits he would have received had the relationship proceeded to full term. This was in fact attended to on what were referred to as compassionate grounds. In my view, more than compassion was involved — the President was legally bound to pay out Mr Masetlha for the remainder of his term.

[236] There is one extra element of fairness that needs attention. I believe that fairness required that Mr Masetlha be consulted on the manner in which the termination was to be publicly communicated. Fairness to an incumbent about to be relieved of a high profile position in public life presupposes the display of appropriate concern for the reputational consequences. People live not by bread alone; indeed, in the case of career functionaries, reputation and bread are often inseparable.

[237] And I would add that it was not only the material benefits and the standing of the incumbent that had to be considered. The general public too had an interest. Constitutionally-created institutions need constantly to be nurtured if they are to function well. This requires that those who exercise public power should avoid wherever possible acting in a manner which may unduly disturb public confidence in the integrity of the incumbents of these institutions.

[238] In this regard, it is my view that fair dealing and civility cannot be separated. Civility in a constitutional sense involves more than just courtesy or good manners. It is one of the binding elements of a constitutional democracy. It presupposes tolerance for those with whom one disagrees and respect for the dignity of those with whom one is in dispute. Civility, closely linked to ubuntu-botho, is deeply rooted in traditional culture, and has been widely supported as a precondition for the good functioning of contemporary democratic societies.[16] Indeed, it was civilised dialogue in extremely difficult conditions that was the foundation of our peaceful constitutional revolution. The Constitution that emerged therefore presupposes that public power will be exercised in a manner that is not arbitrary and not unduly disrespectful of the dignity of those adversely affected by the exercise.

[16] See, for example, Rawls *Justice as Fairness: A restatement* (Harvard University Press, Cambridge 2001) at 116:

> "[A] requirement of a stable constitutional regime is that its basic institutions should encourage the cooperative virtues of political life: the virtues of reasonableness and a sense of fairness, and of a spirit of compromise and a readiness to meet others halfway. These virtues underwrite the willingness if not the desire to cooperate with others on terms that all can publicly accept as fair on a footing of equality and mutual respect."

[239] I should stress that I make these observations in general terms in order to establish what fairness in principle requires in matters such as these. This judgment does not require us to take any position on the hotly-contested factual disputes referred to in the papers, and I expressly refrain from doing so.

[240] I would conclude, then, as follows: given the loss of trust bearing on the central task of the head of the NIA, as is evident from the papers, the termination by the President of the appointment of Mr Masetlha as head of the NIA was not unlawful; the offer to pay him out for the balance of the period of his appointment should not be characterised as an act of grace or compassion, but as compliance with a legal obligation; and to the extent that any reputational damage to Mr Masetlha might have been caused by the manner in which the proceedings unfolded, the judgments in this matter establish that the basis for the termination of Mr Masetlha's incumbency was simply an irretrievable breakdown of trust, and not dismissal for misconduct.

For the Applicant: Advocate N Tuchten SC and Advocate M Chaskalson instructed by Haffegee Savage Attorneys.

For the First Respondent: Advocate IAM Semenya SC and Advocate L Gcabashe instructed by The State Attorney, Pretoria.