

FINDING A BALANCE BETWEEN JUDICIAL ACTIVISM AND  
JUDICIAL DEFERENCE

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**List of abbreviations**

Acquired Immune Deficiency Syndrome	AIDS
Democratic Alliance	DA
Democratic Party	DP
Directorate of Priority Crime Investigation	DPCI
Directorate of Special Operations	DSO
Federal Alliance	FA
Gauteng Freeway Improvement Project	GFIP
Human Immunodeficiency Virus	HIV
National Prosecuting Authority	NPA
New National Party	NNP
Opposition to Urban Tolling Alliance	OUTA
Organisation for Economic Co-operation and Development	OECD
South African National Roads Agency SOC Limited	SANRAL
South African Police Service	SAPS
Treatment Action Campaign	TAC
United Democratic Front	UDM

## Chapter One

### Introduction

Since 1994 the South African judiciary, like the other branches of governmental power, have been under close scrutiny, not only by the citizens of South Africa, but worldwide. The South African Constitution has been seen as a model for other countries as great emphasis is placed on human dignity, equality and the advancement of human rights and freedoms.<sup>1</sup> The issue, however, is not how profound a constitution is in terms of the values it articulates. More importantly, the issue is whether the values and rights enunciated and enshrined in the South African Constitution are implemented.

Section 7(1) of the *Constitution of the Republic of South Africa*<sup>2</sup> stipulates that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa and affirms the democratic value of human dignity, equality and freedom. It is a core obligation of the state to respect, protect, promote and fulfil the rights as reflected in the Bill of Rights.<sup>3</sup> Often, however, situations arise where the state has allegedly failed to meet this constitutional obligation. As will be explained in more detail in Chapter 3, the courts have the responsibility and power to uphold constitutional rights, and to do so independently without recourse or deference to any person or institution, or as the legal expression goes, 'without fear, favour or prejudice'.<sup>4</sup>

However, when the judiciary, in performing this mandate, interprets the Constitution or law in a particularly generous way that strays from an exact reading of the text or rules against policies of the government that are supported by the majority, or where judges depart from strict adherence to judicial precedent, the charge of judicial activism is often brought against the judiciary. On the other hand judicial deference or restraint is disapproved as well if the judiciary pays undue deference to the will of the legislative and executive branches in deciding cases, or when cases are decided on the narrowest possible grounds in favour of the government.

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1 Gips, "*The Right Constitution*" <http://southafrica.usassembly.gov/media-20120226.html> accessed on 13 July 2014.

2 *Constitution of the Republic of South Africa 1996*. (Hereafter: the Constitution).

3 Section 7(2) of the Constitution.

4 Section 165(2) of the Constitution.

This paper will start by briefly dealing with the role and function of the judiciary, as well as the changes it has undergone since the promulgation of the Constitution. This overview will proceed in light of the constitutional provisions ruling the functions of the executive, the legislative, and the judicial authority, respectively, the latter being under continual scrutiny to hold inviolate the separation of powers and thereby fulfil the obligation to uphold one of the three essential pillars of democracy.<sup>5</sup> It will also be argued that although the Constitution is very clear on the separate and distinct powers and functions of each branch of government and could conceivably - and does - occasionally operate at cross purposes, it is imperative for governmental branches to work together.

Having dealt with the separation of powers, the concepts of judicial activism and judicial deference will be considered with particular reference to the impact of these phenomena on the constitutional order or, more specifically, whether they could, or do, undermine the principle of separation of powers and the rule of law. Case law will be scrutinised to that end and with a view to striking a balance between the said factors; moreover to consider whether such a balance is actually needed, the overriding object being to define the proper role of the judiciary in the constitutional order. In conclusion it will be argued that although the judiciary is by nature merely reactive and possibly the weakest branch of government, it is necessary for South African judges to “creatively promote the course of constitutional justice in every facet of their judgements. The risks are high, but the rewards are tremendous”.<sup>6</sup>

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5 Currie and de Waal *The new Constitutional and Administrative Law* 2001 95.

6 Quansah and Fombad “*Judicial Activism in Africa: Possible Defence against Authoritarian Resurgence?*” <http://www.ancl-radc.org.za> accessed on 29 April 2013.

