

# Procedural Fairness and Transformative Constitutionalism in South Africa: Re-visiting *Minister of Defence and Military Veterans v Motau* (2014)

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## Abstract

*This case note employs a doctrinal legal methodology, involving close textual analysis of the judgment, synthesis of judicial precedents, and critical engagement with academic scholarship, to examine the Constitutional Court's unanimous decision in Minister of Defence and Military Veterans v Motau (2014). The case contributes to promoting accountability of state leadership not only in administrative functions and actions but also in executive functions. It addresses a persistent question in administrative justice: the distinction between administrative and executive action under the Promotion of Administrative Justice Act (PAJA) 2000. The case held that the Minister's termination of public entity board members constituted an exercise of executive function, not an administrative action under PAJA. Tracing the evolution of administrative justice from common law due process to constitutional entrenchment in section 33 and PAJA, the analysis dispels the notion that ministerial decisions automatically trigger PAJA's procedural fairness requirements. Instead, it contends that executive actions must remain rational, lawful, and procedurally fair within the bounds of legality. The decision in Motau advances transformative constitutionalism by reinforcing accountability in employment decisions for public servants and entities. It has implications for good governance, public administration, and individual rights against the state, cementing the judiciary's role in South Africa's democratic project.*

## Keywords

Administrative justice, Procedural fairness, Due process, Transformative Constitutionalism, Public sector, Administrative Law, *Minister of Defence and Military Veterans v Motau*, South Africa.

## 1. Introduction

The landscape of administrative law in South Africa has undergone a profound transformation since the advent of constitutional democracy in 1994. Prior to this pivotal moment, administrative law operated under the doctrine of parliamentary sovereignty, under which the power of the executive and administrative bodies was largely unconstrained by judicial review, save for limited common-law grounds.<sup>1</sup> This era was characterised by a lack of accountability and transparency in state action, often leading to arbitrary decisions that disproportionately affected the rights and dignity of individuals, particularly under

1 Hoexter, C *Administrative Law in South Africa* 2 ed (Juta 2012) 120.

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the apartheid regime.<sup>2</sup> The Interim Constitution of 1993 and, more decisively, the final Constitution of the Republic of South Africa, 1996, ushered in an era of constitutional supremacy. Central to this new dispensation is section 33 of the Constitution, which entrenches the right to just administrative action. This right entails that everyone has the right to administrative action that is lawful, reasonable, and procedurally fair, and to be given written reasons for administrative action that adversely affects any of their rights.<sup>3</sup>

This constitutional change fundamentally reshaped the relationship between the state and its citizens, placing administrative power firmly within the bounds of constitutional scrutiny. To give full effect to section 33, the Promotion of Administrative Justice Act (PAJA) of 2000 was enacted.<sup>4</sup> PAJA provides a legislative framework for the exercise of administrative power, detailing the requirements for lawful, reasonable, and procedurally fair administrative action, and establishing mechanisms for judicial review.<sup>5</sup> The enactment of PAJA marked a significant step towards institutionalising administrative accountability and ensuring that the exercise of public power serves the public interest in a just and transparent manner.

The South African Constitution is not merely a legal document but a transformative instrument designed to bring about fundamental social, economic, and political change in a society deeply scarred by its apartheid past.<sup>6</sup> This philosophy is encapsulated in the concept of “transformative constitutionalism”: a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.<sup>7</sup> It seeks to bridge the gap between the formal equality promised by the Constitution and the substantive inequalities that persist in society. In administrative law, transformative constitutionalism plays a crucial role. Procedural fairness serves as a vital vehicle for achieving these transformative goals. By requiring that administrative decisions be made through fair processes, administrative law ensures the accountability of state organs and curbs arbitrary power.<sup>8</sup> Transparency in administrative action is a key component of procedural fairness, fosters public trust in government institutions, and enables greater public participation in governance. As such, administrative law, guided by transformative constitutionalism, seeks not only to correct individual injustices but also to reshape the very culture of public administration, moving it towards one that is responsive, accountable, and respectful of human dignity.<sup>9</sup>

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2 Currie, I & de Waal, J *Bill of Rights Handbook* 6 ed (Juta 2018) 670-675.

3 Constitution of the Republic of South Africa, 1996 section 33(1)–(2).

4 Act 3 of 2000.

5 Ibid. The Preamble.

6 Albertyn, C ‘(In)equality and the South African Constitution’ (2019) 36(6) *Development Southern Africa* 751.

7 Moseneke, K ‘The Architecture of the New South African State: The Role of the Judiciary’ (2004) 20 *South African Journal on Human Rights* 303, 304; D Moseneke ‘Transformative Constitutionalism in South Africa’ (2012) 28 *South African Journal on Human Rights* 1, 2–3.

