

MINI-DISSERTATION

***Devising jurisprudential strategies for the maintenance of constitutionalism in
the context of one party domination***

by

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Submitted in fulfilment of the requirements for the degree
LLM (coursework) Constitutional and Administrative Law

In the Faculty of Law,
University of Pretoria

2016 July

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SUMMARY

“Devising jurisprudential strategies for the maintenance of constitutionalism in the context of one-party domination”

In this dissertation it is argued that a number of recent judgments of the Constitutional Court within the last decade have fallen short of sustaining the integrity of the Constitution. This is a consequence of an inadequate conceptual framework for the adjudication of politically sensitive disputes within the context of one party dominant democracy that has been established in South Africa over the past two decades. One-party domination is a consequence of the democratic will of the (vast) majority of the electorate and should, as such, be respected. At the same time, however, it might have, and in South Africa arguably does have, a collection of legal and socio-political implications that impact the outcome of politically sensitive litigation to the extent that the principles of constitutionalism are bound to be imperilled. The courts, and more particularly the Constitutional Court, should be alive to the possible detrimental impact of one-party domination. Thus, it is suggested that they should follow an approach that fends off that risk. In this discussion it is argued that the judgments in *South African Police Service v Solidarity (obo Barnard)* 2014 (6) SA 123 (CC) and *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) are, in part, manifestations of the negative impact of one-party domination on the Constitutional Court’s jurisprudence and on the principle of constitutionalism. These cases could have used an appropriate conceptual framework that simultaneously accounted for and averted the negative effects of one-party domination. These two decisions will be scrutinised to illuminate the manifestation of this conceptual flaw. With specific reference to the argumentation advanced by Sujit Choudhry in his article “He had a mandate: the South African Constitutional Court and the African National Congress in a dominant democracy” *Constitutional Court Review* 2009 (2) 1-86 the discussion will then harness an adjudicatory framework that the Constitutional Court is implored to adopt, particularly where the matters before it are politically sensitive. A significant aspect of this adjudicatory framework will assist the Constitutional Court to factor the role played by dominant democracy in the potential outcome of the case before it and thus to effectively sustain the principle of constitutionalism.

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CHAPTER I: **INTRODUCTION**

1.1 INTRODUCTION

Constitutional law is of significant importance in South Africa. However, it may be argued that some of the judgments handed down by the Constitutional Court within the last decade have compromised the integrity of constitutional law. Arguably, this is due to the fact that the Constitutional Court's framework for adjudicating politically sensitive matters is flawed.¹ Regard should be had to the growing concern that South Africa is governed within the confines of one-party dominated democracy, which consequently has a number of legal and socio-political implications.² These implications not only influence the judiciary and affect the outcome of politically sensitive matters, but also pose a threat to constitutionalism and the rule of law.³ This discussion will critically analyse two cases in which it has been suggested that this adjudicatory flaw is apparent, as well as harness an adjudicatory framework that is to be employed by the Constitutional Court in assessing politically sensitive matters. Notably, the Constitutional Court should factor into its decision-making process the role played by dominant party democracy in the potential outcome of the case before it as a strategy to safeguard constitutionalism.⁴ Regard will be had to the work of Sujit Choudhry who illuminates the pathologies of one-party dominated democracies and further suggests how the courts, and particularly the Constitutional Court, should adjudicate politically-sensitive matters.⁵

1.2 CONSTITUTIONALISM

Constitutionalism can be broadly described as a framework that circumscribes rules that legally dictate and limit the powers and functions of government.⁶ Arguably, Constitutional documents, such as the Constitution of the Republic of South Africa,

¹ S Choudhry "‘He had a mandate’: the South African Constitutional Court and the African National Congress in a dominant party democracy" 2009 *Constitutional Court Review* 1 at 3.

² Choudhry 2009 *Constitutional Court Review* 3.

³ Fombad Charles M "Challenges to Constitutionalism and Constitutional rights in Africa and the enabling role of political parties: lessons and perspectives from Southern Africa" 2009 *American Journal of Comparative Law* (55) 1 at 5.

⁴ Choudhry *Constitutional Court Review* 2009 (2) 3.

⁵ Choudhry *Constitutional Court Review* 2009 (2) 5.

⁶ I Currie and J de Waal *The Bill of Rights Handbook* 6 ed (2015) 8.

1996 (hereafter ‘the final Constitution’), are the ‘blueprints’ for limited government.⁷ The purpose for these constraints on the exercise of public power by the State is to protect the people from arbitrary rule.⁸ These constraints assume the form of either a ‘check’ or a ‘balance’ that are used to limit the State’s power.⁹ Structural arrangements coupled with the role played by societal forces are the two ‘mechanisms’ that safeguard and enforce constitutionalism.¹⁰ The breadth of structural arrangements are set out in the final Constitution and the relevant legislation that gives effect to the final Constitution’s provisions. The rules in which government should operate are not just protected and enforced by the law, but also by societal forces. Joseph Schumpeter notes that governments are formed through the will of the people; and suggests that this fact should not be disregarded (as a ruling party, in government, can be ousted at the will of the people).¹¹ An extensive analysis of these two mechanisms is beyond the scope of this discussion. However, it is important to take cognisance of the necessity of adhering to the doctrine of the rule of law and of constitutional supremacy for the maintenance of constitutionalism. The fundamental aspects of the doctrine of the rule of law and of constitutional supremacy, relevant to this discussion, will be explored.

1.3 THE DOCTRINE OF THE RULE OF LAW

The doctrine of the rule of law is one of the founding values upon which the South African state is premised. This can be sourced in section 1(c) of the final Constitution.¹² Within the last decade, it has come to light that the content of the rule of law has often been disputed. The uncertainty of the doctrine’s content has become problematic to the extent that the rule of law has been arguably flouted on more than one occasion.¹³ A brief exposé of the initial events that ‘raised the alarm’ will follow shortly. Whilst the rule of law is composed of many aspects, regard should largely be had for rational decision-making. The importance of rational decision-making has been underscored

⁷ Fombad 2009 *American Journal of Comparative Law* 7.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Choudhry 2009 *Constitutional Court Review* 19.

¹² Section 1(c) of the Constitution states that “the Republic of South Africa is one, sovereign, democratic state founded on the following values... supremacy of the Constitution and the rule of law”.

¹³ K Malan “The rule of law versus decisionism in South African constitutional discourse” 2012 *De Jure* (45) 284.

in a handful of noteworthy Constitutional Court judgments.¹⁴ It is suggested that the Constitutional Court, when faced with politically-sensitive cases where the government has an interest in the outcome, has not always adjudicated these matters with the fairness and rationality that is required. This will become evident in a critical analysis of two judgments, namely, *South African Police Services v Solidarity (obo Barnard)*¹⁵ and *AgriSA v Minister of Minerals and Energy*.¹⁶

1.4 CONSTITUTIONAL SUPREMACY

The doctrine of constitutional supremacy essentially entails that the Constitution is the highest law to which all other law and conduct must conform.¹⁷ It is also one of the Constitution's founding values as encapsulated by section 2 of the Constitution. Constitutional supremacy implies that the courts must perform its adjudicatory tasks without fear, favour and prejudice, as well as without external interference.¹⁸ However, in spite of these requirements, it appears that these two rather pertinent imperatives are not as stringently followed as they should be. This, again, is arguably, illuminated by the judgments handed down by the Constitutional Court (specifically the two that will be appraised) where it favours the ruling party or its affiliates. It is suggested that this not only taints the adjudicatory process but also bolsters one-party dominated democracy.

1.5 UNDERSTANDING DEMOCRACY

Understanding the basic framework for the operation of democracy is the starting point for establishing what democracy is and what it is not. Joseph Schumpeter argued that democracy was a process that permitted the people to vote for representatives who

¹⁴ *Poverty Alleviation Network v President of the RSA* 2010 (6) BCLR 520 (CC) para 65-66; *Affordable Medicines Trust v Minister of Health of RSA* 2005 (6) BCLR 529 (CC) para 74-79; *Pharmaceutical Manufacturers Association of SA: In Re: Ex Parte Application of the President of the RSA* 2000 (3) BCLR 241 (CC) para 85 and 90; *Bel Porto School Governing Body v Premier of the Province of the Western Cape* 2000 (9) BCLR 891 (CC) para 45; *United Democratic Movement v President of the RSA* 2000 (11) BCLR 1179 (CC) para 55-76; and *New National Party of South Africa v Government of the RSA* 1999 (5) BCLR 489 (CC) para 19 and 24.

¹⁵ 2014 (6) SA 123 (CC).

¹⁶ 2013 (4) SA 1 (CC).

¹⁷ Section 2 of the Constitution states that "the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid".

¹⁸ Section 165(2) of the Constitution states that "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice". Section 165(3) of the Constitution further submits that "no person or organ of state may interfere with the functioning of the courts".

would govern them.¹⁹ Voting is to take place through an electoral process in which candidates belonging to different political parties engage in “a competitive struggle”²⁰ for the votes of the people by lobbying for varying interests accruing to different segments of the electorate. He defined a political party as “a group whose members propose to act in concert in the competitive struggle for political power”.²¹ He added that the elections would only pass democratic muster if they “consist[ed] of ‘free competition for a free vote’ among the parties”.²² ‘Free competition’ would undoubtedly include the facilitation of public debates concerning legitimate interests without the deliberate delegitimisation of opposing parties. Importantly, Schumpeter submitted that one of the hallmarks of a democracy is the possibility of alternation between ruling political parties at each national election, thereby ensuring changes in majority preferences while maintaining minority inclusion.²³ The requirement of alternation is also underscored by Giliomee and others who, in different phraseology, suggest that the requirement of alternation is a necessary pre-requisite for democracy. These authors suggest that the uncertainty of an electoral outcome is an essential element of substantive democracy because it ensures that different political interests are catered for.²⁴ The assertions made by Schumpeter as well as Giliomee and others concerning democracy highlight some of the important features of this system of governance. To this, Malan adds that there are four important *essentialia* that dictate the operational aspects of democracy.²⁵ These *essentialia* include (a) limiting political decision-makers’ abilities through public control by (b) entrenching political suffrage.²⁶ Further, (c) there should be more than one political party campaigning for governmental power where (d) such governmental power is acquired through the majority rule.²⁷ However it should continually be borne in mind that defining the substantive content of democracy is a difficult task owing to the “sliding scale”²⁸

¹⁹ Choudhry 2009 *Constitutional Court Review* (2) 19.

²⁰ Joseph Schumpeter *Capitalism, Socialism and Democracy* 3 ed (1942) 269.

²¹ Schumpeter *Capitalism* 283.

²² Choudhry 2009 *Constitutional Court Review* 19.

²³ Schumpeter *Capitalism* 272.

²⁴ H Giliomee, J Myburgh and L Schlemmer “Dominant party rule, opposition parties and minorities in South Africa” 2001 *Democratization* (8) 161 at 161 and R Southall “The ‘dominant party debate’ in South Africa” 2005 *Africa Spectrum* (40) 61 at 61.

²⁵ Malan K “Faction rule, (natural) justice and democracy” *South African Public Law* 2006 (21) 142-160 at 144.

²⁶ Malan *SAPL* 144-145.

²⁷ Malan *SAPL* 145.

²⁸ R Southall 2005 *Africa Spectrum* (40) 63. Perhaps it is noteworthy to mention that Malan suggests that an important measure for examining democracy and its structures is justice and the achievement

against which democracy is measured. This understanding of democracy provides the springboard for giving content to the theory of party domination.

