TRANSFORMATIVE ADJUDICATION AND THE PLACE OF ADMINISTRATIVE LAW IN SOUTH AFRICAN JURISPRUDENCE: *ABSA BANK LIMITED v PUBLIC PROTECTOR**

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1 Introduction

The primary purpose of administrative law is to regulate the exercise of public power and the performance of public functions, which is informed by the constitutional principle of the rule of law.[1] This paper argues that what underlies this objective in post-1994 mainstream transformation jurisprudence is a transformative approach in interpreting the Constitution,[2] by which all exercises of power must be justified, including judicial interpretations.[3] Klare coined this

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1 G Quinot *Administrative Justice in South Africa: An introduction* (2015) 2.
2 The Constitution of the Republic of South Africa, 1996 (hereinafter, 'the Constitution').
3 Judges Matter 'The accountability for judges' June 2016 https://www.judgesmatter.co.za/opinions/the-accountability-for-judges/ (accessed 5 May 2018). This is done, for example, through judicial precedent, the Judicial Services Commission, internal tribunals, and other relevant mechanisms.

approach as 'transformative constitutionalism'.[4] This paper critically examines the decision in *Absa Bank and Others v The Public Protector and Others* (*Absa* case)[5] concerning the High Court's approach to adjudication in the administrative law and the role of a transformative constitutionalist approach to adjudication.

The first part of this paper contains a brief exposition of the place of administrative law in the South African legal regime. In the second part of the paper, we provide a summary of the *Absa* case. We then provide a focussed discussion on procedural fairness as a cornerstone of good governance with respect to administrative conduct in the third section of the paper. The fourth part of the paper sets out what a transformative approach to adjudication is, including a discussion on how the Court in *Absa* dealt with the standard of fairness in relation to the Public Protector's conduct from a transformative constitutionalist lens, on the one hand, and a critique on the Court's application of the established principles of administrative law, on the other hand. Lastly, we conclude with recommendations in response to the Court's seemingly split approach to transformative adjudication.

2 The place of administrative law in South African law

2.1 Tenets of South African administrative law

The primary sources of administrative power in South Africa include the Constitution, legislation, judicial precedent, the common law,[6] and other relevant empowering provisions.[7] For our purposes, we focus on the relationship between the common law principle of legality, section 33 of the Constitution, the Promotion of

4 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 147-150. We must mention that the authors' reference to transformative constitutionalism in this paper should not be construed as subscription to the transformative constitutionalist paradigm, but merely highlights its impact/role in the South African administrative law jurisprudence, for purposes of this paper.

5 *Absa Bank and Others v The Public Protector and Others* 2018 JDR 0190 (GP).

6 Quinot (n 1 above) 61-62. According to Quinot, sources of *administrative power* are those sources of law that empower persons or institutions to perform a public power.

7 Sec 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). 'Empowering provisions' are defined in PAJA in a wider sense than legislation as an empowering source, in that 'empowering provision' includes 'a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken'. Compare with the minority judgment given by Langa CJ in *Chirwav v Transnet Limited and Others* 2008 3 BCLR 251 (CC) paras 154-196. In his separate but concurring judgment, Langa CJ explains the narrow interpretation of power exercised in terms of legislation. This, when read in opposing comparison with the definition of 'empowering provision' in terms of sec 1 of PAJA, makes for sound legal analysis.

Administrative Justice Act (PAJA),[8] and other relevant empowering provisions as sources of administrative law.

Administrative law is grounded on the rule of law.[9] Quinot argues that the rule of law in administrative law propagates the idea, *inter alia*, that public power should only be exercised within the confines of the law or in a lawful manner.[10] This rule is encapsulated as a constitutional founding provision according to section 1(c) of the Constitution, that, '[t]he Republic of South Africa is one, sovereign, democratic state founded on … [the] supremacy of the constitution and the rule of law'.[11] In it, the principle of legality finds expression, that 'the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond what is conferred upon them by law'.[12]

Before the commencement of the 1996 Constitution, the exercise of public power and the performance of public functions were mainly regulated by common law constitutional principles, subject to parliamentary sovereignty.[13] In the current South African constitutional dispensation, there exists only one system of law that primarily flows from the legal supremacy of the Constitution.[14] For the sphere of administrative law, this means that the regulation of public power has been infused with the relevant principles of administrative justice that are enshrined in the Constitution, without negating the existing common law principles of administrative law.[15] In particular, section 33(1) of the Constitution guarantees the right to just administrative action that is lawful, reasonable and procedurally fair.[16] The status of the common law in this regard is that it informs certain provisions of PAJA and the Constitution,[17] but derives its power from and supplements the written Constitution.[18]

8 Act 3 of 2000.
9 Quinot (n 1 above) 2.
10 Quinot (n 1 above) 6.
11 Sec 1(c) of the Constitution of the Republic of South Africa (hereafter, 'the Constitution').
12 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 (CC) para 58.
13 *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) para 37 (hereafter, '*Pharmaceutical*').
14 *Pharmaceutical* (n 13 above) para 44.
15 *Pharmaceutical* (n 13 above) para 45.
16 Sec 33(1) of the Constitution. That is, *just* administrative action.
17 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 4 SA 490 (CC) para 22 (hereafter, '*Bato Star*').
18 *Pharmaceutical* (n 13 above) para 49. The common law also applies in incidences where existing legislation does not give effect to the right to just administrative action or to the extent that the relevant legislation is silent on the matter (see sec 8(3)(a) of the Constitution). Although section 33(1) of the Constitution guarantees the right to just administrative action, PAJA was enacted to directly give effect to the right envisaged in section 33(1). Accordingly, 'the cause of action for judicial review of administrative action now ordinarily arises from