8 Woolman, S & Bishop, M ‘Constitutional Law’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (Juta 2013) 34–36.

9 Langa, P ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351, 354–355; Liebenberg, S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 30–35.

This case note aims to analyse the Constitutional Court's decision in *Minister of Defence and Military Veterans v Motau*,<sup>10</sup> elucidating how it refines the distinction between administrative and executive action and advances procedural fairness and transformative constitutionalism in South Africa's public-sector governance. Employing a doctrinal methodology, it involves textual analysis of the judgment, synthesis of precedents, and engagement with scholarship on administrative justice.

The structure proceeds with a factual and procedural background, doctrinal analysis, implications for transformative constitutionalism, and concluding recommendations for public administration.

## 2. Introduction to *Minister of Defence and Military Veterans v Motau and Others*

The Constitutional Court's judgment in *Motau* is a significant pronouncement on the enduring importance of due process in the public sector. The case concerned the termination of the services of board members of the state-owned Armscor by the Minister of Defence and Military Veterans. This decision was challenged on the grounds of procedural unfairness and legality. The case presented the Constitutional Court with a pivotal opportunity to re-examine and reinforce the fundamental tenets of administrative justice, as enshrined in the Constitution and PAJA, particularly regarding the exercise of executive power and its susceptibility to judicial review.<sup>11</sup> This manuscript provides a comprehensive analysis of *Motau's* contribution to the jurisprudence on procedural fairness and to demonstrate how the judgment serves to reassert the principles of transformative constitutionalism within the South African public administration.

## 3. Methodology

This article employs a doctrinal research approach. This methodology involves a systematic and critical analysis of legal rules, principles, concepts, and theories drawn from primary sources, such as statutes and case law, and secondary sources, including academic commentary and legal textbooks.<sup>12</sup> The doctrinal approach is particularly suitable for this manuscript, as it focuses on interpreting and synthesising existing legal norms and applying them to specific factual scenarios, such as those presented in *Motau*.<sup>13</sup> By engaging deeply with judicial pronouncements and scholarly interpretations, this research seeks to clarify the legal position regarding procedural fairness in the public sector and to assess the transformative impact of the *Motau* judgment. This approach allows for a thorough examination of how legal principles are developed, applied, and refined within the South African constitutional dispensation.<sup>14</sup>

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10 2014 (5) SA 69 (CC).

11 *Motau* (note 10 above) para 1.

12 Venter, C 'Research Methodologies in Law' (2007) 10 *Potchefstroom Electronic Law Journal* 1, 3–5.

13 Mofokeng, T *Legal Research Methodology* (Juta 2014) 20–25.

14 *Motau* (note 10 above).

## 4. The constitutional and statutory framework for procedural fairness

### 4.1 Section 33 of the Constitution: The right to just administrative action

Section 33 of the Constitution of the Republic of South Africa, 1996, stands as a cornerstone of administrative justice in the democratic era, providing a robust framework for regulating the exercise of public power. Section 33(1) unequivocally states that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”<sup>15</sup> This provision entrenches three distinct but interconnected requirements for valid administrative action. While lawfulness and reasonableness address the substantive aspects of a decision (i.e., whether the decision itself is lawful and rational), procedural fairness focuses on the way the decision is made.<sup>16</sup>

It ensures that individuals are treated fairly in the administrative process, embodying the principles of *audi alteram partem* (hear the other side) and *nemo iudex in sua causa* (no one should be a judge in their own cause).<sup>17</sup> The importance of procedural fairness as a cornerstone of legitimate administrative power cannot be overstated. As the Constitutional Court affirmed in *President of the Republic of South Africa v South African Rugby Football Union* (SARFU 1),<sup>18</sup> procedural fairness is not merely a technical requirement but a fundamental aspect of good governance that promotes transparency, accountability, and public confidence in the administrative process.<sup>19</sup> It provides individuals with an opportunity to influence decisions that affect them, thereby enhancing the democratic quality of administrative action.<sup>20</sup> Furthermore, section 33(2) of the Constitution complements this right by stipulating that “[e]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons.”<sup>21</sup>

The duty to give reasons is crucial to accountability and enables affected individuals to understand why a decision was made, thereby facilitating their ability to seek review if necessary.<sup>22</sup> The entrenchment of these rights in the Bill of Rights signifies a decisive break with the past, in which administrative decisions were often arbitrary and unjustified.<sup>23</sup>

### 4.2 The Promotion of Administrative Justice Act 3 of 2000

PAJA was enacted to give legislative effect to the rights enshrined in section 33 of the Constitution.<sup>24</sup> It operationalises the constitutional rights by providing a detailed framework for the exercise of administrative power and the judicial review of administrative action.<sup>25</sup>

15 Constitution (note 3 above) s 33(1).

16 Freedman, W & Mzolo, N ‘The Principle of Legality and The Requirements of Lawfulness and Procedural Rationality: Law Society of South Africa v President of the RSA 2019 (3) SA 30 (CC)’ (2021) 42(2) *Obiter* 421.