1.6 THE EVOLUTION OF SOUTH AFRICA'S DEMOCRACY

The effect of the flouting of the rule of law, and the seemingly subtle disregard for constitutional supremacy has led to the revolutionising of our 'law of democracy'. Democracy is a necessary pre-requisite for the following structural mechanisms, as abovementioned, used to safeguard constitutionalism. Democracy ensures that government does not arbitrarily carry out its mandate in excess of the rules (contained in the Constitution) that constrain it. Whilst its existence lays the foundation for constitutionalism, it, ideally, permits the alternation of governments at the following national elections. However, it is submitted that these functions of democracy are only effective if a democracy enables transparency and accountability. With the continual flouting of both the rule of law and constitutional supremacy, constitutionalism is weakened. This has become all the more apparent within the last decade and largely as a result of 'precedent-setting' political judgments that tend to disregard constitutional structures. One of the reasons submitted for this shift in our constitutional democracy is owed to the role played by one-party domination in constitutional adjudication.²⁹ The definition of a one-party dominated democracy will be discussed in Chapter II.

1.7 CONCLUSION: EVIDENCE OF SOUTH AFRICA'S DILUTED CONSTITUTIONALISM

The arguable flouting of the rule of law, in combination with the disregard for constitutional supremacy, and the weakening of our (questionable) constitutional democracy, are all glaringly illustrated in the following politically sensitive matters. The significance of discussing these matters is to highlight the fact that our constitutional structures have become fragile owing to the progressive formalisation of one-party domination. One of the most significant pillars upon which the strength of constitutional

thereof. He states that the achievement of justice is measured by investigating the extent to which the (now constitutional) rights to human dignity, equality and freedom have been entrenched. One of the significant ways in which the furtherance of these rights is hampered is through domination, which results in injustice [Malan *SAPL* 149 - 151].

²⁹ Choudhry 2009 *Constitutional Court Review* 9; J Klaaren "Dominant democracy in South Africa? A response to Choudhry" 2009 *Constitutional Court Review* (2) 87-96.

structures relies upon is the judiciary: the judiciary is required to enforce and uphold the Constitution and its dictates. The *Oasis* matter is the first of these ‘precedent-setting’ political issues. The JSC dealt with the issue before it in much the same way as it did with the *CC/Hlophe* matter.³⁰ It was discovered that Hlophe J had rendered services to *Oasis* for remuneration without the required statutory consent of the Minister of Justice; and that while receiving payment from *Oasis* he improperly have them consent to sue Desai J, a judge, for defamation.³¹ The JSC decided against holding an official public enquiry because it held that there was insufficient evidence to warrant such a need.³² The *CC/Hlophe* matter is the second case that leant itself to bolstering dominant party democracy. The concern that this matter raised was the decision taken by the Judicial Service Commission not to hold a formal hearing, including cross-examination of the parties involved. The JSC took this decision in spite of the mandate enunciated in its *Rules Concerning Complaints of the Judicial Service Commission* which called for a formal enquiry to discover the truth.³³ At issue was the complaint laid against Hlophe J by two Constitutional Court judges who claimed that he tried to improperly influence the judges to decide a matter before it in favour of President Zuma.³⁴ The JSC made its decision in favour of Hlophe, and arguably in favour of the President and the current national ruling party. Although the two abovementioned matters were not placed before and presided over by the Constitutional Court, they are important to the discussion as they illuminate the “long-term significance”³⁵ that these issues will have upon constitutional democracy in South Africa. Chapter III will illuminate further arguments concerning the position of the judiciary in South Africa. This will be followed by Chapter IV which will present a deliberation on the adjudication of politically-sensitive matters (with reference to case law) and shall include defining ‘politically sensitive’ matters.

³⁰ Malan 2012 *De Jure* 289.

³¹ *Ibid.*

³² *Ibid.*

³³ K Malan “The rule of law versus decisionism in South African Constitutional discourse” 2012 *De Jure* (2) *De* 272 at 284.

³⁴ Malan 2012 *De Jure* 280.

³⁵ Choudhry *Constitutional Court Review* 3.

CHAPTER II:

ONE-PARTY DOMINATED DEMOCRACY

2.1 INTRODUCTION

This chapter will discuss the concept of one party dominated democracy, and its operation within the South African context. In his work, Charles Fombad states that the African continent has seen the rise of “majoritarian abuse or dominant party dictatorships”.³⁶ The question that should continually be borne in mind is whether this statement finds application within the South African political context? Chapter I has already elaborated on the basics of what a democracy should entail. The discussion in Chapter II flows from this and will elaborate on one-party dominance. The way in which the ruling party secures its dominance (which Choudhry describes as a ‘pathology’) in the country will be elucidated. Emphasis will be placed on the adjudicatory processes of the courts, particularly the Constitutional Court.

2.2 ONE PARTY DOMINATION

In order to understand how one party domination can manifest itself in the adjudicatory processes of politically sensitive matters (and the effects thereof) it is necessary to explain the concept. There is a panoply of academic literature that has observed a growing trend in systems of government that can be described as ‘illiberal’, ‘virtual’, or ‘façade’ democracies.³⁷ These are democracies that merely subscribe to the procedural aspects of democracy but are deficient in a number of features that collectively establish substantive democracy.³⁸ It is argued that one-party dominance affects the “dynamics and prospects of democracy” to the extent that democracy becomes flawed.³⁹ One-party dominance can be established by political parties who either manipulate electoral rules through undemocratic means⁴⁰ or who dominate the voting polls by virtue of the electorate’s will as “expressed in democratic procedures”.⁴¹ In the final analysis, it should be noted that one party dominated systems are, in fact, democracies. It is within this context that one party uses the opportunity before it to

³⁶ Fombad 2009 *American Journal of Comparative Law* 2.

³⁷ Giliomee *et al.*, 2001 *Democratization* 161.

³⁸ *Ibid.*

³⁹ R Southall “The ‘Dominant Party Debate’ in South Africa” 2009 *Africa Spectrum* (2) 61 at 62.

⁴⁰ “No easy stroll to dominance: party dominance, opposition and civil society in South Africa” in H Giliomee and C Simkins (eds) *The awkward embrace: one party domination and democracy* (1999) 99.

⁴¹ Southall *Africa Spectrum* 63 and Giliomee *et al.*, *The awkward embrace* 99.

cartelise (state) power and firmly establish itself as the ruling party over an extensive period in repeated elections without the risk of being ousted by popular vote.⁴²

2.2.1 DEFINING ONE-PARTY DOMINANCE

One-party dominance is strongly establishing itself in the public scene. As such, it becomes necessary to give content to this term. There are numerous definitions available for study that define party domination. Arguably, the most concise definition is a blend of what is espoused by Pempel, Giliomee, Schlemmer and Myburgh, as suggested by Roger Southall. Dominant parties can be defined as parties which:

- “a) establish electoral dominance for an uninterrupted and prolonged period;
- b) enjoy dominance in the formation of governments; [and]
- c) enjoy dominance in determining public agenda, notably with regard to pursuit of a “historical project”.”⁴³

Applying the broad definition proposed by Pempel, Giliomee and others, it will be established that South Africa is a one party dominated democracy.

2.2.1.1 ELECTORAL DOMINANCE

Giliomee and others in support of Schumpeter’s proposition, submit that one of the fundamental features of substantive democracy is the uncertainty of outcome at each national election.⁴⁴ This is to ensure that the interests of all segments of society are protected not just from tyrannical rule but also from the potential injustices that could be inflicted by other parts of society.⁴⁵ However, this democratic phenomenon of uncertainty of electoral outcome is not experienced within the South African context. If one considers the outcome of each national election held since the first democratic elections in 1994 up until the elections in 2014, it can be observed that the African National Congress (hereafter referred to as the ‘ANC’) has managed to secure electoral victories for the last two decades. In 1994, the ANC won the majority vote with 62.65% of the electorate’s backing.⁴⁶ In 1999, the ANC’s vote increased by 3.7%,

⁴² S Friedman “No easy stroll to dominance: party dominance, opposition and civil society in South Africa” in H Giliomee and C Simkins (eds) *The awkward embrace. One party domination and democracy* (1999) 97 at 99.

⁴³ Southall 2009 *Africa Spectrum* 63.

⁴⁴ Giliomee *et al.*, *Democratization* 161.

⁴⁵ Giliomee *et al.*, *Democratization* 162.

⁴⁶ Southall 2009 *Africa Spectrum* 62.

with a further increase of 3.3% in 2004.⁴⁷ In spite of the decrease in support in the 2009 and 2014 elections, the ANC has still managed to maintain its electoral success.⁴⁸ This leads one to conclude that the ANC's protracted rule has met the first requirement of the abovementioned definition.

2.2.1.2 DOMINATION IN THE FORMATION OF GOVERNMENT

The second definitional element addresses the party's dominance within government. To this end, the ANC as the ruling party has dominated the formation of government. This is illustrated by the ANC's occupation of at least 62% of the seats in the National Assembly for the last two decades.⁴⁹ The fact that the ANC has not had to form a coalition government further indicates its dominance. One of the ways in which the ANC has accomplished this is through, over an extended period of time, the delegitimation of its opposition parties. This is at odds with a substantive democratic feature that states that democratic systems should prevent the delegitimation of opposition parties.⁵⁰ The ANC's most prominent opposition is the Democratic Alliance.⁵¹ Opposition parties, especially the Democratic Alliance, are delegitimised by the current ruling party through being labelled as anti-transformationists as "they conspire to hold back black advancement".⁵² Another way in which the ANC protects its dominance in the formation of government is through eliminating any internal opposition to the existing leadership within the ruling party.⁵³ The ANC's *modus operandi* is premised on the doctrine of centralism.⁵⁴ This means that "all its structures and members [must] pursue the same goal".⁵⁵

⁴⁷ *Ibid.*

⁴⁸ The Independent Electoral Commission of South Africa "Annual Report to the National Assembly for the Financial Year Ended 31 March 2009" <https://www.elections.org.za/...reports,-reports...reports---IEC/2009-IEC-Annual-Report> (accessed 16 February 2016).

⁴⁹ The Independent Electoral Commission "National and Provincial election Results" <http://www.elections.org.za/content/Elections/National-and-provincial-elections-results/> (accessed 02 February 2016).

⁵⁰ Giliomee *et al.*, *Democratization* 170.

⁵¹ The Independent Electoral Commission "National and Provincial election results" <http://www.elections.org.za/content/Elections/National-and-provincial-elections-results/> Over the last two decades, the Democratic Alliance has seen a rise in support. In 1994, it had a mere 7 seats in the National Assembly. Today, this number has risen to 89.

⁵² Giliomee *et al.* *Democratization* 170.