2.2 The *modus* of administrative law review

The principle of constitutional subsidiarity requires litigants to first rely on PAJA to enforce their constitutional right to just administrative action before relying on section 33(1) of the Constitution.[19] The Constitutional Court emphasised this principle in *Mazibuko v MEC for Traditional and Local Government Affairs*,[20] where O'Regan J elucidated that:

> The answer to this raises the difficult question of the principle of constitutional subsidiarity. This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively, challenge the legislation as being inconsistent with the Constitution.[21]

PAJA does not apply to conduct by administrators that escapes the definition of 'administrative action' stipulated in section 1 of PAJA. The courts have in such instances adopted an approach that places reliance on the common law principle of legality to regulate the exercise of any public power that falls outside of the ambit of PAJA.[22]

On the one hand and unlike the aforementioned sources of administrative law review, the constitutional principle of legality is less exacting in applications for review, as it is merely a general constitutional principle that makes it possible for the courts to defer

PAJA, not from the common law as in the past' (our emphasis) (see *Bato Star* (n 17 above) para 25), especially taking into account the prevailing or superseding effect of statutes against the common law (see C Hoexter *Administrative Law in South Africa* (2012) 118). Furthermore, PAJA is not regarded as ordinary legislation but as 'triumphal' or 'constitutional' legislation that governs the exercise of administrative action in general (see *Sasol Oil (Pty) Ltd v Metcalfe NO* 2004 5 SA 161 (W) para 7; *Platinum Asset Management (Pty) Ltd v Financial Services Board and Others*; *Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others* 2006 4 SA 73 (W) para 142; *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) para 101.

19 C Hoexter *Administrative Law in South Africa* (2012) 119. It happens at times that empowering provisions themselves contain specific provisions that grant the right to review administrative action incidental to matters dealt therewith. Where this is the case, the rule of implied exception might in some instances be bypassed in favour of the provisions of PAJA where such provisions from the PAJA provide a more generous protection of rights than the relevant empowering provision, given PAJA's status as a 'universal' legislation (see *Sasol* (n 19 above) para 7). The rule of implied exception stipulates that '*generalia specialibus non derogant*' (i.e. provisions of a general statute must yield to those of a special (or specific) one).

20 *Mazibuko v MEC for Traditional and Local Government Affairs* 2010 4 SA 1 (CC).

21 *Mazibuko* (n 20 above) para 73. The exception to the constitutional subsidiarity principle applies where legislation is challenged on grounds of constitutionality (see Hoexter (n 19 above) 119). The courts will attempt to read the impugned provisions in a manner that is consistent with the Constitution, failing which the provisions will be declared unconstitutional (see *Zondi* (n 18 above) para 102), and as a consequence, become unenforceable.

22 M Carnelley & S Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 63-64. This reliance on legality is residual and should only act as a safety net in instances where PAJA is not applicable (see Hoexter (n 19 above) 121-124).

to the government without abandoning its supervisory role over the exercise of public power.[23] On the other hand, the principle of legality offers some convenience in that it is far reaching and inclusive.[24] All of these legal regimes will apply based on the source of administrative law that is applicable in a given case.[25]

3 Factual summary of the *Absa* case

In 2010, a complaint was lodged by Advocate Paul Hoffman SC of the Institute for Accountability in Southern Africa (IFAISA), about the alleged failure of the South African government to implement the findings of a CIEX Report and to recover the money allegedly owed to the South African Reserve Bank (SARB) by Absa Bank Ltd. (Absa) and other entities.[26] The alleged debt arose from what has become known as 'lifeboat transactions' concluded between the SARB and several small banking institutions during the mid-1980s, including Bankorp Ltd (Bankorp), which was in financial distress at the time.[27] The acquisition of Bankorp by Absa was conditional upon the existing financial assistance arrangements between the SARB and Bankorp being extended to Absa.[28] In the final report, CIEX concluded that there was corruption, fraud and maladministration committed in relation to the financial assistance the SARB rendered to Bankorp/Absa.[29]

Consequently, the Public Protector invoked her powers in terms of section 6(9) of the Public Protector Act[30] (the PPA) to investigate the lifeboat transactions that the SARB concluded with Bankorp/Absa and other entities.[31] Thereafter, the Public Protector issued a report