17 Hoexter (note 1 above) 323–328.

18 2000 (1) SA 1 (CC).

19 *Ibid.* para 45.

20 *Ibid.* para 45.

21 Constitution (n 3) s 33(2).

22 *Investigating Directorate: Serious Economic Offences v Hyundai Motors Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 20.

23 *Ibid.* para 20.

24 PAJA (note 4 above). Preamble.

25 PAJA (note 4 above). Preamble.

The Act defines “administrative action” broadly and sets out the requirements for procedurally fair administrative action, distinguishing between actions affecting specific individuals and those affecting the public. Section 3 of PAJA deals with procedurally fair administrative action affecting any person. It stipulates that administrative action which “materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.”<sup>26</sup> This section outlines a set of mandatory requirements for procedural fairness, including: Adequate notice of the nature and purpose of the proposed administrative action;<sup>27</sup> a reasonable opportunity to make representations;<sup>28</sup> a clear statement of administrative action;<sup>29</sup> adequate notice of any right of review or internal appeal, where applicable;<sup>30</sup> and the adequate notice of the right to request reasons in terms of section 5.<sup>31</sup>

Crucially, section 3(2)(a) of PAJA introduces flexibility, stating that “a fair administrative procedure depends on the circumstances of each case.”<sup>32</sup> This acknowledges that the precise content of procedural fairness is not static but must be adapted to the specific context, balancing the need for fairness with administrative efficiency and practicability. The Constitutional Court, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*, emphasised that the standard of procedural fairness is not a rigid one, but must be determined by the particular circumstances.<sup>33</sup> This flexible approach enables a nuanced application of procedural requirements, ensuring fairness without imposing undue burdens on administrators. Section 4 of PAJA addresses procedurally fair administrative action affecting the public, outlining procedures such as public enquiries, notice-and-comment procedures, and other fair procedures.<sup>34</sup> Together, these provisions in PAJA constitute a comprehensive statutory framework to ensure that administrative action in South Africa adheres to the principles of due process.

### 4.3 Procedural fairness in the public sector employment context

The principles of procedural fairness, as enshrined in section 33 of the Constitution and operationalised by PAJA, are particularly pertinent in the context of public sector employment. Public sector employees, as individuals, are entitled to just administrative action when state organs make decisions affecting their employment. This includes decisions related to appointments, promotions, transfers, disciplinary actions, and dismissals.<sup>35</sup> The application of administrative law in this sphere ensures that public employers, unlike their private counterparts, are constrained by constitutional and statutory duties of fairness, transparency, and accountability.<sup>36</sup>

26 PAJA (note 4 above). Section 3(1).

27 PAJA (note 4 above). Section 3(2)(b)(i).

28 PAJA (note 4 above). Section 3(2)(b)(ii).

29 PAJA (note 4 above). Section 3(2)(b)(iii).

30 PAJA (note 4 above). Section 3(2)(b)(iv).

31 PAJA (note 4 above). Section 3(2)(b)(v).

32 PAJA (note 4 above). Section 3(2)(a).

33 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 48; *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) para 55.

34 PAJA (note 4 above). Section 4.

35 Van Niekerk, A & Smit, N *Law@work* 5 ed (LexisNexis 2021) 140–145.

36 *Ibid* 140–145.

The interplay between PAJA and labour legislation, particularly the Labour Relations Act 66 of 1995 (LRA), is crucial in this context. While the LRA primarily governs unfair labour practices and unfair dismissals in both the public and private sectors, PAJA provides a complementary layer of protection for public servants by subjecting administrative actions to the broader principles of administrative justice. The Constitutional Court has, in cases such as *Sidumo v Rustenburg Platinum Mines Ltd*,<sup>37</sup> clarified the relationship between administrative law and labour law, affirming that while the LRA provides specific remedies for unfair dismissals, the underlying administrative action by a public body must still comply with constitutional principles of legality and procedural fairness.<sup>38</sup> Similarly, in *Chirwa v Transnet Ltd*, the Court grappled with the distinction between a contractual dispute and a public law review, underscoring the complexities of determining the appropriate forum and legal framework for challenging public-sector employment decisions.<sup>39</sup> Despite these complexities, the overarching principle remains that public-sector employees are entitled to procedurally fair administrative action, thereby ensuring that decisions affecting their careers are made justly and transparently.<sup>40</sup>