⁵³ Giliomee *et al.* *Democratization* 172.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

2.2.1.3 DOMINANCE IN DETERMINING PUBLIC AGENDA

As concerns the final requirement of the definition, the ANC is making progressive gains in the realisation of its public agenda, termed ‘transformation’. At the inception of this concept, what its substantial content entailed was largely unknown.⁵⁶ Put differently, the ANC leaders refused to define it.⁵⁷ However, as the ANC has extended its power throughout the country, it has been suggested that there are three emerging meanings attached to the realisation of this ‘goal of transformation’.⁵⁸ The first involves transforming demographic representation in both the public and private sectors.⁵⁹ The second relates to the furtherance of the ANC’s control by dominating “all levers of power”.⁶⁰ The third concerns the way in which the ANC is continually securing its domination in the country by ensuring that all organs of state adopt the same thinking patterns. This could be termed ‘intellectual transformation’. The ANC has ensured that the controversial topic of transformation has been kept at bay of the public debating arena.⁶¹ Arguably, this has been a deliberate and strategic move “to suppress controversy over the extension of party control, whilst its push to transform the state is justified, disguised, and facilitated by, racial transformation”.⁶² It is submitted that the ruling party’s justification for this is to “be able to effect transformation”.⁶³ Cadre deployment has been used to undermine institutions that would, otherwise, have functioned as a check on the state’s exercise of public power.⁶⁴ Viewed in this light, it is suggested that the ruling party holds no concern for the legitimate interests of either its opposition parties or its opposition voters.⁶⁵ Debatably, this could be attributed to the fact that the ruling party does not depend upon the white minority vote to remain in power.⁶⁶ Giliomee and others point out that two important features of substantive democracy include efforts on behalf of the government to facilitate discussions about important interests at a public level as well the protection and advancement of opposition and white minority interests.⁶⁷

⁵⁶ Giliomee *et al.*, *Democratization* 168.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Giliomee *et al.*, *Democratization* 169.

⁶⁰ *Ibid.*

⁶¹ Giliomee *et al.* *Democratization* 169.

⁶² Giliomee *et al.* *Democratization* 170.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Giliomee *et al.* *Democratization* 171.

⁶⁶ Giliomee *et al.* *Democratization* 167.

⁶⁷ Giliomee *et al.* *Democratization* 169.

2.3 CONCLUSION

This discussion has sought to establish that South Africa is a one-party dominated democracy. It is important to establish this as one of the flawed aspects of the Constitutional Court's adjudicatory process in deliberating the outcome of politically-sensitive matters is that it fails to account for one-party dominated democracy in its adjudicatory process, thus enforcing instead of countering it. What followed was a discussion that established an arguable framework for democracy, with emphasis placed on the need for alternation of ruling parties or the uncertainty of electoral outcome at the end of each national election. Subsequently a proposed and amended definition of one-party domination was deliberated and applied to the South African context which highlighted that South Africa is, indeed, a one-party dominated democracy.

CHAPTER III:

THE RESPONSIBILITY OF THE JUDICIARY IN THE SOUTH AFRICAN CONSTITUTIONAL SYSTEM

3.1 ASSUMPTIONS OF THE JUDICIARY

As stated in section 165 of the Constitution, the courts are vested with judicial authority to adjudicate matters independently and impartially using the Constitution and the law.⁶⁸ However, it is asserted that the judiciary is inherently weak, particularly within our constitutional democracy. This chapter will elaborate on the judiciary's responsibility to adjudicate matters independently and impartially with the aim of illuminating that this responsibility has been frustrated by the fact that South Africa is a one-party dominated democracy. This is especially the case when the Constitutional Court hears politically-sensitive matters. A range of cases heard in the Constitutional Court have presented arguments that illuminate that there are numerous harms that flow from the ANC's dominant status, and that the Court should have regard to these harms when it adjudicates politically-sensitive matters.⁶⁹ The Constitutional Court has dismissed many arguments concerning the ANC's dominant status as it labours under the assumption that South Africa is a consolidated liberal democracy where there are checks in place to prevent the abuse of power. To this end, it is suggested that the Constitutional Court should adopt a framework that aids the Court in adjudicating matters in which the ruling party has a great interest. Choudhry expounds a set of doctrines that would help the Court to grapple with the ANC's dominance in politically-sensitive matters. These doctrines are, namely, 'anti-domination'; 'anti-capture'; 'non-usurpation'; 'anti-seizure' and 'anti-centralisation'.⁷⁰

Mention has already been made concerning the court's mandate concerning the judiciary's responsibility. Section 165(4) of the Constitution states that organs of state are to aid the courts to the extent that their independence, impartiality, dignity, accessibility and effectiveness are safeguarded. Furthermore, and as proposed by

⁶⁸ Section 165(2) and (3) of the Constitution.

⁶⁹ Choudhry 2009 *Constitutional Court Review* 5. Choudhry notes that "the dominant status of the ANC has been raised before the Constitutional Court... the Court quickly dismissed the relevance of ANC domination to the constitutional challenge." He aptly states that "this reflects the Court's inadequate understanding of the concept of dominant party democracy...."

⁷⁰ Choudhry 2009 *Constitutional Court Review* 6.

Malan, if the courts can secure their independence then it is implied that the remaining characteristics will eventuate and endure.⁷¹ The discussion that follows will, once again, argue that, because the courts cannot properly effect their independence (and therefore their impartiality), the judiciary is placed in a weak position. Consequently, the judiciary is unable to properly adjudicate politically-sensitive matters before it. This bolsters the ruling party's dominance.

3.2 OVERVIEW OF JUDICIARY

Chapter 8 of the Constitution deals with the courts and the administration of justice.⁷² Importantly, the courts derive their jurisdiction from Chapter 8 of the Constitution. Section 165 of the Constitution demarcates the framework for general judicial authority that is assigned to the judiciary. It states that judicial authority vests in the courts, and that a decision made by the courts shall be binding against whom the decision is made.⁷³ It underscores the independence of the courts and that the only authority to which they are bound is the Constitution and the law which they are to apply "impartially and without fear, favour or prejudice".⁷⁴ It provides that neither an organ of state nor person may interfere with the mandate of the courts to the extent that they impede, threaten or harm the courts' "independence, impartiality, dignity, accessibility and effectiveness".⁷⁵ Lastly, the Chief Justice (and head) of the Constitutional Court is the judicial head and "exercises responsibility over the establishment and monitoring of norms and standards for the exercise of judicial functions of all courts".⁷⁶

Section 166 of the Constitution sets out the judicial system. The judiciary consists of a hierarchy of courts, with each tier of courts having their own specific jurisdiction over certain matters.⁷⁷ The most basic explanation of the court structure highlights that the lowest level is occupied by the Magistrates' Courts.⁷⁸ This is followed by the superior

⁷¹ K Malan "Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa" 2014 *Potchefstroom Electronic Law Journal* 19654 at 1967.

⁷² Chapter 8 of the Constitution is tasked with assigning functions and powers to the courts in their administration of justice.

⁷³ Section 165(1) states that "judicial authority of the Republic is vested in the courts. Section 165(5) states that "an order or decision issued by a court binds all persons to whom and organs of state to which it applies".

⁷⁴ Section 165(2) of the Constitution.

⁷⁵ Section 165 (3) and (4).

⁷⁶ Section 165(6).

⁷⁷ See sections 168 to 170 of the Constitution of the Republic of South Africa.

⁷⁸ Section 166 of the Constitution of the Republic of South Africa.

courts, namely the High Courts and then the Supreme Court of Appeal. Section 167 establishes the Constitutional Court as the apex court in the hierarchy of the courts, and determines the types of cases that the Constitutional Court may adjudicate with finality. It further outlines the powers of the Constitutional Court and outlines the composition of the Constitutional bench. It states that the Constitutional Court may hear any “constitutional matter” as well as “any other matter... [that] raises an arguable point of law of general public importance which ought to be considered by that Court” and which falls within its jurisdiction. Section 167(4) sets out the matters that may only be heard by the Constitutional Court. It is suggested that these specific matters over which the Constitutional Court has exclusive jurisdiction are political in nature, and thus somewhat blur the line between law and politics, especially when they fall within the purview of constitutional review.

Section 174 of the Constitution regulates the appointment of judicial officers. It states that the President appoints the Chief Justice as well as the Deputy Chief Justice of the Constitutional Court after consulting these potential appointments with both the Judicial Services Commission (hereafter, the ‘JSC’) and leaders of parties represented in the National Assembly.⁷⁹ The President thereafter appoints candidates to the remaining seats in the Constitutional Court after consulting both the Chief Justice and leaders of parties represented in the National Assembly.⁸⁰ Section 178 establishes the JSC and states that the JSC is responsible for the appointment and removal of judicial officers.

At the outset, it appears as if the judiciary as a whole encounters numerous concerns that question its independence and impartiality. This is particularly emphasised in relation to the composition of the Constitutional Court. The President is involved in the appointment of the Chief and Deputy Chief Justice. Where one-party domination features in a political and constitutional system such as South Africa’s, it would not be unlikely if there is an association between the President and these candidates. This association could potentially affect the appointments of Constitutional Court judges as the Chief Justice’s impartiality could become, arguabl, questionable. Furthermore, the composition of the JSC is debatably a matter of politics which is problematic as it

⁷⁹ Section 174(3) of the Constitution of the Republic of South Africa, 1996.

⁸⁰ Section 174(4) of the Constitution of the Republic of South Africa, 1996 states that there is a specific procedure that requires adherence in this appointment process.

weakens the independence and impartiality of the judiciary.⁸¹ A more detailed discussion of this particular point will feature further on.

3.3 THE JUDICIAL SERVICES COMMISSION

It is argued that the judiciary, and particularly the Constitutional Court, has become politicised. Insight into this submission can be gleaned from an understanding of the politically-charged organisation that is responsible for the appointment of judicial officers. The JSC, as mentioned above, is established by section 178 of the Constitution. It plays a crucial role in recommending candidates to the Bench. The JSC has become a political arena that has arguably become closely associated with the ruling party.⁸² The most prevalent reason proffered for this association is that the appointment of judicial officers has become political to the extent that the ruling party has a stake in these appointments.⁸³ The judiciary's wide review powers need to be controlled and to accomplish this the ruling party needs to deploy cadres to protect and further its interests. Evidence supporting this claim is illustrated in the JSC's approach to appointing judicial officers. Section 174 of the Constitution sets out the twofold criteria for these appointments: firstly, a candidate must be fit and proper, and secondly, the racial and gender composition of the judiciary in terms of the nation's demographics should be considered.⁸⁴ Legal academics such as Malan have intimated that the selection criteria for judicial officers is "inappropriate" and that "unsuitable" candidates have been recommended for these appointments.⁸⁵ The effect of these resulting appointments is the gradual deterioration of the quality of adjudication by the judiciary, and by implication, the decline of the rule of law and the Constitution.⁸⁶ It becomes glaringly apparent that the hallmark characteristics of judicial independence and impartiality are constantly waning. The political motivations for 'capturing' the JSC (and by implication the judiciary) require further illumination. However, it needs to be understood how the ruling party has managed to exert its control over judicial processes, especially when it comes to the adjudication of politically-sensitive matters. It is suggested that one of the powerful pathologies that has led to this is one-party dominance.

⁸¹ Malan 2014 *PELJ* 1976.

⁸² Malan 2014 *PELJ* 1968.

⁸³ *Ibid.*

⁸⁴ Section 174(1) and (2) of the Constitution of the Republic of South Africa.

⁸⁵ Malan 2014 *PELJ* 1970.

⁸⁶ *Ibid.*

3.4 EFFECTS OF PARTY DOMINANCE

Mention has already been made concerning the court's mandate concerning the judiciary's responsibility. Section 165(4) of the Constitution states that other organs of state are to aid the courts to the extent that their independence, impartiality, dignity, accessibility and effectiveness are safeguarded. Furthermore, and as proposed by Malan, if the courts can secure their independence then it is implied that the remaining characteristics will eventuate and endure.⁸⁷ The discussion that follows will, once again, argue that, because the courts cannot properly effect their independence (and therefore their impartiality), the judiciary is placed in a weak position. Consequently, the judiciary is unable to properly adjudicate politically-sensitive matters before it. This bolsters the ruling party's dominance.