23 Hoexter (n 19 above) 124.
24 Hoexter (n 19 above) 124-125.
25 Hoexter (n 19 above) 122. There is an important point of differentiation between the grounds of review under PAJA and those under legality, although each route falls under the same single constitutional system of law. The grounds of reviewing conduct by an administrator under PAJA are unlawfulness, unreasonableness, or procedural unfairness, and the failure by an administrator to provide written reasons for their decisions in some instances, all of which are based on requirements established in terms of section 33 of the Constitution (See sec 33(1) & (2) of the Constitution and sec 6 of PAJA). The grounds of review in respect of specific legislation would generally be provided for in the particular legislation and will be read along with PAJA where applicable (See *Zondi* (n 18 above) para 101). In the alternative and where applicable, the grounds of reviewing conduct by an administrator under the constitutional principle of legality are based on the duty imposed on administrators at common law to act within the powers that have been conferred by law and not to misconstrue such powers; the duty to act in good faith and not arbitrarily, and the duty to act rationally and fairly unless acting unfairly would be rational (see Hoexter (n 19 above) 121-123).
26 *Absa* (n 5 above) paras 24-26.
27 *Absa* (n 5 above) para 25.
28 As above.
29 *Absa* (n 5 above) para 27.
30 Act 23 of 1994.
31 *Absa* (n 5 above) para 30.

in which she made findings that the South African government failed to recover allegedly stolen public funds that resulted from financial assistance extended by the SARB to Bankorp in the form of a simulated loan transaction,[32] the latter of which was later acquired by Absa.[33] The loan agreement between SARB and Absa was terminated without any repayment to SARB.[34] This led to the Public Protector's remedial action that the Absa-SARB matter be reinvestigated and that Absa should repay the said loan to SARB.[35] Prior to finalising her report, the Public Protector had undisclosed meetings with various state officials from the South African Presidency and political organisations.[36] In the final report, the Public Protector's remedial action was different from that proposed in her preliminary report.[37]

Absa, SARB, and the Minister of Finance made an application for review against the Public Protector's remedial action and the Court had to determine whether: (i) the Public Protector's remedial action in paragraph 7 of the Report constitutes administrative action according to PAJA; if so, (ii) whether the Public Protector adhered to the dictates of procedural fairness and reasonableness; and (iii) whether the Public Protector's remedial action was lawful;[38] alternatively (iv) whether the Public Protector's conduct could be reviewed according to the principle of legality.[39]

The Court held that the Public Protector's conduct amounted to 'administrative action' in terms of PAJA.[40] According to the Court, the Public Protector's remedial action concerning a reinvestigation adversely impacts the rights of Absa and the SARB because of its invasive nature.[41] Furthermore, the Public Protector's findings against Absa were predetermined, which raised potential prejudice.[42]

The Court further held that: (i) when applying the principles and the findings in respect of administrative action in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* (*Bapedi* case),[43] as well as section 182(c) of the Constitution, it is clear that the decision and remedial action set out in the Public Protector's report falls squarely in the definition of

32 *Absa* (n 5 above) para 1.
33 *Absa* (n 5 above) para 25.
34 *Absa* (n 5 above) para 30.
35 *Absa* (n 5 above) para 31.
36 *Absa* (n 5 above) para 32.
37 As above.
38 *Absa* (n 5 above) para 34.
39 *Absa* (n 5 above) para 5.
40 *Absa* (n 5 above) para 41.
41 As above.
42 *Absa* (n 5 above) para 43. This, of course, is in line with the *dictum* in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA), which determined that a person's 'rights' according to PAJA includes an impact on potential future rights.
43 *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* 2015 3 BCLR 268 (CC).

'administrative action' prescribed by PAJA. It amounts to administrative action in terms of both PAJA and the principle of legality;[44] (ii) the remedial action imposed on the President and the Special Investigating Unit by the Public Protector is unlawful; and (iii) the Public Protector's remedial action was a product of a procedurally unfair process.[45] According to the Court, the Public Protector's remedial action was reviewable under section 6(2) of PAJA. The Court then set the report aside and reasoned that should it be mistaken regarding the applicability of PAJA, the principle of legality applies in light of the Public Protector's duty to comply with the rule of law in decision making.[46]

4 Procedural fairness: The cornerstone of good governance

4.1 The object of procedural fairness

Procedural fairness serves several important purposes. Mokgoro J eloquently expressed these as follows:

> When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that no-one shall be the judge in his own matter and that the other side should be heard aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law.[47]

The *dictum* above places emphasis on the instrumental rationale for the existence of a right to procedural fairness.[48] At common law, the requirements of natural justice had to be complied with.[49] This entailed compliance with two natural law rules that formed two separate requirements: (i) *audi alteram partem* ('hear the other side'); and (ii) *nemo iudex in sua causa* ('no one should be a judge in their own cause/interest').[50] These rules ensured that individuals who were adversely affected by decisions would know about such

44 *Absa* (n 5 above) para 52.
45 *Absa* (n 5 above) paras 50-103.
46 *Absa* (n 5 above) para 52.
47 *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 131.
48 JR De Ville *Judicial Review of Administrative Action in South Africa* (2003) 217. The requirements of fairness as demanded by the rules of natural justice remain in place post-apartheid as they are protected by section 33 of the Constitution, PAJA and legality. Section 33(1) of the Constitution grants everyone a right to administrative action that is 'procedurally fair' (see Quinot (n 1 above) 146-147).
49 De Ville (n 48 above) 218.
50 As above.

decisions and be able to participate in the decision-making process.[51] In *Zondi v MEC for Traditional and Local Government Affairs and Others*,[52] Ngcobo J reiterated the importance of this position and explained that:

> The overriding consideration will always be what fairness demands in the circumstances of each case. The decision-makers that are vested the authority to make administrative decisions are… required to do so in a manner consistent with PAJA.[53]

Accordingly, section 3(2)(a) of PAJA stipulates that procedural fairness depends on the 'context of the decision' and that it has a 'highly variable content'.[54]

4.2 A reasonable opportunity to make representations

Section 3(2)(b)(ii) of PAJA provides that any person referred to in subsection (1) must be given a reasonable opportunity to make representations. This requirement gives effect to the *audi alteram partem* rule.[55] The right to be heard is integral to the South African constitutional scheme and over the past two to three decades there has been much development of the *audi alteram partem* rule in the South African administrative law.[56] Our courts have unwaveringly shifted from the old narrow and formalistic approach towards the tenets of natural justice, flexible and broad duty to act fairly in all cases.[57]

Section 7(9)(a) of the PPA provides that, where it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated, the Public

51 Quinot (n 1 above) 147. The common-law rules of natural justice entailed prior notice of the decisions and an opportunity for those affected to state their case and influence the outcome of the decisions to an unbiased decision-maker. Section 3(1) of PAJA states that the procedural fairness requirement applies when the administrative action at issue: (i) 'affects any person'; (ii) has a material and adverse effect'; and (iii) affects 'rights or legitimate expectations'. See Quinot (n 1 above) 149.

52 *Zondi* (n 18 above).

53 *Zondi* (n 18 above) para 114.

54 Y Burns & M Beukes *Administrative Law under the 1996 Constitution* (2006) 224; see also *Turner v Jockey Cub of South Africa* 1974 3 SA 633 (A) para 652-653. Section 3(2)(b) of PAJA contains the minimum requirements to give effect to the right to procedurally fair administrative action to the person referred to in subsection (1): (i) adequate notice of the nature and purpose of the proposed administrative action;(ii) a reasonable opportunity to make representations; (iii) a clear statement of the administrative action; (iv) adequate notice of any right of review or internal appeal (where applicable); and (v) adequate notice of the right to request reasons in terms of section 5 of PAJA. Section 3(3) of PAJA provides that in some situations, more onerous procedures may be required in respect of administrative action that affects a person, such as an opportunity for the affected person to present and dispute information and arguments, including in person.

55 Burns & Beukes (n 54 above) 227.

56 Hoexter (n 19 above) 363.

Protector shall afford such person an opportunity to respond in connection therewith.[58] In making a decision without affording the applicants an effective opportunity to make representations before the decision was made, as elucidated by the facts in *Absa*, the Public Protector acted unfairly. Therefore, the remedial action in paragraphs 7.1 and 8.1 of the report was set aside as they were a product of a procedurally unfair process and were unlawful.[59] The importance of a reasonable opportunity to make representations was explained in *Zondi* as follows:

> 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.[60]

This *dictum* demonstrates that the Public Protector did not uphold and defend the objectives of section 3(2)(b)(ii) of PAJA and section 7(9) of the PPA. She also forsook the duty to promote an efficient administration imposed on administrators by section 33(c) of the Constitution as she did not afford and make it clear to the applicants that they had an opportunity to make representations. The Court in *Absa* referred to *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (*New Clicks* case)[61] and emphasised that affected parties cannot make meaningful representations when they do not know what factors will weigh against them in a decision to be taken.[62] In this instance, the affected parties were not informed at all before the final report was published.[63]

4.3 The prohibition against bias

Another common law principle associated with procedural fairness is the *nemo iudex in sua causa* rule. The maxim is often described as the

57 The Court in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 72 held that the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation require, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which a decision is based. The Court favoured the minority approach in *Masethla v President of the Republic of South Africa* 2008 (1) SA 566 (CC), wherein Ngcobo J held in his dissenting judgment that those who exercise public power are under a duty to act fairly by virtue of the rule of law and its existing requirement of rationality as part of the objective normative value system (see also Murcott 'Procedural fairness as a component of legality: is a reconciliation between Albutt and Masetlha possible?' (2013) 130 *South African Law Journal* 264).

58 Sec 7(9)(a) of the PPA.

59 As above.

60 *Zondi* (n 18 above) para 113. Compare with *De Beer NO v North-Central Local Council and South Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 1 SA 429 (CC) paras 1-32.

61 *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 2 SA 311 (CC).

62 *Absa* (n 5 above) para 102.