## 5. Analysis of *Minister of Defence and Military Veterans v Motau*

### 5.1 Factual matrix and procedural history of the case

The case of *Minister of Defence and Military Veterans v Motau and Others*<sup>41</sup> concerned the termination of the services of General Motau, the Chairperson, and Ms Mokoena, a non-executive board member, of the Armaments Corporation of South Africa (SOC) Limited (Armscor), a state-owned entity.<sup>42</sup> The Minister of Defence and Military Veterans (the Minister) had terminated their appointments without affording them a hearing or an opportunity to make representations.<sup>43</sup> The Minister justified her decision on the basis of various governance issues and alleged poor performance, citing delays in procurement projects and the Board's failure to grant necessary approvals.<sup>44</sup> These allegations included concerns regarding Project Porthole, a high-priority project for the South African Special Forces, which had experienced significant delays in acquiring specialised high-altitude parachute systems.<sup>45</sup>

General Motau and Ms Mokoena first challenged the termination of their employment in the North Gauteng High Court, Pretoria.<sup>46</sup> The High Court declared the Minister's actions unlawful for failing to follow the procedure set out in section 71(1) and (2) of the Companies Act of 2008,<sup>47</sup> which requires notice and an opportunity to make representations

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37 *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) paras 60-67.

38 *Ibid.* paras 77-79.

39 *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) paras 134-138 (Ngcobo J dissenting).

40 Van Niekerk & Smit (note 35 above) 140-145.

41 *Motau* (note 10 above) .

42 *Motau* (note 10 above) para 1.

43 *Motau* (note 10 above) para 1.

44 *Motau* (note 10 above) paras 8-10.

45 *Motau* (note 10 above) para 10.

46 *Motau* (note 10 above) para 14.

47 Act 71 of 2008

before removing a director.<sup>48</sup> The High Court found that the Minister's decision was an administrative action and therefore subject to PAJA's procedural fairness requirements.<sup>49</sup> The Minister subsequently appealed to the Constitutional Court. The core legal question before the Constitutional Court was whether the Minister's decision to terminate the services of the board members constituted "administrative action" and, as such, reviewable under PAJA, or whether it was an exercise of executive power reviewable only under the principle of legality. This distinction was crucial because it determined the applicable standard of review and the procedural requirements governing the Minister's decision. The Constitutional Court also had to consider the interplay between the Companies Act, the Armscor Act, and the general principles of administrative law.<sup>50</sup>

## 5.2 The Constitutional Court's reasoning on procedural fairness and legality

This case has significant doctrinal value, as it clarifies the critical distinction between administrative and executive action and the differing applications of procedural fairness to each, thereby motivating its selection here to illuminate the boundaries of judicial review in South African public law.<sup>51</sup> The Constitutional Court, in a unanimous judgment, upheld the appeal in part, finding that the Minister's decision was unlawful for failing to comply with the Companies Act.<sup>52</sup> However, the Court's reasoning delved into that distinction, emphasising that procedural fairness principles under section 33 of the Constitution vary depending on the nature of the executive conduct at issue.

The Court held that the Minister's decision to terminate the board members' services was not an administrative action as defined under PAJA.<sup>53</sup> Instead, it was an exercise of executive power derived from the Constitution and the Armscor Act of 2003,<sup>54</sup> reviewable under the principle of legality, a key clarification that distinguishes spheres of review and limits PAJA's scope to true administrative functions. Moreover, the Constitutional Court held that the decision constituted not only a failure to act under the Companies Act but also under the Armscor Act, rendering it unlawful on both grounds. This distinction was pivotal, forming the gist of the Court's decision. Administrative action, under PAJA, is subject to the full panoply of procedural fairness requirements set out in section 3 of PAJA. Executive action, while not subject to PAJA, must still comply with the principle of legality, which requires that all public power be exercised rationally and within the bounds of the law.<sup>55</sup> Critically, the case clarified the misconception that a Minister's decision automatically constitutes administrative action; here, it was executive action, rationally reviewable for legality, underscoring that such powers remain confined by constitutional bounds, even when they escape PAJA's strict procedural requirements.

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48 *Motau* (note 10 above) para 3.

49 *Motau* (note 10 above) para 3.

50 *Motau* (note 10 above) para 34.

51 *Motau* (note 10 above) para 45.

52 See further *Motau* (n 16) paras 40–50, where the Court delineates these categories to resolve ongoing uncertainties in PAJA jurisprudence.

53 *Motau* (note 10 above) para 45.

54 Act 51 of 2003.

55 *Motau* (note 10 above) paras 40–48.