## Chapter Two

### The role and function of the judiciary

As early as 1990 TJ Kruger predicted that the role of the courts is going to change if South Africa wants to establish a newly negotiated constitution.<sup>7</sup> A new constitution would mean the establishment of a human rights dispensation and the eventual establishment of a Constitutional Court. With the enactment of the Interim Constitution as well as the final Constitution this prediction indeed came true. The extent to which the judiciary changed and the Constitution's contribution to the change will be discussed in the paragraphs that follow. Such changes need to be noted in view of the incessant development, however subtle, of judicial power vested in the courts.<sup>8</sup>

#### 2.1 A review<sup>9</sup>

For three centuries a racial minority had a monopoly of political power in South Africa and ruled for most of the twentieth century in terms of parliamentary supremacy, infamously known as the 'apartheid' regime. The commencement of the *Interim Constitution Act 200 of 1993*<sup>10</sup> on 27 April 1994, however, brought an end to this minority rule and heralded the installation of the 1996 or 'final' Constitution. The 1996 Constitution is based on the rejection of unlimited legislative powers that could be abused to the detriment of rights, and the endeavour to establish a new constitutional system, in which the powers therein are directed and guided by the law.<sup>11</sup>

#### 2.2 The role of courts before 1994

Before 1994 the proper protection of human rights was severely hampered since constitutional law proceeded from the principle of parliamentary sovereignty. Dicey's viewpoint as discussed by Currie and De Waal is that, according to the principle of parliamentary sovereignty, parliament could make any law they wished

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7 Kruger *Die Wordingsproses van 'n Suid-Afrikaanse Menseregtebedeling* LLD thesis, Potchefstroomse Universiteit vir Christelike Hoër Onderwys, 1990 315.

8 Section 165 of the Constitution.

9 Currie and De Waal *The new Constitutional and Administrative Law 2001* Preface v.

10 *Interim Constitution Act 200 of 1993*. (Hereafter: the Interim Constitution).

11 Basson *South Africa's Interim Constitution v*; Section 2 of the Constitution stipulates "this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

to make and no person or institution (including the court) could do anything about it.<sup>12</sup> The British Parliament could arguably base such a claim to supremacy on its representation of the population as a whole who vested autonomy in Parliament by virtue of the authority granted to the electorate in terms of universal suffrage. In South Africa, however, only the white minority were represented, whilst the black citizens were excluded from the franchise,<sup>13</sup> dating back to the constitutional agreement of 1909 that established the Union of South Africa.<sup>14</sup>

Because of the sovereignty of parliament and the absence of a binding bill of rights, the courts' ability to protect individual rights and freedoms was severely restricted.<sup>15</sup> Thus, the vast majority of the local South African population had no means to sanction the South African Parliament and prevent the enactment of oppressive laws. Only the majority members of a "whites only" Parliament could write or rewrite laws and change the basic structure of the state. What are now known as human rights were treated with cavalier disregard.<sup>16</sup>

Parliament essentially had a free hand in its enactments. Courts could only declare a law invalid on procedural grounds as laid down by previous constitutions.<sup>17</sup> In the 1952 case of *Harris v Minister of Interior*<sup>18</sup> it was decided that besides the formal constraints imposed on parliamentary legislative procedure, parliamentary supremacy would subsist in unlimited purport as regards legislative content. In particular, courts had no jurisdiction over legislation passed by parliament, thus could not sanction legislative violations of human rights. The three South African constitutions<sup>19</sup> preceding the Interim Constitution did not enjoy supremacy and could be amended by Parliament through normal legislative procedures.

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12 Currie and De Waal *Introduction to the Constitution and the Bill of Rights* 2013 6<sup>th</sup> ed 3.

13 Currie and De Waal *Introduction to the Constitution and the Bill of Rights* 2013 6<sup>th</sup> ed 3.

14 *Union Constitution* (South Africa Act 1909).

15 Andrews and Ellmann *The Post-Apartheid Constitutions: Perspectives of South Africa's Basic Law* 2001 525.

16 Currie and De Waal *Introduction to the Constitution and the Bill of Rights* 2013 6<sup>th</sup> ed 3.

17 *Union Constitution* (South Africa Act 1909); *Constitution of the Republic of South Africa* 32 of 1961; *Constitution of the Republic of South Africa* 110 van 1983.

18 *Harris v Minister of Interior* 1952 2 SA 428 (A) 21.

19 *Union Constitution* (South Africa Act 1909); *Constitution of the Republic of South Africa* 32 of 1961; *Constitution of the Republic of South Africa* 110 of 1983.