63 As above.

rule against bias and expresses the idea that decisions ought to be impartial.[64] This principle is expressed in section 6(2)(a)(iii) of PAJA, which grants the court power to review administrative action where the administrator 'was biased or reasonably suspected of bias'.[65] Decisions-makers must be prevented from making decisions that are based on illegitimate (often personal) motives and considerations.[66] The Constitution in this regard provides that the Public Protector is 'independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'.[67]

In *President of the Republic of South Africa and Others v South African Rugby Football Union*,[68] the Court formulated the test for bias as follows:

> The test is an objective one which enquires whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case.[69]

Similarly, the Court in *Absa* correctly stated that this test was applicable to the present matter.[70] It appears that to show that a judge or other official was actually biased, one must inspect their conduct during the proceedings.[71] Actual bias will be present if the presiding officer or other official manifested signs of partiality during the course of the proceedings (with reference to remarks or conduct).[72]

On 19 June 2017, the Public Protector finalised her report. As appears from her report, prior to finalising it, the Public Protector held meetings with an official from the State Security Agency (SSA), officials from the Presidency and representatives from an organisation known as Black First Land First (BLF).[73] However, the Public Protector did not disclose that she had met the officials from the Presidency and BLF.[74] The shortfall of this conduct was that the Public Protector did not afford the reviewing parties a similar

64 Hoexter (n 19 above) 451.
65 As above. It is based on two common law principles of good administration: (i) that decisions are more likely to be sound when the decision-maker is unbiased; and (ii) that the public will have more faith in the administrative process when justice is not only done but seen to be done.
66 As above.
67 Sec 181(2) of the Constitutional of the Republic of South Africa, 1996.
68 *South Africa and Others v South African Rugby Football Union* 1999 4 SA 147 (CC).
69 *South African Rugby Football Union* (n 68 above) para 48.
70 *Absa* (n 5 above) para 97.
71 De Ville (n 48 above) 271.
72 As above. In *Suburban Transport (Pty) Ltd v Local Board Road Transportation, Johannesburg* 1932 WLD para 100, the Court reiterated that the test for bias is two-fold: it requires (i) a 'reasonable suspicion for bias; and (ii) the 'real likelihood' of bias.
73 *Absa* (n 5 above) para 32.
74 As above.

opportunity, thereby failing to allow the implicated parties the opportunity to state their case and contribute to the outcome of the decision that was supposed to have been made by an unbiased decision-maker. She should have informed all parties of these meetings before releasing the report.

The Court found that such conduct cannot be an administrative oversight as she was clearly aware of the provisions of section 7(9) of the PPA when she decided to have an interview with the Presidency and other relevant parties.[75] The Court further found that, if it was an oversight, one would have expected the Public Protector to have stated this in her answering affidavit.[76] One can conclude that a reasonable, informed and objective person would reasonably have an apprehension that the Public Protector, as a result of her conduct, did not bring an impartial mind to bear on the issues before her.[77]

5 Transformative constitutionalist approach to adjudication in administrative law

5.1 A transformative imperative to post-1994 adjudication

Until 1994, the South African legal culture had been homogenous, conservative and predictable.[78] The period in South African history which predated the new constitutional era was characterised, in the words of Etienne Mureinik, by a culture of (repressive) authority.[79] In 1986, Dean described the administrative law as 'a somewhat depressing area of South African law' partially on account of Parliament's then unlimited legislative freedom and the courts' often passive response to it:

> [Administrative law] has developed within a system of government which concentrates enormous powers in the hands of the executive and the state administration and in which the law has been used not to check or structure these powers, but rather to facilitate their exercise by giving those in whom they are vested as much freedom as possible to exercise them in the way they see best. In this process, the South African courts have at times appeared to be all too willing partners displaying what

75 *Absa* (n 5 above) para 100.

76 As above.

77 This is in accordance with the findings in *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 3 SA 673 (A), where the Court found that there was no evidence of bias but there were reasonable grounds for a suspicion of bias. See also *Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga* 2008 2 SA 570 (T) para 25.

78 D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 316.

79 E Mureinik 'A bridge to where: Introducing the interim Bill of Rights' (1994) 31 *South African Journal on Human Rights* 32. That is, understood by the authors as authoritarianism.

virtually amounts to a phobia of any judicial intervention in the exercise of public powers.[80]

During this period, parliamentary sovereignty dictated that Parliament was supreme and the *audi alteram partem* rule would be excluded if parliament intended its exclusion, irrespective of whether or not the rights of individuals were affected.[81] Klare described this legal culture as formalistic, particularly in the sense that it is characterised by cautious traditions of analysis and rather literal, rule-bound interpretation of legal texts.[82] Adopting a transformative constitutionalist jurisprudence, Kibet and Fombad argue that the judicial mindset founded on a positivistic legal culture must be 'examined and revised so as to reflect the transformative conception of adjudicative process and method demanded by the doctrine of transformative constitutionalism'.[83]

The imperative goal in post-1994 South Africa lies in redressing the damages of the past and progressively constructing a society based on substantive equality, human dignity, and freedom.[84] This is the transformative goal that is said to underlie the Constitution which informs mainstream post-1994 jurisprudence in the current constitutional dispensation.[85] As the day-to-day interpreters of the law, judges play a vital role in the actualisation of this goal.[86] This is done by adopting a transformative approach to adjudication, which is a value-orientated approach to judicial interpretation that allows judges to move beyond the confines of a restricted, formalistic jurisprudence.[87]

The present constitutional dispensation has brought with it a broader philosophical foundation for administrative law — a rights-based philosophy.[88] One of the main characteristics of constitutional transformation in South Africa is a shift towards a culture of justification where every exercise of public power must be justified.[89] Within such a culture, an array of constitutional rights 'are standards of justification — standards against which to measure the justification of the decisions challenged under them'.[90] Langa was