Crucially, the court clarified that even where an action is executive rather than administrative, the principle of legality may, in certain circumstances, require procedural fairness. The court stated that “the principle of legality requires that the exercise of public power should not be arbitrary. It must be rational. It must be exercised in good faith. It must also be procedurally fair where the circumstances so demand.”<sup>56</sup> This was a significant pronouncement, confirming that procedural fairness is not confined to administrative action under PAJA but can also be part of the legality review of executive decisions. Scholars have noted that this aspect of the judgment is particularly important for closing potential accountability gaps for executive actions that might otherwise escape procedural scrutiny.<sup>57</sup>

In the context of the *Motau* case, the Court found that the Minister’s decision to remove the board members, even if executive, was unlawful because it failed to comply with the procedural requirements of section 71 of the Companies Act.<sup>58</sup> This statutory provision, requiring notice and an opportunity to make representations, imposed a specific procedural obligation on the Minister, which she failed to observe. The Court thus found the termination unlawful on the basis of this procedural non-compliance, without resorting to PAJA.<sup>59</sup> This highlights that the principle of legality encompasses not only substantive rationality but also procedural regularity as prescribed by empowering legislation.<sup>60</sup>

The court’s reasoning underscored that, while the characterisation of public power as administrative or executive dictates the primary framework for review, the underlying constitutional values of fairness and rationality permeate both. Specific statutory provisions, such as section 71 of the Companies Act, may impose procedural fairness obligations regardless of whether the action is classified as “administrative action” under PAJA.<sup>61</sup> This demonstrates a pragmatic approach to ensuring due process, acknowledging that different legal avenues can yield the same outcome: upholding fairness.

### 5.3 *Motau’s* contribution to the jurisprudence on procedural fairness

The case is a pivotal contribution to South African administrative law jurisprudence, particularly in clarifying the complex relationship between PAJA and the principle of legality, as well as the pervasive reach of procedural fairness.<sup>62</sup> One of *Motau’s* most significant contributions is its affirmation that procedural fairness can be a component of legality review for executive action. Prior to *Motau*, there was some uncertainty about the extent to which procedural fairness applied to executive decisions outside the ambit of PAJA. While cases like *Albutt v Centre for the Study of Violence and Reconciliation*<sup>63</sup> had hinted at procedural requirements for executive action, *Motau* explicitly articulated that legality demands procedural fairness “where the circumstances so demand.”<sup>64</sup>

56 *Motau* (note 10 above) para 35.

57 Klaaren, J ‘Administrative Justice’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (Juta 2008) 25–15; G Quinot *Administrative Law* (Juta 2015) 120–125.

58 *Motau* (note 10 above) para 45.

59 *Motau* (note 10 above) para 45.

60 Hoexter (note 10 above) 110–115.

61 *Motau* (note 10 above) para 35.

62 Moseneke (note 7 above) 10–12; Hoexter (note 1 above) 5–8.

63 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 51.

64 *Motau* (note 10 above) para 35.

This pronouncement broadened the scope of procedural fairness beyond PAJA's strict definition of "administrative action," ensuring that even high-level executive decisions are subject to some procedural scrutiny. Academic scholars have lauded this clarification, noting that it strengthens the rule of law and prevents arbitrary executive power.<sup>65</sup> For instance, Hoexter argues that this judgment contributes to a more coherent and robust system of public accountability, in which no exercise of public power is entirely immune to procedural scrutiny.<sup>66</sup> Furthermore, *Motau* provided crucial guidance on the distinction between administrative action and executive action. This distinction has been a persistent source of complexity in South African administrative law, often giving rise to jurisdictional disputes.<sup>67</sup>

The court's careful analysis of the nature of the Minister's power to terminate the board members' services, concluding that it was executive, provided a valuable precedent for future cases. This clarification helps practitioners and courts correctly identify the appropriate standard and framework for review, whether PAJA or the principle of legality. This aspect of the judgment has been particularly welcomed by commentators seeking greater certainty in this area, although some critics argue that the distinction remains difficult to apply in practice.<sup>68</sup> The judgment also reinforced the principle that specific statutory provisions can impose procedural fairness obligations, irrespective of the PAJA-legality distinction.

By relying on section 71 of the Companies Act to find the Minister's action unlawful, the Court emphasised that legislative prescripts for fair procedure must be complied with, regardless of how the power is classified.<sup>69</sup> This underscores the importance of statutory compliance as a fundamental aspect of legality. This is a vital reminder that even where PAJA does not apply, other legislative instruments may still mandate due process, ensuring that administrators cannot circumvent fairness requirements simply by arguing that their actions are "executive." This reinforces the idea that the Constitution's commitment to procedural fairness is pervasive and not limited to a single legislative instrument.