3.4.1 JUDICIAL INDEPENDENCE

It is suggested that one of the first responsibilities of the judiciary is to independently adjudicate matters before it. In theory, the judiciary is autonomous to the extent that i) its personnel are separate from the other branches of government; ii) there is separation of functions between the organs of state; iii) the judges are independent because they should neither align themselves with a political party nor have an interest in the outcome of a matter; and iv) the judiciary has institutional independence.⁸⁸ In practice, it may be argued that this independence is nothing more than theoretical. Upon closer scrutiny, it is gleaned that the judiciary is financed by the other branches of government; it lacks its own resources; and it is dependent upon the compliance of the public and the organs of state to adhere to their orders of court.⁸⁹

The importance of judicial independence must be further underscored in politically-sensitive matters. In order to safeguard their independence, the courts will adopt a pragmatic stance in adjudicating these matters where the ruling party has a stake in the outcome.⁹⁰ This is to pre-empt antagonising the ruling party so that the judiciary will continue to forfeit the support of the other branches of government which are controlled by the ruling party.⁹¹ In pursuit of its pragmatic approach, the court will take

⁸⁷ Malan 2014 *PELJ* 1967.

⁸⁸ Malan 2014 *PELJ* 1984.

⁸⁹ Malan 2014 *PELJ* 1985.

⁹⁰ Malan 2014 *PELJ* 1987.

⁹¹ Malan 2014 *PELJ* 1985.

the ruling party's potential responses to the adjudicated outcome into account.⁹² Roux points out that this pragmatic stance to the adjudication of politically-sensitive matters has a threefold effect: firstly, it guards the judiciary's legitimacy; secondly, it safeguards the judiciary's institutional security; and lastly, it buttresses the support of public.⁹³ The adoption of a pragmatic stance to the adjudication of politically-sensitive matters illuminates not only the judiciary's acquiescence of one-party domination but also its failure to adjudicate these matters by taking into consideration the ruling party's dominance. To put it bluntly, the courts would rather forego their independence to maintain their institutional security.⁹⁴ The ruling party has, through the implementation of cadre deployment, created a "ruling elite"⁹⁵ which demarcates the scope in which the judiciary may operate. Subsequently, where the ruling party has a stake in a politically-sensitive matter, this "ruling elite"⁹⁶ will be tasked with ensuring that the outcome will favour the interests of the ruling party.

3.4.2 JUDICIAL IMPARTIALITY

Fundamental to the responsibilities of the judiciary is that it has to adjudicate its matters independently and impartially. This is underscored in section 165(4) of the Constitution and by the Code of Judicial Conduct.⁹⁷ The Code states that a judge must recuse himself from the case which he is meant to be adjudicating if there is "a real or reasonable perceived conflict of interest" or if there is "a reasonable suspicion of bias based upon objective facts." This is an important consideration to bear in mind when a politically-sensitive matter is being adjudicated. A judicial officer should not decide the outcome of a matter if he is aligned with a party (such as the government) as this flouts the need to remain impartial. Section 165(2) states that the only considerations in adjudication include references to the law and the Constitution. In an attempt to ensure this, reasons for decisions made are always given and explained. The question that needs to be addressed is whether or not our government operates within a democracy.

⁹² Malan 2014 PELJ 1987.

⁹³ Roux T "Principle and pragmatism on the South African Constitutional Court" *International Journal of Constitutional Law* 2009 (7) 106-138.

⁹⁴ Malan 2014 PELJ 1990.

⁹⁵ Malan 2014 PELJ 1992.

⁹⁶ *Ibid.*

⁹⁷ The Code of Judicial Conduct was adopted in terms of section 12 of the Judicial Service Commission Act 9 of 1994.

3.5 THE IDEAL ROLE THAT SHOULD BE PLAYED

Choudhry asserts that South Africa is a one-party dominated democracy, and that this has implications for constitutionalism.⁹⁸ This is especially the case when the Constitutional Court hears politically-sensitive matters. A range of cases heard in the Constitutional Court have presented arguments that illuminate that there are numerous harms that flow from the ANC's dominant status, and that the Court should have regard to these harms when it adjudicates politically-sensitive matters in order to safeguard democracy and Constitution. The Constitutional Court has dismissed many arguments concerning the ANC's dominant status as it labours under the (mis)apprehension that South Africa is a consolidated liberal democracy where there are checks in place to prevent the abuse of power. To this end, it is suggested that the Constitutional Court should adopt a framework that aids the Court in adjudicating matters in which the ruling party has a great interest. Choudhry expounds a set of doctrines that would help the Court to grapple with the ANC's dominance in politically-sensitive matters. These doctrines are, namely, 'anti-domination'; 'anti-capture'; 'non-usurpation'; 'anti-seizure' and 'anti-centralisation'.

3.5.1 ANTI-DOMINATION

Choudhry suggests that the Constitutional Court should seriously take into account the purpose for which public power is exercised, and this can be accomplished using the doctrine of 'anti-domination'. Choudhry elaborates that this doctrine "would render illegitimate any exercise of public power that has its principal goal the preservation, enhancement or entrenchment of the dominant status of a dominant political party."⁹⁹ This doctrine differs from rationality review to the extent that it "narrows dramatically the scope of the doctrine of rationality to cases that concern the design of the democratic purpose."¹⁰⁰ The Constitutional Court is the only arena in which the State's decisions can be tested. He suggests that because accountability is central to any democracy the doctrine should commence with an enquiry into the "[illegitimate] true reason"¹⁰¹ of the measure that the ruling party wishes to implement.¹⁰² Because the effects of the exercise of power uncover the "true reason" for the exercise of power,

⁹⁸ Choudhry 2009 *Constitutional Court Review* 3.

⁹⁹ Choudhry 2009 *Constitutional Court Review* 34.

¹⁰⁰ Choudhry 2009 *Constitutional Court Review* 42.

¹⁰¹ Choudhry 2009 *Constitutional Court Review* 36.

¹⁰² Choudhry 2009 *Constitutional Court Review* 35.

the doctrine ultimately seeks to discover these effects.¹⁰³ Choudhry poignantly notes that the manifestation of disadvantage is the most prevalent signifier of these effects, and to this end, the anti-domination doctrine is better than rationality review.¹⁰⁴

3.5.2 ANTI-CAPTURE

The Constitution establishes a number of independent institutions that are meant to support constitutional democracy as well as “restore [the state’s] credibility.”¹⁰⁵ Most of these institutions are found in Chapters 8, 9, 10 and 13 of the Constitution.¹⁰⁶ However, the independence of these institutions is frequently questioned as there are political factors in existence that compromise or detract from their independence. Nowadays they are described as “features of the South African State,”¹⁰⁷ and as a result of this they no longer act as checks on the exercise of state power. Choudhry states that this is accomplished through the ANC’s “manipulation of the process governing appointments”¹⁰⁸ within these institutions. In his work, Choudhry urges the courts, and particularly the Constitutional Court, to recognise this reality when it adjudicates politically-sensitive matters.¹⁰⁹ The manipulation of the appointment process indicates that these institutions have become politicised to the extent that their independence has been eroded.¹¹⁰ A consequence of the politicisation of these institutions is that the power of the ruling party to govern the applications for appointments and removals bolsters one-party dominated democracy.¹¹¹ Therefore the Constitutional Court should, where necessary, appraise politically-sensitive matters concerning these institutions by scrutinising the appointment or removal of candidates with “due suspicion”.¹¹²

¹⁰³ Choudhry 2009 *Constitutional Court Review* 43.

¹⁰⁴ *Ibid.*

¹⁰⁵ Choudhry 2009 *Constitutional Court Review* 51.

¹⁰⁶ Section 181 of the Constitution establishes the following independent institutions: the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission. Section 196 establishes a Public Service Commission. Section 220 creates the Financial and Fiscal Commission for the Republic.

¹⁰⁷ Choudhry 2009 *Constitutional Court Review* 58.

¹⁰⁸ Choudhry 2009 *Constitutional Court Review* 56.

¹⁰⁹ Choudhry 2009 *Constitutional Court Review* 52.

¹¹⁰ Choudhry 2009 *Constitutional Court Review* 58.

¹¹¹ Choudhry 2009 *Constitutional Court Review* 57.

¹¹² Choudhry 2009 *Constitutional Court Review* 60.

3.5.3 NON-USURPATION

It has been asserted that one way in which the doctrine of the separation of powers can be protected is through the concept of federalism.¹¹³ Federalism is concerned with the separation of powers between a country's central governing body and its constituent provinces.¹¹⁴ Federalism grants each constituent province its own executive and legislative independence, with general rule vesting in the central governing body. Proponents for federalism believe that federalism bolsters democracy and protects minorities which is important in a society where there is clear divide between majority and minority groups: the necessity to advance justice within the minority group becomes important.¹¹⁵ Thus, it is important to ensure that each constituent province retains its independence. Although South Africa is a unitary state with nine constituent provinces, the Constitution only provides for a minimum degree of federalism.

In the South African constitutional system it is quite evident that, once again, there are political factors that detract from each constituent province's independence, and this must be accounted for in the Constitutional Court's adjudication so as to safeguard federalism. Choudhry suggests that one way of preventing the erosion of federalism through the vehicle of dictation is to adopt a doctrine that assumes that the ruling party bolsters its dominance through "dictation to elected officials by party apparatus."¹¹⁶ With reference to the trans-border municipality cases,¹¹⁷ Choudhry highlights that these decisions have not been made for reasonable and legitimate purposes, but rather to bolster the ruling party's dominant status.¹¹⁸ In both the trans-border municipality cases as well as *Barnard*, this has been accomplished through the practice of unlawful dictation with the aid of cadre deployment.¹¹⁹ The purpose of the

¹¹³ AMB Mangu *Separation of Powers and Federalism in African Constitutionalism: the South African Case* (LLM thesis, UNISA, 1998) 7.

¹¹⁴ Mangu *Separation of Powers* 7.

¹¹⁵ *Ibid.*

¹¹⁶ Choudhry 2009 *Constitutional Court Review* 66.

¹¹⁷ *Matatiele Municipality & Others v President of the RSA & Others* 2006 5 SA 47 (CC); 2006 5 BCLR 622 (CC) ('Matatiele I'); *Matatiele Municipality & Others v President of the RSA & Others (No 2)* 2007 6 SA 477 (CC); 2007 1 BCLR 47 (CC) ('Matatiele II'); *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 5 SA 171 (CC); 2008 10 BCLR 969 (CC); and *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others* (unreported, CCT86/08) [2010] ZACC 5 (24 February 2010).

¹¹⁸ Choudhry 2009 *Constitutional Court Review* 65.

¹¹⁹ *Ibid.*

doctrine is twofold. Firstly, it serves a protective function to the extent that it safeguards democratically elected representatives and public officials from being usurped by officials who have not been elected.¹²⁰ Secondly, and by implication of the first point, the doctrine protects our democracy,¹²¹ and particularly the minorities. There is an underlying thread in the doctrines that follow the doctrine of non-usurpation. It will become evident that the doctrines of non-usurpation, anti-seizure and anti-centralisation centre on the constitutional right to vote as enshrined in section 19(3)(a) of the Constitution.