80 WHB Dean 'Our Administrative Law — A Dismal Science?' (1986) 2 *South African Journal on Human Rights* 164.
81 VL Peach 'The application of the *audi alteram partem* rule to the proceedings of commissions of Inquiry' unpublished LLM thesis, North West University, 2003 6.
82 C Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) 24 *South African Journal on Human Rights* 285.
83 E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 358.
84 P Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 352.
85 Langa (n 84 above) 351.
86 Klare (n 4 above) 147.
87 Moseneke (n 78 above) 317-318.
88 Burns & Beukes (n 54 above) 61.
89 Mureinik (n 79 above) 31-32.
90 Mureinik (n 79 above) 33.

of the view that under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority but by reference to entrenched values.[91] Transformative adjudication requires an evolved, updated and politically aware account of the rule of law as opposed to the rigidity of formalism.[92]

5.2 The court's approach towards procedural fairness

It is important to bear in mind that the mere setting aside of the Public Protector's remedial action does not mean that the Court absolved *Absa* from paying back the maladministered state funds received by them. In fact, the Court's decision shows us that the maladministered state funds can be recovered. However, the prescribed procedure(s) must be followed. The Court's determination of the applicability of the rules of procedural fairness in *Absa* reveals admirable substantive reasoning in administrative law review.[93]

In *Absa*, the Public Protector had no adequate or justifiable reasons neither to follow the formally prescribed procedures, nor to deny the reviewing parties an opportunity to make representation(s), which is essential for good governance.[94] In *New Clicks*, the Court endorsed participatory democracy as it held that the right to speak and be listened to is part of the constitutional democracy dialogue as all interested parties, not only those implicated, are entitled to know what government institutions are doing and to have a say.[95]

The Court in *Absa* demonstrated procedural fairness well as it held the Public Protector accountable on the ground that her remedial action was a product of an unfair procedure, thus compromising the principle of good administration. Transformative adjudication necessitates that judges must demand, in every constitutional matter, that state institutions present adequate justification for all their actions that impact on constitutional rights.

5.3 The court's handling of the interplay between legality, section 33 of the Constitution, and PAJA in the *Absa* case

The courts have warned against conflating the principles of legality with that of PAJA when it relates to reviewing the exercise of public

91 Langa (n 84 above) 358.
92 Klare (n 4 above) 166-188.
93 G Quinot 'Substantive Reasoning in Administrative-Law Adjudication' (2010) 3 *Constitutional Court Review* 121.
94 As demanded by sec 181(2) of the Constitution and sec 7(9) of the PPA.
95 *New Clicks* (n 61 above) para 111.

power, so as to avoid a parallel system of law.[96] Murcott argues that legality should be seen as a safeguard or safety net after determining that public conduct does not fall within the ambit of PAJA.[97] She opines that although the inquisition into whether the definition of administrative action in terms of PAJA applies is cumbersome,[98] it remains the duty of the courts to consider the definition where it is applicable so that the objectives to give effect to the right to just administrative action as envisaged by section 33 of the Constitution are not undermined.[99]

It is arguable that the Court in *Absa* did not follow the correct approach by not embarking on the appropriate inquisition into the definition of administrative action according to PAJA. Instead, the Court held that the Public Protector's conduct amounted to administrative action based on an unfamiliar and confusing 'two-stage process' which (only) considers an adverse impact of rights that is based on a peremptory decision in the first stage, or an adverse impact of rights in the second stage which is based on a non-peremptory decision (i.e. a recommendation) that places reliance for its legal effect on another peremptory decision which was yet to be made.[100]

The issue with this approach is that PAJA is a constitutionally mandated legislation that was enacted to give effect to section 33 of the Constitution.[101] Once such legislation (PAJA) is side-stepped, section 33 of the Constitution is undermined, and ultimately, the same is true for the value of justification that underlies it.[102]

96 *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 4 SA 298 (SCA) para 19; *New Clicks* (n 61 above) para 436; *Pharmaceutical* (n 13 above) para 44; *Bato Star* (n 17 above) para 22. That is, appropriately recognising the conceptual difference between PAJA, legality, and sec 33 of the Constitution, understanding how they overlap and inform each other, and understanding that they all fall under the one-system of law created by the Constitution, without inappropriately conflating them by confusing one for the other.

97 Murcott 'Procedural fairness as a component of legality: is a reconciliation between Albutt and Masetlha possible?' (2013) 130 *South African Law Journal* 270.

98 Murcott (n 97 above) 269.

99 Murcott (n 97 above) 270. This is especially relevant since PAJA was enacted to give effect to sec 33 the Constitution. See *New Clicks* (n 62 above) para 95, and the preamble to PAJA.

100 *Absa* (n 5 above) paras 41-43.