Compared with other key cases, *Motau* builds on and refines the administrative law landscape. While cases like *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*<sup>70</sup> clarified the reasonableness standard under PAJA, and *Sidumo v Rustenburg Platinum Mines Ltd*<sup>71</sup> addressed the intersection of administrative and labour law regarding review standards, *Motau* specifically extended the reach of procedural fairness into the executive domain under the umbrella of legality. This distinguishes it from cases primarily concerned with "administrative action" under PAJA, such as *Joseph v City of Johannesburg*,<sup>72</sup> which focused on the procedural fairness required when terminating a service, such as electricity supply. *Motau* also complements the Constitutional Court's

65 Klaaren (note 57 above).

66 Hoexter (note 1 above) 10–12.

67 See generally Chirwa (n 34); *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC).

68 Wessels, E 'The Minister of Defence and Military Veterans v Motau and Others: Clarifying the Scope of Legality Review' (2015) 78 *THRHR* 650.

69 *Motau* (note 10 above) para 45.

70 *Bato Star Fishing* (note 33 above).

71 *Sidumo* (note 37 above).

72 *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

earlier pronouncements on the principle of legality, such as *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa*,<sup>73</sup> by adding a procedural dimension to the rationality requirement. This development ensures that the exercise of public power, regardless of its classification, is subject to a minimum standard of procedural regularity.<sup>74</sup>

In essence, *Motau's* contribution lies in its nuanced yet firm approach to public accountability. It ensures that even executive decisions, traditionally seen as less amenable to judicial intervention, are subject to a measure of procedural fairness under the principle of legality, particularly where statutory provisions mandate it. This robust application of administrative law principles directly advances the transformative constitutional project by ensuring that the state, as a primary actor in society, operates within the bounds of justice and fairness, thereby enhancing transparency, accountability, and ultimately the legitimacy of state action.<sup>75</sup>

## 6. Transformative constitutionalism and procedural fairness

The enforcement of procedural fairness, as powerfully demonstrated in *Minister of Defence and Military Veterans v Motau and Others*, is not merely about upholding technical legal requirements; it is intrinsically linked to the broader project of transformative constitutionalism in South Africa.<sup>76</sup> Transformative constitutionalism, as envisioned by Chief Justice Langa, seeks to move South Africa from a “culture of authority” to a “culture of justification.”<sup>77</sup> In this paradigm, every exercise of public power must be justified, transparent, and accountable. Procedural fairness is a critical mechanism for achieving this justification. By demanding that administrators provide adequate notice, afford opportunities for representation, and furnish reasons, procedural fairness forces public officials to engage with affected individuals and to articulate the rationale behind their decisions.<sup>78</sup> This process directly combats arbitrary power, which was a hallmark of the pre-1994 legal order. As Moseneke has argued, the judiciary’s role in enforcing these procedural safeguards is vital for ensuring that the state operates within the constitutional framework and remains responsive to the needs and rights of its people.<sup>79</sup>

Furthermore, procedural fairness enhances public trust in government institutions. When administrative processes are perceived as fair and transparent, citizens are more likely to accept the legitimacy of decisions, even if they are unfavourable.<sup>80</sup> This fosters a more democratic and participatory form of governance, where individuals feel that their voices are heard and their concerns considered. The emphasis on procedural fairness in cases like *Motau* thus helps embed constitutional values of openness and accountability into

73 *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

74 Langa (note 9 above) 358–360.

75 *Ibid* 358–360.

76 *Ibid* 354.

77 *Ibid* 354.

78 Hoexter (note 1 above) 323–328.

79 Moseneke (note 7 above) 308–310.

80 Quinot (note 57 above) 10–12.

the day-to-day functioning of the public sector.<sup>81</sup> It is through these seemingly “procedural” requirements that the substantive goals of equality, dignity, and social justice are advanced, ensuring that the state acts in accordance with the Constitution’s foundational values.<sup>82</sup>

## 7. *Motau’s* impact on public sector governance and accountability

The *Motau* judgment has profound implications for public sector governance and accountability in South Africa. By confirming that even executive decisions, falling outside PAJA, are subject to procedural fairness under the principle of legality where circumstances demand it, the Constitutional Court significantly tightened the reins on the exercise of public power.<sup>83</sup> This means that Ministers and other high-ranking public officials cannot hide behind the “executive action” label to avoid procedural scrutiny, particularly when their decisions affect the rights or legitimate expectations of individuals, such as board members of state entities.<sup>84</sup>