3.5.4 ANTI-SEIZURE

The doctrine of anti-seizure focuses on highlighting and eradicating instances where dictation (through cadre deployment) is employed by the ruling party. This doctrine seeks to protect the public's right to vote by ensuring that the representatives that the vote for are not arbitrarily removed from power. In most cases, majority of the votes cast highlight an individual's interest in a political party. Individuals' interests are influenced by the identities of the representatives of the political party. If those elected representatives are replaced and disempowered by unelected officials, what arguably occurs can be described as 'daylight robbery' as voters are, in essence, stripped of their vote.¹²² The vehicle for the disempowerment of both elected representatives and the public is cadre deployment. Choudhry submits that dictation is possible because of cadre deployment.¹²³ The doctrine of anti-seizure seeks to ban the publication of party lists after elections.¹²⁴

3.5.5 ANTI-CENTRALIZATION

The final doctrine that requires elucidation is the doctrine of anti-centralism. At the heart of this doctrine is the protection of the minimum degree of federalism that the Constitution provides for. In 2.4.2 above it has been argued that the ANC has managed to erode federalism in an attempt to thwart any internal and external political opposition.¹²⁵ Centralism is therefore used as a mechanism to re-inforce its

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Choudhry 2009 *Constitutional Court Review* 73.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Gilliomée *et al.*, 2001 *Democratization* 172.

dominance. The problem that results from this has already been abovementioned: the electorate's right to vote has very little significance. However, centralism erodes democracy through the chain of accountability "which runs from the voters through MPs to the President and the Cabinet."¹²⁶ The ANC has, through cadre deployment, ensured that the provincial legislatures heed the pursuit of the ANC's agenda, and thus secure its dominance. Choudhry states that the doctrine of anti-centralism, which focuses on determining the effect a decision may have on federalism, will protect the federalist nature that our constitutional democracy envisions.¹²⁷

3.6 CONCLUSION

The primary aim of this chapter has sought to illuminate that there are a number of doctrines that the Constitutional Court can adopt (and should have adopted) in its adjudication of politically-sensitive matters. These doctrines have been applied to the current political situation where it has been established that the ANC is the dominant party. Be that as it may, it is suggested that these doctrines should mould into the Constitutional Court's jurisprudence so as to safeguard constitutionalism. The application of these doctrines will depend on the matter heard before the Constitutional Court. To this end, they may be applied individually or collectively. However, it might be more practicable to apply the doctrines as a set to ensure that the Constitutional Court investigates the complete purview of the ruling party's true intentions. The next Chapter will subsequently present critiques of two politically-sensitive cases and how these doctrines could have been employed by the Constitutional Court in its adjudication of these matters to safeguard our democracy and constitutional system.

¹²⁶ Choudhry 2009 *Constitutional Court Review* 73. Choudhry describes the chain of accountability as follows: "At the national level, the Constitution creates a structure of accountability between voters, the National Assembly, the President and the cabinet. Voters elect the National Assembly, which in turn elects the President at its first sitting after an election or within 30 days of a vacancy occurring. The President in turn appoints the cabinet... The Cabinet...are accountable, individually and collectively, to Parliament for the performance of their functions."

¹²⁷ Choudhry 2009 *Constitutional Court Review* 76.

CHAPTER IV: POLITICALLY SENSITIVE MATTERS AND CASE DISCUSSIONS

4.1 INTRODUCTION

Particular emphasis has been placed on how the Constitutional Court decides the outcome of politically-sensitive matters litigated before it, and how the ANC has exploited the nature of these matters to maintain and ensure its dominance as the ruling party. This Chapter will attempt to elicit a ‘working’ definition of ‘politically-sensitive’ matters and further seek to illuminate how the Constitutional Court has adjudicated matters with reference to two key judgments: *South African Police Services v Solidarity (obo Barnard)* [hereafter referred to as “*Barnard*”] and *AgriSA v Minister of Minerals and Energy* [hereafter referred to as “*AgriSA*”].

4.2 THE POLITICS OF ADJUDICATION

It has been suggested above that some of the issues over which the Constitutional Court exercises exclusive jurisdiction are political in nature. Reasons must be elucidated as to why these decisions can be described as such. Mendes, gleaning from Klug’s work, suggests that the Constitutional Court is political because of its functions.¹²⁸ Mendes summarises what he regards as the key, arguable, functions of the Constitutional Court in three points. Firstly, the Constitutional Court is tasked with having to define and ascribe substantive content to the Constitution so that the document, itself, can be understood. Because the Constitutional Court is continually shaping legislation, and thus having to remain mindful of the doctrine of the separation of powers, it becomes a representative voice for the people so that an aspect of public participation is realised.¹²⁹ In the second instance, Mendes illuminates that the essence of constitutional review is political as the Justices of the Constitutional Court are often tasked with adjudicating matters in a discretionary capacity – this often calls for justices to decide matters according to their own political convictions.¹³⁰ Lastly, Klug states that “for the Court, the greatest threat is that it is ignored”.¹³¹ It is because

¹²⁸ CH Mendes “Fighting for their place: Constitutional Courts as political actors: A reply to Heinz Klug” 2010 *Constitutional Court Review* (45) 33 at 34.

¹²⁹ Mendes 2010 *Constitutional Court Review* 34.

¹³⁰ *Ibid.*

¹³¹ H Klug “Finding the Constitutional Court’s place in South Africa’s democracy: the interaction of principle and constitutional pragmatism in the Court’s decision-making” 2010 *Constitutional Court Review* (3) 1 at 31.

of this fear that the Constitutional Court is often compelled to strategise its adjudication.¹³²

In his academic commentary, Klug argues that the Constitutional Court has managed to prevent itself from becoming “an arena of pure political contestation”.¹³³ He submits that this accomplishment is attributed to the Constitutional Court’s ability to navigate its way between principled-adjudication and institutional-pragmatism when adjudicating matters before it that are politically-charged.¹³⁴ Whilst it is possible to accept Klug’s argument, this discussion seeks to suggest that the Constitutional Court has, upon greater analysis, transformed into a political arena. According to Malan, the reason for this is attributed to the broad review powers that the Constitution bestows upon the Constitutional Court especially when it is tasked with adjudicating politically sensitive matters.¹³⁵ This is arguably evident from certain judgments where the Constitutional Court has favoured pragmatism over principled-adjudication to, ultimately, secure the ruling party’s dominance and permitting public distrust in the judiciary as a whole to fester.¹³⁶ Put differently, the ruling party optimises its dominance through the exploitation of the Constitutional Court’s fears and weaknesses. This will become apparent in the case discussions to follow.

4.3 DEFINING POLITICALLY-SENSITIVE MATTERS

Before ascribing content to the term ‘politically-sensitive’, it is necessary to establish at what particular moment the judiciary, and particularly the Constitutional Court, is unable to adjudicate a matter according to its mandate as set out in section 165 of the Constitution. Importantly, section 165(2) states that “the courts are independent and subject only to the Constitution and the law, which they must apply impartially, and without fear, favour or prejudice”. The outcomes of *Barnard* and *AgriSA*, which provide an informative platform for this discussion, arguably flout the requirements set out in section 165 of the Constitution. Subsequently, this paper seeks to propose that the moment the judicial officers of a court potentially cannot apply their minds with due regard to this section, and in its place they adjudicate a matter in accordance with an

¹³² Mendes 2010 *Constitutional Court Review* 35.

¹³³ Mendes 2010 *Constitutional Court Review* 35.

¹³⁴ *Ibid.*

¹³⁵ Malan 2014 *PELJ* 2025.

¹³⁶ *Ibid.*

ulterior motive; the effectiveness of section 165 of the Constitutional is diluted. In other words, a matter becomes politically sensitive the moment a court cannot adjudicate a matter independently and impartially.

Subsequently, the question that needs to be asked is what affects the independence and impartiality of a matter that qualifies it as ‘politically-sensitive’? The discussion that follows will illuminate that there are two broad components of litigious matters that potentially classifies them as ‘politically-sensitive’. In sum, one needs to firstly consider the parties to a dispute, and secondly, regard should be had for the nature of issue that is disputed. Throughout this discussion it should be noted that these two components are not always seen in isolation, but are often interrelated.

4.4 ‘PARTY POLITICS’

A matter can become politically sensitive by virtue of the parties that are litigating the disputed issue. If a party wields enough political power to potentially influence the court to adjudicate the matter outside its section 165 mandate, then the issue before the court could become politically sensitive. This power does not discriminate against either natural or juristic persons – it is a power that can be used by either legal persona. For example, natural persons who could exercise this power include those with political affinities such as Julius Malema, Vusi Pikoli and Helen Zille. Examples of juristic persons wielding potential political power include state organs (such as the South African Police Service) and private juristic persons (such as Agri South Africa) and other parastatals. However, for the purposes of this discussion, it is important to note the significance of the State as a party to litigation, and by implication the ruling party. The outcomes of the abovementioned cases have been unfavourable to the constitutional system, and largely criticised. Although there is a wealth of academic literature that chastises the outcomes, particular attention should be paid to the role played by the State in these situations.

In his work concerning the reality of the judiciary’s independence and impartiality, Malan asserts that when the State is a party to litigation, there is very little room for the judiciary to ‘wangle’ an outcome that is not for the benefit of the State, unless the

State-favoured outcome is flagrantly obscene.¹³⁷ He suggests that the judiciary, whilst bestowed with broad review powers, is not isolated from executive and legislative control; and to this end the judiciary does not enjoy unfettered exercise of its powers. It has already been suggested that the JSC has been “captured”¹³⁸ to a considerable extent by the ruling party. By strategically appointing loyal actors into powerful positions within the JSC, the JSC, in turn, appoints ANC-sympathetic actors to the positions of judicial officers with the ultimate aim of pushing the ruling party’s transformative agenda. When transformative-laden issues (as defined in Chapter III) are placed before the Constitutional Court there will, undoubtedly, be a ‘push’ by the majority of the Constitutional Court to rule in favour of the ruling party. What ultimately transpires is a shift in adjudication that, to my mind, transcends the rules set out in section 165(2) of the Constitution.

The strategic placement and appointment of ANC loyalists into key positions that will aid in securing the ruling party’s dominance is just one reason why the presence of the State as a party to litigation culminates in a politically-sensitive matter. Another reason that suggestively motivates the Constitutional Court (inclusive of the judiciary as a whole) to make decisions which favour the State is the position that the Constitutional Court finds itself in in the legal-political realm. Elsewhere in his academic commentaries, Malan submits that the judiciary is not a truly independent organ of state.¹³⁹ In spite of the doctrine of the separation of powers, the judiciary is dependent upon the other organs of state to provide it with financial and other resources so that it can carry out its mandate.¹⁴⁰ Furthermore, the most profound institutional threat faced, in particular, by the Constitutional Court is the complete disregard by the State in the enforcement of judgments made against it. In order for the Constitutional Court to protect itself as an institution, it often has to strategically approach its adjudicatory tasks. In his work concerning the Constitutional Court’s adjudicatory functions, Roux states that the Constitutional Court sometimes elects to decide the outcome of politically-charged cases based on pragmatism.¹⁴¹ This is instead of following a principled-approach – an approach that incorporates the law,

¹³⁷ Malan 2014 *PELJ* 1999.

¹³⁸ Choudhry 2009 *Constitutional Court Review* 57.

¹³⁹ Malan 2014 *PELJ* 1999.

¹⁴⁰ *Ibid.*

¹⁴¹ Roux 2009 *IJCL* 106-138.

and nothing but the law, in the Court's legal reasoning. This is contrasted with pragmatism where the Constitutional Court adjudicates a matter by measuring an outcome against the security of the Court as an institution. If the outcome is favoured by the State then the Constitutional Court's institutional security is guaranteed. It is therefore suggested that when the Constitutional Court is forced to adopt a pragmatic approach to adjudicate a matter, that matter is politically-sensitive because the Court has exceeded the bounds of section 165(2) by subjecting itself to the potential whims and dictates of the ruling party.