101 See n 18 above.

102 Of course, where PAJA is *contra* sec 33 itself, it will have to be amended to be in consonance with sec 33 of the Constitution. There is also a tendency by courts to side-step PAJA in preference of legality. Placing preference over legality at the cost of applying PAJA where PAJA is indeed applicable makes it harder to hold administrators accountable for their decisions, in that PAJA imposes more stringent requirements on administrators regarding just administrative action than what legality imposes. This preference further creates legal uncertainty as

In *Minister of Defence and Military Veterans v Motau and Others* (*Motau* case),[103] the Constitutional Court laid down the appropriate construction for determining whether conduct by administrators falls within the definition of 'administrative action' according to PAJA. In its formulation, the Court asserted that:

> The concept of "administrative action", as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.[104]

It is highly likely that the Court in *Absa* would have reached a different decision had it applied the appropriate construction for determining the applicability of PAJA as established by the Court in *Motau* above. The Supreme Court of Appeal in *Minister of Home Affairs v Public Protector*[105] illustrated the importance of a proper inquisition into the definition of administrative action in terms of PAJA. The Court in that case held that decisions by the Public Protector to order remedial action are not administrative in nature and fall outside the ambit of PAJA.[106] The Court reached this decision after appropriately embarking on an inquisition into the definition of administrative action in terms of PAJA. In contrast, the Court in *Absa* did not even consult section 1 of PAJA to ensure whether PAJA was applicable

In addition, the Court in Absa relied on section 182(1)(c) of the Constitution and the legal principles applied by the Constitutional Court in *Bapedi* to classify the Public Protector's conduct as 'administrative action' according to PAJA.[107] The Court was unclear as to exactly which principle from *Bapedi* it relied on, for which particular reasons, and on what basis it relied on such principle(s). The Court vaguely stated that it relied on 'the principles and the findings in respect of administrative action by the Constitutional Court …' to establish the applicability of PAJA.[108] The only explicit reference by the Court in *Absa* to a principle applied in *Bapedi* was

to the applicability of PAJA to certain precarious administrative conduct, as the principles in PAJA are seldom utilised to test such conduct. See also Carnelley & Hoctor (n 22 above) 65, where Hoexter submits that, '[h]owever, the very attractions of the principle of legality have negative implications for South African administrative law as it is currently constructed. The main difficulty is that over-reliance on the principle is subversive of the scheme laid down in s 33 of the Constitution'.

103 *Minister of Defence and Military Veterans v Motau and Others* 2014 5 SA 69 (CC).
104 *Motau* (n 103 above) para 33.
105 *Minister of Home Affairs v Public Protector* 2018 3 SA 380 (SCA).
106 *Minister of Home Affairs* (n 105 above) para 37.
107 *Absa* (n 5 above) para 50.
108 As above.

the principle of deferring to constitutionally established state institutions,[109] that:

> A level of deference is necessary — and this is especially the case where matters fall within the special expertise of a particular decision-making body. We should, as this Court counselled in *Bato Star*, treat the decisions of administrative bodies with "appropriate respect" and "give due weight to findings of fact… made by those with special expertise and experience".[110]

However, the Court in *Bapedi* considered the principle of deference in relation to the standard of reviewing conduct by administrators, and not in determining whether such conduct should be classified as 'administrative action' according to PAJA, the latter of which was relevant to the matter that was before the Court in *Absa*.[111] Furthermore, section 182(1)(c) of the Constitution briefly deals with the power of the Public Protector to order remedial actions. It is unclear why the Court in *Absa* relied on this provision to establish the applicability of PAJA when PAJA itself provides requirements that are to be considered by courts when determining the applicability of PAJA.[112]

The Court further considered the grounds for reviewing the Public Protector's remedial action. It stated that in the alternative review application under legality, section 33 of the Constitution applies, and the Public Protector's decision must have been lawful, reasonable, and procedurally fair in order to survive scrutiny.[113]

It is submitted that the Court conflated the grounds of review under PAJA with those under legality. Although there are considerable overlaps between PAJA and legality, the grounds of review under

109 *Absa* (n 5 above) para 16.
110 *Bapedi* (n 43 above) para 79.
111 There are different phases in review applications in terms of PAJA. The first phase is where the applicability of PAJA is determined. The second phase determines the grounds of reviewing conduct by administrators, which depends on the applicability of PAJA as dealt with in the first phase. The last phase determines the appropriate remedy that is applicable in the given circumstances (see secs 1-8 of PAJA).
112 Moreover, as much as courts have the responsibility to defer to legitimate state institutions that have the necessary expertise to make appropriate decisions before reviewing such decisions (see *Bato Star* (n 17 above) paras 46-48), this principle very clearly applies to decisions made by the Public Protector as well as a constitutionally mandated state institution. The Court in Absa did not defer to the Public Protector's expertise when reviewing her decisions, even though the Court held her office to a higher standard than ordinary administrators when it comes to the exercise of public power (See *Absa* (n 5 above) para 98). The provisions and powers given to the office of the Public Protector in terms of the PPA illustrate this well. It is clear from sec 1A(3) of the PPA that anyone that seeks to be considered for the position of Public Protector has to meet demanding requirements that require expertise. It is also clear from sec 11 of the same Act that non-compliance by anyone with the Public Protector results in a criminal offense, which heightens the prestige and gravity of this office and further confirms the due respect owed to whoever heads it.
113 *Absa* (n 5 above) paras 51-52.

legality do not specifically include requirements of procedural fairness and reasonableness that operate under PAJA.[114] Since the courts have confirmed that South Africa operates under one system of law that is informed by the Constitution, this conflation runs the risk of suggesting the existence of a parallel system of law that may possibly conflict with established constitutional jurisprudence.[115]