The judgment sends a clear message that public sector administrators, regardless of their hierarchical position, are not immune to the constitutional demands of fairness. This directly promotes good governance by encouraging meticulous adherence to statutory procedures and general principles of due process.<sup>85</sup> It compels public bodies to establish robust internal processes that ensure transparency and accountability in decision-making. For instance, the case highlights the importance of understanding the specific procedural requirements embedded in legislation governing public entities, such as the Companies Act in *Motau’s* context.<sup>86</sup> Failure to comply, as demonstrated in *Motau*, will result in the unlawfulness of the action, even if the decision itself was substantively rational. This reinforces the “culture of justification” by requiring public officials to demonstrate not only *what* they decided but *how* they arrived at that decision, and whether they followed all prescribed procedures.<sup>87</sup>

This enhanced accountability is crucial for combating maladministration, corruption, and arbitrary decision-making within the public sector. By providing individuals with a clear avenue to challenge procedurally unfair executive actions, *Motau* empowers citizens and public servants to hold the state to account. This aligns with the Constitutional Court’s consistent stance that public power must be exercised in the public interest and for the public good, as evidenced by cases concerning public procurement and service delivery.<sup>88</sup>

## 8. Affirming dignity and equality in administrative action

Procedural fairness, as reasserted in *Motau*, plays a vital role in affirming individuals’ dignity and equality in their interactions with the state. The right to be heard and to have

81 Currie & De Waal (note 2 above) 670–675.

82 Liebenberg (note 9 above) 30–35.

83 *Motau* (note 10 above) para 35.

84 Hoexter (note 1 above) 10–12.

85 Quinot (note 57 above) 15–20.

86 Companies Act 71 of 2008 s 71.

87 Langa (note 9 above) 354.

88 See generally *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (4) SA 179 (CC); *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC).

one's representations considered is fundamental to human dignity.<sup>89</sup> It acknowledges the individual's agency and their right to participate in decisions that affect their lives, rather than being mere subjects of state power. In the context of public-sector employment, where individuals often depend on the state for their livelihood, ensuring procedural fairness in decisions, such as termination of employment, is paramount for protecting their dignity and economic security.<sup>90</sup> The arbitrary removal of an individual from a position of authority without a fair process can have devastating effects on their reputation, career, and sense of self-worth.<sup>91</sup>

Furthermore, the rigorous application of procedural fairness contributes to advancing equality. Historically, administrative power was often wielded in a discriminatory manner, particularly against marginalised communities. By insisting on fair processes, the Constitution seeks to ensure that all individuals, regardless of their background or status, are treated equally before the state's administrative machinery.<sup>92</sup> While *Motau* did not directly address issues of substantive equality, its emphasis on procedural regularity creates a level playing field, ensuring that decisions are made on merit and through due process, rather than on arbitrary factors or prejudice. This is particularly important in a transformative constitutional democracy that strives to overcome the legacy of systemic inequality.<sup>93</sup> The judgment thus contributes to a more just and equitable public administration in which the rights of every individual, including those in positions of power within state entities, are respected and protected.

## 9. *Motau* in the broader context of procedural fairness

### 9.1 Procedural fairness in disciplinary hearings and employment terminations

The *Motau* judgment, while primarily addressing the termination of board members' services under the Companies Act and the Armscor Act, offers valuable insights that resonate with the broader jurisprudence on procedural fairness in public-sector disciplinary hearings and employment terminations. The case reinforces the fundamental principle that, even when an action is executive, procedural fairness may be required, particularly when mandated by statute.<sup>94</sup> This aligns with a consistent line of cases that have grappled with the procedural requirements governing the dismissal of public servants. In *Zondi v MEC for Traditional and Local Government Affairs*,<sup>95</sup> the Constitutional Court affirmed that even in the context of traditional leadership disputes, procedural fairness is a constitutional imperative. Similarly, in *Khumalo v MEC for Education, KwaZulu-Natal*,<sup>96</sup> the Court reiterated the importance of a fair hearing in disciplinary matters affecting public sector employees, emphasising that the fairness of the process is distinct from the substantive

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89 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

90 Van Niekerk & Smit (note 35 above) 140–145.

91 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 60.

92 Currie & De Waal (note 2 above) 670–675.

93 Moseneke (note 7 above) 14–16.

94 *Motau* (note 10 above) para 35.

95 *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 100.

96 *Khumalo v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) para 30.

merits of the decision. These cases, such as *Motau*, underscore that public bodies cannot bypass due process, even when addressing serious allegations or performance issues.