In concluding this section, it becomes apparent that there are occasions where parties to a litigious issue have the ability to influence the Constitutional Court to decide outcomes that transgress the rules of adjudication set out in section 165(2) of the Constitution. The situation becomes more controversial when the State is a party to litigation. This is because the judiciary as a whole is unable to remain truly impartial in these situations. There is a role played by ANC loyalists who are appointed into the positions of judicial officers in securing the ANC's dominance as the ruling party. This, coupled with the Constitutional Court's institutional securities, contribute to the classification of certain matters as politically-sensitive. What remains to be discussed is the role played by the nature of the issues before the Court.

4.5 NATURE OF THE ISSUE

The nature of the disputed issue is another way in which a matter can be classified as 'politically-sensitive'. In the abovementioned cases, both of the issues presented in the Constitutional Court were informed by the ruling party's transformative agenda. *Barnard* was concerned with the implementation of transformative measures, namely affirmative action, in the workplace that, to my mind, amounted to discrimination on the grounds of race. *AgriSA* involved the issue of land reform, as well as interpreting and determining the difference between deprivation and expropriation of property as set out in section 25 of the Constitution.

Both issues are already contentious topics in society. Bearing this in mind, regard should also be had to the vested interests that persons may have in the outcome of these issues. To this end, it is submitted that the interests had in the outcome of these

matters further qualifies these matters as politically-sensitive. This is the backdrop against which the judgments of *Barnard* and *AgriSA* will be analysed.

4.6 POLITICALLY CHARGED CASES AND STRATEGIC JUDICIAL RESPONSES

With reference to Choudhry and others, it has been shown that the Constitutional Court has been transformed into a political arena. Arguably, one of the main contributing factors for this assertion is the fact that the Constitutional Court is often tasked with having to adjudicate politically-sensitive matters. The question that requires exploration is whether or not the Constitutional Court can adequately deal with politically-charged cases? This discussion will present a case analysis of two, arguably, politically-sensitive cases. Each analysis will expound the factual matrix of the cases; discuss the judgments, both majority and minority judgments, and, in the final analysis, critique the Constitutional Court's adjudication to the extent that it bolsters one-party dominated democracy.

4.6.1 SOUTH AFRICAN POLICE SERVICES V SOLIDARITY (OBO BARNARD)¹⁴² BACKGROUND

After exhausting internal appeal systems, followed by an unsuccessful application to the Commission for Conciliation Mediation and Arbitration (hereafter 'the CCMA'), the matter was taken to the Labour Court, and was eventually heard in the Constitutional Court. *Barnard* is largely concerned with the standard of review of affirmative action matters. Barnard's initial complaint was that the National Commissioner's decision not to appoint her amounted to unfair discrimination on the listed ground of race, and that she should be fairly compensated for this.¹⁴³ On appeal, she raised a new cause of action, namely, that the National Commissioner's decision not to appoint her was unlawful, and that it should be subject to judicial review.¹⁴⁴ Central to the matter was the court's right to test the issue of the constitutionality of the implementation of the SAPS's affirmative action measures as mandated by its employment equity plan.¹⁴⁵

¹⁴² 2014 (6) SA 123 (CC). All the references in this judgment are as reflected in the Constitutional Court's judgment.

¹⁴³ 2014 (6) SA 123 (CC) para 1.

¹⁴⁴ Para 20.

¹⁴⁵ Para 38.

Barnard, who was represented by Solidarity (a trade union), twice applied for a promotion advertised by the SAPS, and her application, in spite of recommendations by her superiors to appoint her to the advertised position, was rejected on both occasions. Upon requests for reasons advanced for her rejected application, the SAPS averred that if Barnard was appointed she would aggravate the over-representation of white women at that salary level.¹⁴⁶ The position was subsequently eliminated when the division in the SAPS was restructured.¹⁴⁷ Barnard instituted an action against the SAPS that would see the beginning of a ‘tennis court’ battle of appeals that would result in a Constitutional Court hearing where an unfavourable (to Barnard and the CC’s jurisprudence) judicial pronouncement would ensue.

Just as a tennis ball is bounced from one end of the tennis court to the other, so too has this matter been vaulted into every legal arena in which it can be heard. The decisions made in the various courts have attracted much attention. However, in spite of the reasons given for each judgment, none of the courts that have heard the matter have taken the opportunity to delve into the political interest(s) that the ruling party may have in the outcome of this case.

The Labour Court scrutinised the issue by looking at it through section 9(3) of the final Constitution and section 6(1) of the Employment Equity Act¹⁴⁸ (hereafter ‘the Act’). Its reasons for upholding Barnard’s claim was that the SAPS had neither discharged its burden of proving that the discrimination was not unfair; nor did the National Commissioner provide adequate and sufficient reasoning for the rejection of Barnard’s promotion.¹⁴⁹ In determining whether the (SAPS’s) employment equity plan had been fairly applied it stated that representivity should be weighed against an individual’s right to equality.¹⁵⁰

The LC’s decision was appealed by the SAPS in the Labour Appeal Court. The LAC set aside the order of the LC for two reasons. Firstly, no-one (of colour) had been appointed to the position which meant that there was no differentiation between

¹⁴⁶ Para 66.

¹⁴⁷ Para 64.

¹⁴⁸ Act 55 of 1998

¹⁴⁹ Para 21.

¹⁵⁰ *Ibid.*

Barnard and another candidate.¹⁵¹ Therefore, as the LAC argued, Barnard had not been unfairly discriminated against. Secondly, the LAC rejected the LC's assertion that the implementation of the employment equity plan had to be subjected to an individual's right to equality. It held that this restrains the objects of restitutionary measures.¹⁵²

The decision of the LAC was then appealed in the Supreme Court of Appeal. The SCA, essentially, adopted the same reasons as the LC for its decision. The SCA's decision did not find favour with the SAPS who appealed to the Constitutional Court to adjudicate the matter.

4.6.1.1 DECISIONS MADE

The majority judgment, delivered by Moseneke ACJ, upheld the SAPS's appeal and overturned the decision of the SCA. It decided to overturn the SCA's decision because it believed that it misconceived the issue before it.¹⁵³ Because the decision no longer entailed looking at the test for unfair discrimination, the matter was approached through a different legislative prism. The judges had to determine the lawfulness of the decision. It was held that the decision was lawful as it was rationally related to the purpose of the SAPS's employment equity plan which was to reach numerical targets.¹⁵⁴ The majority judgment dismissed Barnard's claim to review and set the National Commissioner's decision aside, arguing that this issue was heard for the first time on appeal.¹⁵⁵ This judgment established its support for the National Commissioner's reasons for not appointing Barnard to the advertised position. The judges were of the view that SAPS's representivity imperatives constituted a fair and lawful reason for Barnard's rejection.¹⁵⁶

The first minority judgment, written by Cameron J, Froneman J and Majiedt AJ commenced its reasoning by looking at that which it thought the majority judgment had overlooked: establishing a standard of review for challenging the individual

¹⁵¹ Para 22.

¹⁵² *Ibid.*

¹⁵³ Para 48.

¹⁵⁴ Para 66.

¹⁵⁵ Para 60.

¹⁵⁶ Para 69.

implementation of affirmative action measures.¹⁵⁷ The judges noted that the discrimination challenge was brought in terms of the Act and consequently the standard was required to be Act-specific. This judgment suggests that the Act requires the standard of fairness in addition to rationality.¹⁵⁸ The judges noted fairness entailed the furnishing of reasons to provide evidence that the policy was fairly implemented.¹⁵⁹

Van der Westhuizen J wrote the second concurring judgment. He assesses the lawfulness of the decision in terms of the policy and its implementation's impact on equality and the right to dignity.¹⁶⁰ He deduced that the decision not to appoint Barnard furthered the achievement of equality and did not "excessively" impact on her dignity.¹⁶¹ Van der Westhuizen J advances that proportionality is the correct review standard to apply because it is not as "vague" as a fairness review standard.¹⁶² Van der Westhuizen illuminates that there was insufficient evidence to prove that there was disproportionality between advancing representivity and improving service delivery to the extent that service delivery was compromised.¹⁶³ Although he believes that the reasons given by the National Commissioner could have been more detailed, he is of the view that they are adequate because they make it clear why Barnard was not appointed.¹⁶⁴

The final concurring minority judgment is drafted by Jafta J. He fully agrees with the majority judgment to the extent that a new cause of action should not be determined because it would blatantly disregard the opposing party's right to a fair hearing, and thus to a fair trial.¹⁶⁵ This is so because the opposing party would be unaware of the case against it and therefore lack the legal clout to fight it. He finds that there is no basis that permits him to accept the new cause of action.¹⁶⁶

¹⁵⁷ Para 75.

¹⁵⁸ Para 76.

¹⁵⁹ Para 108.

¹⁶⁰ Para 133.

¹⁶¹ Para 180.

¹⁶² Para 165.

¹⁶³ Para 189.

¹⁶⁴ Para 194.

¹⁶⁵ Para 197.

¹⁶⁶ Para 213.

Although this case glaringly illuminates that the standard of implementation of remedial measures in the workplace is an issue, Jafta J decides against raising this issue *mero motu* because it would be disrespectful towards the parties to engage in an issue that they did not raise. He defers the issue for another day. As concerns the complaint of unfair discrimination, Jafta J concludes that the Harsken test cannot be used to determine the unfairness of a discriminatory decision where the discrimination is a result of the implementation of a remedial measure.¹⁶⁷ This is because section 6(2)(a) of the Act states that affirmative action measures taken in furtherance of the Act do not amount to unfair discrimination.

4.6.1.2 CRITIQUE

It can be gleaned from the analysis of the judgments that the Constitutional Court failed to engage in principled-adjudication. Instead it adopted a strategic and pragmatic approach to determine the issues before it. It is suggested that the glaring reason for this is the fact that the Constitutional Court fails to acknowledge the role that dominant party democracy has in its adjudicatory processes. In sum, this analysis will illuminate how the Constitutional Court's decision has bolstered dominant democracy in South Africa.

Firstly, the Constitutional Court misconceived the issue before it to the extent that it made it harder for itself to make a judicial pronouncement on the blatant unfairness of the discrimination. It created this 'triumph' by addressing the issue through the remedial lens that is affirmative action. It becomes a significant challenge for an individual to challenge a decision that is apparently made for the achievement of equality in society as a whole.

Secondly, although it was held that the Court can scrutinise executive decisions, it opted not to do so by virtue of deference.¹⁶⁸ It creates an implicit separation of powers issue which is not actually a legitimate concern in this case.¹⁶⁹ This deference becomes increasingly prevalent as the judges in the various judgments pen ideas about a correct standard of review, only to conclude that irrespective of the standard

¹⁶⁷ Para 208.

¹⁶⁸ Para 38.

¹⁶⁹ Malan 2014 *PELJ* 136.

of review, the National Commissioner's decision was lawful, and that he furnished adequate reasons for Barnard's rejection.

Thirdly, the Constitutional Court abdicates its powers and essentially gives the National Commissioner an absolute power to decide how to implement the SAPS's employment equity plan. To this end, the Court erodes the check that it has on executive powers which weakens the judiciary as an independent institution.¹⁷⁰ It permits the National Commissioner to exercise his discretion in any manner he pleases. This is illustrated by the alarming manner in which the judges carelessly agree that the decisions made by the National Commissioner are lawful if they further representivity agendas as a remedy for rectifying the injustices suffered by the previously disadvantaged in the past. It is most apparent that the National Commissioner failed to take into account the necessary criteria in addition to representivity considerations when deciding whether or not to appoint Barnard.