As stated above, according to the subsidiarity principle, direct reliance on section 33 of the Constitution will only be relevant where the provisions of PAJA are challenged on the basis of inconsistency with the Constitution, after an unsuccessful attempt to reconcile such provisions with section 33 of the Constitution.[116] The Court in *Absa* neither invoked provisions of PAJA in order to reconcile them with section 33 of the Constitution nor did it invalidate any provision in terms of PAJA on constitutional grounds.[117] This, again, possibly undermines the purpose of PAJA as the instrument that has been specifically enacted to give effect to section 33 of the Constitution. Consequently, the Court may have missed an opportunity to invoke

114 Secs 3-6 of PAJA. Notwithstanding this, Murcott argues that there might be certain incidences whereby the standards of procedural fairness may be applied to the exercise of public power under legality where it would be irrational not to do so (see Murcott (n 97 above) 260). This would ideally be in consonance with a transformative and purposive approach to adjudication, in that it involves a wider approach to protecting persons against the unjust exercise of public power that falls under legality, which would be one step closer to upholding the rule of law and entrenching a stronger culture of justification.

115 See *Freedom Under Law* (n 96 above) para 19. The Court in *Absa* stated at paragraph 52 that, 'Even though the court has found that PAJA does apply, it is clear that, in the alternative, the principle of legality will apply as the Public Protector had made a decision … we are of the view that the decision on remedial action does constitute administrative action, both according to the provisions of PAJA and the principle of legality'. This is, again, a conflation made by the Court with respect to the applicability of 'administrative action' under both PAJA and legality, which is inconsistent with set precedence and PAJA (see *Freedom Under Law* (n 96 above) para 28, *Motau* (n 103 above) paras 27-34, and sec 1 of PAJA. We are of the view that in a single system of law, there cannot be review in terms of both PAJA and legality simultaneously. As discussed above, PAJA should be consulted first before review on the basis of legality is considered.

116 *Zondi* (n 18 above) paras 101-103.

117 The Court only dealt with the fact that it was unnecessary to try to determine whether the Public Protector's decision adversely impacted rights when it came to the applicability of legality through sec 33 of the Constitution (see *Absa* (n 5 above) para 51). In so doing, the Court basically suggested that sec 33 of the Constitution regulates legality. It is rather contended that legality, as found in the rule of law, is regulated by s1(c) of the Constitution, not sec 33, although sec 33 most probably flows from the same principles underlying legality which highlight the need to regulate public power in the first place. Sec 33 is much more specific than legality and is effected through PAJA, not through legality at common law. To say that sec 33 applies because PAJA doesn't apply is to imply that certain provisions of PAJA are unconstitutional and/or inadequate since sec 33 should be relied on to challenge PAJA in accordance with the subsidiarity principle. *Otherwise*, where PAJA is not applicable, then sec 33 will not be applicable. See also Carnelley & Hoctor (n 22 above) 65.

the values underlying PAJA to optimally give effect to the right to just administrative action.[118]

6 Conclusion

In this paper, the authors offered an analysis of the Court's decision in *Absa* that although the conduct of the Public Protector is administrative action to which PAJA applies, it is also susceptible to review in terms of legality and section 33 of the Constitution, all on the same grounds as PAJA. The authors critiqued the Court's conflation of the principles of PAJA, legality, and section 33 of the Constitution due to its propensity to promote a parallel system of law. The authors also examined and endorsed the Court's approach in handling of the procedural unfairness of the Public Protector's conduct. The authors further demonstrated how the Public Protector acted *ultra vires*, unlawfully and breached several provisions of PAJA and the principle of legality.

It appears the Court in *Absa* adopted a split or mixed approach to transformative adjudication. On the one hand, the Court evinced an approach that promoted transformative adjudication, while on the other hand the Court did the exact opposite — all in the same case. This is made clear by how the Court applied a transformative approach to adjudication when considering the conduct of the Public Protector, and not so when it came to its own decision-making, which is (correctly) applying the law, as the latter relates to a culture of justification with respect to judicial interpretations.[119]

The authors are of the view that a transformative approach to adjudication is one that is thoroughly interwoven throughout and it does not necessarily negate the proper application of the substantive law and set procedure. Rather, it both informs and tests law and procedure against the Constitution. This is intricately connected to a transformative approach to adjudication, especially to the goal of creating a culture of justification, which is arguably strengthened by legal certainty. Therefore, it is imperative for courts to first acknowledge the constitutional values that already underlie existing legal norms. In so doing, the courts will always be placed in a better

118 That is, a transformative approach to adjudication rightly invokes the values underlying the Constitution in order to effect the necessary transformative task given by the Constitution. By side-stepping PAJA (as the Act enacted to give effect to sec 33 of the Constitution, the section of which is part of the grand scheme of the Constitution to transform society), courts run the risk of not fulfilling the intended task by the Constitution in correctly and effectively holding office bearers accountable for their decisions (especially considering the fact that PAJA places a heavier obligation on administrators through procedural fairness and reasonableness, which makes it harder for administrators to escape judicial review).

119 Klare (n 4 above) 147, 172-188.

position to adopt a value-orientated approach to adjudication and will inevitably make significant contributions to the transformative scheme underlying the Constitution.