However, *Motau* distinguishes itself from cases like *Gcaba v Minister for Safety and Security*.<sup>97</sup> While *Gcaba* famously held that disputes concerning unfair dismissals of public servants fall primarily within the ambit of the Labour Relations Act and are not administrative action reviewable under PAJA, *Motau* clarified that even if an action is not “administrative action” for PAJA purposes, it may still be subject to procedural fairness under the principle of legality if a specific statute imposes such a duty. This means that while a public servant might not always be able to challenge a dismissal directly under PAJA, they could still rely on the principle of legality if the public employer failed to comply with a statutory procedural requirement, as was the case with the Companies Act in *Motau*.<sup>98</sup> This nuanced distinction is crucial for understanding the various avenues of recourse available to public-sector employees.

## 9.2 The duty to give reasons

The *Motau* judgment, by emphasising the importance of statutory compliance, implicitly reinforces the broader constitutional and statutory duty to give reasons for administrative action. Although the Court in *Motau* primarily found unlawfulness due to non-compliance with the Companies Act’s procedural requirements, the underlying rationale for such requirements often includes enabling affected parties to understand the basis of a decision.<sup>99</sup> The duty to give reasons, enshrined in section 33(2) of the Constitution and section 5 of PAJA, is a cornerstone of administrative accountability. The Constitutional Court has consistently held that reasons must be adequate, intelligible, and rationally connected to the decision.<sup>100</sup> In *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd*,<sup>101</sup> the Supreme Court of Appeal stressed that the furnishing of reasons is not a mere formality but a vital component of administrative justice. Similarly, in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*,<sup>102</sup> even under the common law, the importance of reasons for understanding the basis of an administrative decision was recognised. *Motau*, by upholding a procedural requirement that implicitly serves the purposes of transparency and justification, aligns with this broader jurisprudential trend that demands reasoned, justifiable public decision-making.

## 10. The Development of the Concept of “Administrative Action” under PAJA

*Motau*’s most significant contribution to the understanding of “administrative action” under PAJA lies in its definitive pronouncement on the distinction between administrative and executive action.<sup>103</sup> For years, this distinction has been a source of considerable academic

97 *Gcaba* (note 67 above).

98 Van Niekerk A ‘Administrative Justice and Labour Law: A Fractured Relationship?’ (2010) 31 *Industrial Law Journal* 1, 10–15.

99 Hoexter (note 1 above) 388–390.

100 *Phambili Fisheries* (note 33 above) para 56.

101 *Phambili Fisheries* (note 33 above) para 56.

102 *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) 664G–H.

103 *Motau* (note 10 above) para 34.

debate and judicial inconsistency, particularly in the context of employment-related decisions by public bodies.<sup>104</sup> Prior to *Motau*, cases such as *Chirwa v Transnet Ltd and Gcaba v Minister for Safety and Security* had created uncertainty as to whether certain employment decisions by state entities constituted administrative action reviewable under PAJA or fell exclusively within the domain of labour law. *Motau* provided a clearer framework, albeit in the context of board member termination, by firmly classifying the Minister's action as executive. This helps to delineate the boundaries of PAJA's application more precisely.

However, it is important to note that *Motau's* classification of the action as executive does not mean that such actions are entirely immune from judicial scrutiny or procedural requirements. As discussed, the Court clarified that the principle of legality can still impose procedural fairness obligations. This nuanced approach, while providing some clarity, also means that determining whether an action is "administrative" for PAJA purposes remains context-specific and often complex, requiring careful analysis of the source of power and its nature.<sup>105</sup> Academic scholars continue to debate the implications of this distinction for the overall coherence of South African public law.<sup>106</sup> Nonetheless, *Motau* stands as a landmark decision in this ongoing jurisprudential conversation, guiding future interpretations of "administrative action" and the scope of PAJA.

## 11. Conclusion

*Minister of Defence and Military Veterans v Motau* stands as a landmark doctrinal clarification in South African public law, decisively distinguishing administrative action under PAJA from executive action reviewable under the principle of legality, while affirming the reach of procedural fairness across both domains. Through rigorous doctrinal analysis, this manuscript demonstrates *Motau's* pivotal role in dispelling misconceptions about ministerial powers and in enforcing statutory compliance (the Companies Act and the Armscor Act), thereby promoting accountability of state leadership in public-sector employment decisions. The judgment advances transformative constitutionalism by embedding a "culture of justification" in executive conduct, curbing arbitrary power, and upholding constitutional values of dignity, equality, and just administrative action (s 33). Implications compel public administrators to prioritise procedural regularity, bolstering good governance and individual rights against state overreach. Ultimately, *Motau* reinforces the judiciary's transformative mandate, ensuring no exercise of public power escapes constitutional scrutiny. Future scholarship should examine its practical implications across public entities and refine the "fairness where circumstances demand" standard for enduring administrative justice.

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104 See generally *Chirwa* (note 39 above); *Gcaba* (note 67 above).

105 Hoexter (note 1 above) 100–105.

106 Wessels (note 68 above) 655–658