Fourthly, and as discussed in extensive detail by Louw, the Court failed to account for, and in considerable depth, the effect that the Employment Equity Act and its policies have on service delivery in the public service sector.¹⁷¹ Louw notes that the time was ripe for a judicial pronouncement on the effect of affirmative action measures on the effect of public service delivery.¹⁷² Instead, the Court deferred this issue for another day. In what could be described as a controversial conclusion, Louw states that the Employment Equity Act does not actually seek to advance equality rights in the employment realm. Instead, it progresses the ANC's transformative agenda.¹⁷³

Despite the fact that the judges of the first and second minority judgments state that the decisions are meagre and lack meticulous explanations,¹⁷⁴ they blindly agree that the reasons suffice as adequate deliberations.

¹⁷⁰ Choudhry 2009 *Constitutional Court Review* 11.

¹⁷¹ AM Louw "The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa) (Part 2)" *PELJ* 2015 (18) 668 at 681.

¹⁷² Louw *PELJ* 685 and 688.

¹⁷³ Louw *PELJ* 686 to 688.

¹⁷⁴ Paras 113 and 194.

4.6.2 *AGRI SA V MINISTER FOR MINERALS AND ENERGY*¹⁷⁵

AgriSA is another Constitutional Court judgment that arguably bolsters party dominance in South Africa. An analysis of this judgment will suggest that the justices failed to apply their minds in respect of the role played by one-party dominated democracy and, thus, failed to take into account the vested interests the ruling party had in the outcome of the case before it.

4.6.2.1 BACKGROUND

In this case, the Constitutional Court was faced with a matter in which it had to decide whether the effect of a provision in the Mineral and Petroleum Resources Development Act¹⁷⁶ (hereafter ‘the MPRDA’) amounted to expropriation when the MPRDA came into effect. Sebenza (Pty) Ltd (hereafter ‘Sebenza’) had bought coal rights (hereafter referred to as ‘mineral rights’)¹⁷⁷ in 2001 that were attached to a piece of land which they did not own - and subsequently had them registered in their name.¹⁷⁸ These coal rights were regulated by the Minerals Act.¹⁷⁹ Sebenza had not used the rights and upon the commencement of the MPRDA in 2004,¹⁸⁰ the rights that were formerly regulated by the Minerals Act became classified as ‘unused old older rights’.¹⁸¹ According to the MPRDA, Sebenza had a year in which to apply for a prospecting or mining right.¹⁸² Due to unforeseen circumstances, Sebenza was liquidated and was unable to conclude a contract of sale that would transfer the mineral rights to another company.¹⁸³ This was because the company that wished to purchase the coal rights was advised that the coal rights no longer existed in terms of the MPRDA.¹⁸⁴ Subsequently, Sebenza lodged a claim for compensation because their mineral rights had been expropriated by the MPRDA.¹⁸⁵ *AgriSA*, a non-profit organisation to which Sebenza belonged, secured Sebenza’s claim in light of its

¹⁷⁵ 2013 (4) SA 1 (CC).

¹⁷⁶ Act 28 of 2002.

¹⁷⁷ JD Van der Vyver “Nationalisation of mineral rights in South Africa” 2012 *De Jure* 125-142 at 126 notes that inclusive in the term ‘mineral rights’ is the right to prospect and mine that particular mineral.

¹⁷⁸ Para 13.

¹⁷⁹ Act 50 of 1991.

¹⁸⁰ The MPRDA came into effect on the 1st of May 2004.

¹⁸¹ This was in terms of Item 8 of Schedule II to the MPRDA.

¹⁸² Para 14.

¹⁸³ Para 15.

¹⁸⁴ *Ibid.*

¹⁸⁵ Para 16.

decision, as an organisation, to seek legal clarity concerning its view that that MPRDA effectively expropriated mineral rights without compensation owned by holders as per the Minerals Act.¹⁸⁶ Thus, the situation encountered by Sebenza became AgriSA's "test case".¹⁸⁷

Litigation commenced in the North Gauteng High Court where it was held that the MPRDA deprived Sebenza of its mineral rights and therefore amounted to deprivation in terms of section 25(1) of the Constitution.¹⁸⁸ It further held that the deprivation amounted to expropriation because the State had acquired the substance of the right.¹⁸⁹ The Minister approached the Supreme Court of Appeal to appeal the decision. The Supreme Court of Appeal decided that Sebenza's mineral rights had neither been expropriated nor deprived: it substantiated this outcome by paying attention to the content of the coal rights. It held that a mineral right, without the right to prospect and mine the mineral in question, does not amount to 'property' because the right to the mineral itself is of no practical value.¹⁹⁰ Aggrieved by this decision, AgriSA appealed to the Constitutional Court.

4.6.2.2 DECISIONS MADE

In the majority judgment, delivered by Mogoeng CJ (with Moseneke DCJ, Cameron J, Jafta J, Nkabinde J, Skweyiya J, Yacoob J and Zondo J concurring), it was held that the MPRDA did not expropriate these mineral rights. The Constitutional Court's reasoning differed from that of the SCA's to the extent that it delved into the "characterisation of property" that was arguably expropriated by the MPRDA.¹⁹¹ In this regard, the Constitutional Court looked at the nature of the affected right(s) and held that the right to mine, prospect, extract and dispose of the minerals always vested in the state.¹⁹² It further argued that the right to mine formed part of the State's substantive powers and therefore it was "illusory" to believe that these rights could be held privately.¹⁹³ The Constitutional Court further added that the individualisation of

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ Section 25(1) of the Constitution states that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

¹⁸⁹ Para 18.

¹⁹⁰ Para 20.

¹⁹¹ Para 33.

¹⁹² *Ibid.*

¹⁹³ Para 34.

the terms ‘right to mine’ and ‘mineral rights’ was a source of great confusion as the former constituted an aspect of the latter – this was until the MPRDA took effect.¹⁹⁴ The Constitutional Court noted that this confusion could have been avoided if the term ‘right to mine’ was replaced with ‘exploitation rights’ and ‘mineral rights’ with ‘ownership of minerals’.¹⁹⁵ It was also noted that whenever a mineral right owner was forced by the State to utilise the right that it would be compensated in doing so.¹⁹⁶

The Constitutional Court then had to deal with the relationship between the value of a right and its content.¹⁹⁷ It agreed that just because a right lacked value did not destroy the right.¹⁹⁸ It was also taken into account that the corollary of the right to mine was the right not to mine. This in itself did not destroy the right either.¹⁹⁹ Again it was underscored that the State could only compel exploitation by expropriation against the payment of compensation.²⁰⁰

The Constitutional Court then went on to assess the difference between deprivation and expropriation as set out in section 25 of the Constitution. Whilst deprivation refers to sacrifices that private landowners are required to make without being given compensation, expropriation entails that the privately owned land is acquired by the State and used for transformative purposes, in return for compensation.²⁰¹

It was established that any holder of unused old order right that did not apply for the same right under the MPRDA within the stipulated time frame forfeited these rights which then accrued to the State.²⁰² Although the MPRDA is a law of general application, and the deprivation of Sebenza’s rights was therefore not arbitrary, Sebenza was lawfully deprived of its rights.²⁰³ The Constitutional Court then had to establish whether the deprivation amounted to expropriation. According to AgriSA, the mineral rights that were formerly owned by Sebenza were extinguished and now

¹⁹⁴ Para 38.

¹⁹⁵ Para 39.

¹⁹⁶ Para 41.

¹⁹⁷ Para 42.

¹⁹⁸ *Ibid.*

¹⁹⁹ Para 43.

²⁰⁰ Para 46.

²⁰¹ Para 48.

²⁰² Para 52.

²⁰³ *Ibid.*

vested in the State which were subsequently to be used by a third party to whom the Minister would grant them.²⁰⁴ The majority re-iterated the point made in *Harksen* that expropriation had to be proved by way of establishing that the state acquired the core content of what the claimant was deprived of.²⁰⁵ It went on further to state that there can be no expropriation of property where deprivation does not result in the property being acquired by the state.²⁰⁶ The Constitutional Court stated that the interpretation of section 25 of the Constitution is best viewed through a transformative lens.²⁰⁷ The Constitutional Court highlighted that determining whether acquisition has taken place can only be properly done through a case by case basis. It looked at the additional elements that set expropriation apart from deprivation, namely: i) compulsory acquisition of rights in property by the state; ii) for a public purpose or in the public interest and iii) subject to compensation.²⁰⁸ The Constitutional Court held that there was no expropriation because it held that the State was “a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised”.²⁰⁹ It further held that the state did not take away the substance of the right which would otherwise have amounted to expropriation.²¹⁰

In a dissenting judgment written by Cameron J, he hastened to add that whilst he concurs with most of the majority judgment, he cautions that the state’s acquisition of the property rights should be a flexible consideration.²¹¹ In the second dissenting judgment, written by Froneman J (with Van der Westhuizen J concurring), he argues that the appeal should be dismissed but because compensation had been offered (since Sebenza had a year in which to transfer its old-order rights in terms of the MPRDA).²¹² He terms this as “compensation in kind”.²¹³ He is “unable to agree” with

²⁰⁴ Para 56.

²⁰⁵ Para 58.

²⁰⁶ Para 59.

²⁰⁷ Para 60 states that “the approach to be adopted in interpreting s 25, with particular reference to expropriation, is to have regard to the special role that this section has to play in facilitating the fulfilment of our country’s nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all South Africans.” In para 61, it is further added that “we must interpret s 25 with due regard to the gross inequality in relation to wealth and access to business opportunities in the mining industry for all, especially the previously disadvantaged.”

²⁰⁸ Para 67.

²⁰⁹ Para 68.

²¹⁰ Para 71.

²¹¹ Para 78.

²¹² Para 79.

²¹³ Para 88.

the majority judgment because of the reasons is proffers for final decision.²¹⁴ Froneman J finding stands in direct opposition to the justices of the majority judgment when he states that “I do not see how it can be avoided that the state acquired, in a material and substantive sense, at least some of the power and competencies that previously vested in private ownership”.²¹⁵ He argues that the most accurate way of establishing whether or not there has been expropriation is to determine the preferred interpretation of section 25 of the Constitution which conforms to the “spirit, purport and objects” of the Constitution.²¹⁶ In this light, he suggests that “the transitional measures as set out in the MPRDA should be interpreted as compensatory measures that seek to give effect to just and equitable compensation for property as set out in section 25 of the Constitution”.²¹⁷ He therefore concludes that the “crucial issue to be determined will be whether, on the facts of the particular case, he ‘compensation in kind’ provided for by the MPRDA is substantively equivalent to ‘just and equitable compensation’ in terms of s 25”.²¹⁸ Froneman J then concludes that the reason preventing Sebenza from, accordingly, transferring its rights in terms of the MPRDA was owed to its insolvency.²¹⁹

4.6.2.3 CRITIQUE

Criticism can be levelled against this judgment in four points. The first point is one which finds resonance in the remaining three issues. This judgment, while hailed as a landmark property rights case, is one that furthers the transformative agendas of the ruling party. Instead of adopting a literal approach to section 25 of the Constitution, Mogoeng CJ states that one should “have regard to the special role this this section has to play in facilitating the fulfilment of our country’s nation-building and reconciliation responsibilities”.²²⁰ He suggests that this can be accomplished “by recognising the need to open economic opportunities to all South Africans”.²²¹

²¹⁴ Para 79.

²¹⁵ Para 106.

²¹⁶ Para 87.

²¹⁷ Para 90.

²¹⁸ Para 90.

²¹⁹ Para 109.

²²⁰ Para 60.

²²¹ *Ibid.*

This leads to the second and third points, respectively. Because the Constitutional Court decides to follow this interpretation, it superimposes the State's obligation to realise the advancement of property rights for the purposes of social and economic growth.²²² To this end, the Constitutional Court does not protect the property rights of private landowners, and subsequently asserts that the right to mine falls within the State's substantive powers, and thus the land and its minerals accrue to the State.²²³ This is in spite of the fact that the majority judgment states that it cannot determine what is meant by the assertion that the right to mine has always vested in the substantive powers of the state.²²⁴ Notwithstanding this confusion, the Constitutional Court then decides that there has been no expropriation as the State has not acquired the property under the MPRDA. This stands in stark contrast to the finding made by Froneman J that the State definitely acquires the property under the MPRDA.²²⁵ It can be argued that the majority judgment refuses to permit this finding so that the ruling party can bolster its dominance by exerting its control over land, and any attached minerals, and the subsequent rights to exploit those rights. The majority judgment highlights its rigid approach to this situation. It does not permit any flexibility in its approach and adjudicates the case pragmatically rather than following a principled approach. In refusing to compensate those from whom it expropriates property, the state's wealth is hoarded for purposes other than those related to land reform.

The final point that needs to be addressed is whether the MPRDA is, of itself, constitutional. Van der Vyver asserts that the constitutionality of the MPRDA is beyond dispute. He reasons that the MPRDA aims to address the inequality of past practices, and ensure that those whom were previously disadvantaged are able to participate in the sharing of the country's wealth of minerals.²²⁶ Although the MPRDA permits expropriation, the expropriation cannot be concluded without compensating the

²²² Para 61.

²²³ Van der Vyver 2012 *De Jure* 136.

²²⁴ Paras 34 and 35.

²²⁵ Paras 80 and 81. In paragraph 80, Froneman J asserts that "[He] find[s] it unconvincing, both in plain language and legal conceptualisation, to say that the power of disposition that private mineral ownership entailed was not acquired or does not now vest in the state." In para 81 he states that "previously, private owners of minerals had the power or competence to decide whether to exploit minerals they owned and to whom they could give their exploitation rights. It was an incidence of ownership. Now the state has that power or competence by virtue of its custodianship of mineral resources under the MPRDA."

²²⁶ Van der Vyver 2012 *De Jure* 139.

person or entity that is being expropriated.²²⁷ However, to my mind, the procedure that needs to be followed when determining whether the deprivation of property amounts to expropriation desperately needs to be addressed by the Constitutional Court.

4.7 APPLICATION OF CHOUDHRY'S FRAMEWORK

It is suggested that the application of Choudhry's doctrine of anti-domination could have been effectively applied to both *Barnard* and *AgriSA* in preventing an outcome that furthered ANC ideologies. This can be evidenced in both *Barnard* and *AgriSA*. The facts in *Barnard* illuminate that in each occasion where an appointment was to be made, Barnard was the best candidate. The fact that numerous excuses were given for the failure to appoint the most suitable candidate are arguably the manifestations of the negative effects of the ruling party's "true reason"²²⁸ for the refusal to appoint Barnard. This should have attracted the Court's attention, and to this end the Court, had it applied this doctrine, would have discovered that the failure to appoint Barnard was, although masked by the ruling party's transformative agenda, illegitimate. It is for this reason that the Supreme Court of Appeal's finding that there was unfair racial discrimination is the preferred outcome of the matter.²²⁹

If, in *AgriSA*, the Constitutional Court used the doctrine, it could have made a finding that the ruling party sought to bolster its dominance through increasing the amount of property that it owned. This was accomplished through the Court's description of the State's role as a 'custodian'. Whilst this may be the case, the State monopolises on property 'ownership' to the extent that it then controls who may apply for mineral and property rights. Although it claims it is custodian for 'transformation' purposes, this is potentially problematic as it bolsters the ruling party's dominance as it controls who can acquire property-related rights. Accordingly this manifests as a disadvantage that should help the Court uncover the "true reason"²³⁰ for the State's appropriation of the property in question.

²²⁷ This is confirmed in Item 12(1) of Schedule II in the MPRDA.

²²⁸ Choudhry 2009 *Constitutional Court Review* 43.

²²⁹ Para 48.

²³⁰ Choudhry 2009 *Constitutional Court Review* 43.

The doctrine of anti-usurpation could have also been effectively used to assess whether the decision taken in *Barnard* was to further legitimate purposes or to bolster the dominant status of the ruling party as well as to push its transformative agenda.²³¹ *Barnard* seems to make it apparent that the Regional Commissioners as well as the National Commissioner have been appointed to their positions through cadre deployment. Subsequently, and gleaned from Choudhry's work, it can be inferred that the Commissioners have been given a mandate that conforms to the ruling party's agenda to realise its transformative imperatives. Again, the case illuminates that there was a position available within the SAPS, and for racially-related reasons, *Barnard* – the most qualified candidate – was not appointed. The application of this doctrine could have protected *Barnard* in her capacity as member of a minority group, which at the time of litigation, was a designated group in terms of the Employment Equity Act which fact the Court decided to ignore. In both the trans-border municipality cases as well as *Barnard*, this has been accomplished through the practice of unlawful dictation with the aid of cadre deployment.²³²

4.8 CONCLUSION

This Chapter has sought to give greater insight into the term 'politically sensitive matters'. Subsequently it was noted that the moment the Constitutional Court is unable to adjudicate a matter independently and impartially that the matter may be politically tainted. Matters can become politically sensitive either through the parties involved in the litigation or as a result of the nature of the issue (and the interests sought in the outcome). It is against this backdrop that the two cases, *Barnard* and *AgriSA* were expounded to highlight the flawed adjudicatory process adopted by the Constitutional Court. In each case, the Court has a choice: it could have made the most fair and appropriate decision, one which would fend off the negative effects of one party dominance. It was suggested that the adjudicatory process could be remedied by the application of Choudhry's set of doctrines, where each doctrine was applicable. Based on Choudhry's arguments, the Court, in both cases, should have ruled against government.

²³¹ Choudhry 2009 *Constitutional Court Review* 65.

²³² Choudhry 2009 *Constitutional Court Review* 65.

CHAPTER V: **CONCLUSION**

This mini-dissertation has discussed the threat that one-party domination poses to our democracy and, by implication, our constitutional system (and the rule of law). It has been argued that one of the manifestations of this threat can be located in the judiciary. More specifically, it can be identified in the Constitutional Court's judgments of politically-sensitive matters. This is owed to the Court's adjudicatory flaws when deciding these matters. Regard is had to the work of Sujit Choudhry who suggests that the Court should adopt a framework, consisting of a handful of doctrines that would protect our constitutional system by limiting political influences in these decisions.²³³

Chapter II focuses on ascribing content to the term 'one-party dominated democracy', and investigating how it operates within the South African context. Gleaning from the work of Pempel, Giliomee, Schlemmer and Myburgh, a broad definition of the term was espoused.²³⁴ Regard was had to the ANC's electoral success;²³⁵ its domination in the formation of government;²³⁶ and its dominance in determining the public agenda.²³⁷ It was subsequently concluded that one-party dominance does find application within the South African context.

Chapter III sought to illuminate that the judiciary's responsibility to adjudicate matters independently and impartially, applying only the Constitution and the law, has been frustrated by one-party domination.²³⁸ This is particularly the case when the Constitutional Court adjudicates politically-sensitive matters. The first leg of this argument dealt with the position of the JSC. The JSC is meant to be an independent body, but has to a considerable extent been captured by the ruling party through the vehicle of cadre deployment as the ruling party has a stake in the appointment of judicial officers.²³⁹ This compromises the independence and impartiality of the

²³³ Choudhry 2009 *Constitutional Court Review* 19.

²³⁴ Giliomee *et al.*, 2001 *Democratization* 161.

²³⁵ Friedman *The awkward embrace* 99.

²³⁶ Giliomee *et al.*, 2001 *Democratization* 170-172.

²³⁷ Giliomee *et al.*, 2001 *Democratization* 167-171.

²³⁸ Sections 165(2) and (3) of the Constitution.

²³⁹ Malan 2014 *PELJ* 1970.

judiciary. The second leg of this argument deliberated on the effects of one-party domination on judicial independence and judicial impartiality. It was concluded in this regard that the judiciary merely has theoretical independence owing to the fact that it is composed by the other branches of government on which the judiciary also relies for funding and access to resources.²⁴⁰ Apart from that it depends on organs of state to give effect to its orders. Moreover, the courts also rely on a minimum measure of public support without which it could hardly function.²⁴¹ Thus, in order to safeguard its independence, particularly in politically-sensitive matters, the judiciary is hard-pressed to adopt a pragmatic stance in adjudicating matters before it.²⁴² In respect of the judiciary's impartiality, it was noted that judicial officers have a duty to recuse themselves from matters in which they have an interest or a stake in the outcome.²⁴³ However, in spite of the fact that judges, especially the highest courts ordinarily share with the executive and the ruling party the same partial ideological outlook, judges would nevertheless not recuse themselves when a matter that involves such ideological outlook is up for decision.

It is then argued in Chapter III that the judiciary, and especially the Constitutional Court when it adjudicates politically-sensitive matters, should have a framework in place that illuminates and subsequently eliminates the harms that ensues from the ANC's dominant status. Reference is made to Choudhry's work in which he formulates a set of doctrines that should be employed by the Court when it adjudicates politically-sensitive matters. These doctrines are termed 'anti-domination', 'anti-capture', 'non-usurpation', 'anti-seizure' and 'anti-centralisation'.²⁴⁴

A golden thread that weaves throughout Chapter IV highlights that the responsibilities of the Constitutional Court are in their very nature political. Gleaning from Mendes' academic commentary, it is suggested that the Court's mandate in ascribing substantive content to the Constitution and its power to engage in judicial review are political actions.²⁴⁵ To this, Klug adds that the Court is continually faced with the threat

²⁴⁰ Malan 2014 *PELJ* 1984.

²⁴¹ Malan 2014 *PELJ* 1985.

²⁴² Malan 2014 *PELJ* 1987.

²⁴³ Malan 2014 *PELJ* 1992.

²⁴⁴ Choudhry 2009 *Constitutional Court Review* 34.

²⁴⁵ Mendes 2010 *Constitutional Court Review* 34.

of being ignored and to protect itself against this it adjudicates politically-sensitive matters pragmatically.²⁴⁶ Chapter IV further seeks to define 'politically-sensitive matters'. It is concluded that a matter has the potential to become politically-sensitive the moment any court cannot adjudicate a matter independently and impartially. It was further argued that there are two components of litigious matters that have the ability to transform a matter into one that is politically-sensitive. The first component is concerned with the parties litigating in the matter whereas the second component scrutinises the nature of the issue that is being litigated. In respect of the latter component, it was submitted that the interests at stake in the outcome of certain matters can cause a matter to become politically-sensitive. This particular point was the backdrop against which the judgments of *Barnard* and *AgriSA* were analysed and critiqued. It was subsequently concluded that if the Court had been able to implement the doctrines espoused by Choudhry, it would have decided the outcomes of the matters before it rather differently. In the context of these two particular cases, only two out of the five doctrines found application. The doctrine of anti-domination would have aided the Court in determining the exact purposes for which public power was exercised.²⁴⁷ Further, the doctrine of anti-usurpation could have been used effectively in *Barnard* to determine the reason for the decision taken not to appoint Barnard to the advertised position.²⁴⁸

²⁴⁶ Mendes 2010 *Constitutional Court Review* 35.

²⁴⁷ Choudhry 2009 *Constitutional Court Review* 34.

²⁴⁸ *Ibid.*

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