### 2.3 A judicial revolution

The promulgation of the Interim Constitution on 27 April 1994, together with its sequel, the 'final' Constitution, heralded a judicial revolution that entailed a radical shift in the principle that governed the courts' role in the affairs of parliament. The Interim Constitution as well as the 'final' Constitution established a totally different dispensation to what it had been before. Parliament could no longer claim supremacy in accordance with the limitations stipulated in the Constitution; it was subjected to the provisions of the Constitution in every respect and had only those powers which were expressly or by implication assigned to it in the Constitution.<sup>20</sup>

From the beginning of the process of political negotiations which led to the new constitution there had been an understanding that the Constitution would be supreme and justiciable. In light of this consensual principle the Constitution was set in authority over all the branches of government, including Parliament; moreover by the same token the now justiciable constitution both authorised and obligated the judiciary to uphold the Constitution.

Whereas parliamentary supremacy obliges the courts to uphold decisions emanating from the political majority in parliament, constitutional supremacy obliges them to uphold the provisions of the Constitution regardless of decisions emanating from the said majority which may be ruled invalid and void.<sup>21</sup> The exercise of power by the courts under the Constitution can be divided into two basic functions: on the one hand, courts must determine the boundaries of powers between the different branches and spheres of the government, and on the other hand courts are empowered to interpret and uphold the rights in the Constitution against infringements thereof by organs of state or private bodies.<sup>22</sup>

Thus the courts have become a pivotal concern in the governance of South African society.

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20 *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) para 62.

21 Currie and De Waal *The new Constitutional and Administrative Law* 37.

22 Currie and De Waal *The new Constitutional and Administrative Law* 38.



## Chapter Three

### The separation of powers and relative constitutional provisions

The matter at issue here is infringement by overextension, referred to as judicial activism, by the courts on the legitimate domains of other branches of government. On the other hand, judicial deference is premised on the view that cases should be decided on the narrowest possible grounds.<sup>23</sup> Judicial activism and judicial deference are explored as phenomena relating to the separation of powers as laid down in the Constitution.

#### 3.1 Separation of powers

The principle of separation of powers is a core constitutional value that proceeds from the principle that no one is above the law.<sup>24</sup> Very importantly, the doctrine of legality lies at the core of the rule of law.<sup>25</sup> This doctrine holds that all spheres of governmental power, the judiciary, legislature and executive, are controlled by the principle that they may only exercise the power and perform only those functions which are conferred upon them by law.<sup>26</sup> The separation of powers determines that the freedom of citizens of a state can only be secured if the concentration of powers, which can lead to abuse, is prevented by allocating power to the legislative, executive and judiciary bodies.<sup>27</sup> By diffusing rather than concentrating the power, the separation of powers fulfils a core function of constitutionalism and limited government.

Van der Vyver<sup>28</sup> explains the modern version of the separation of powers as it developed over the centuries in relation to four principles, the first being the principle of *trias politica* which refers to the formal distinction between the different spheres of government; second the principle of separation of personnel functions, as each branch of government is staffed with different personnel; and third, the principle of separate functions as each branch of government is entrusted with its

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23 Chapter 4 will explain the principles of judicial activism and judicial deference.

24 Section 1(c) of the Constitution. Anonymous *Rule of Law* <http://www.lexisnexis.co.za>. Accessed on 22 April 2013.

25 Malan “*The rule of law versus decisionism in the South African constitutional discourse*” 2012 Volume, De Jure 273, 274-275.

26 *Fedsure Life assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 56-58.

27 Rautenbach and Malherbe *Constitutional Law* 2004 4<sup>th</sup> ed, 78.

28 Van der Vyver “*The Separation of Powers*” 1993 SA Public Law 177, 178.

core function - execution and administration of state affairs, law-making and adjudication. Lastly, Van der Vyver refers to the principle of checks and balances. Each branch is entrusted with special powers to oversee the affairs of the other branches in order to maintain an equilibrium in the separation and distribution of powers.<sup>29</sup>

### **3.2 Constitutional provisions**

The constitutional provisions that determine the scope and function of each of the governmental branches are briefly outlined below.

#### *3.2.1 Legislative authority*

According to Section 42 of the Constitution Parliament consists of the National Assembly and the National Council of Provinces, which are jointly responsible for the national lawmaking function. More particularly according to Section 43, Parliament is entrusted with the enactment of national legislation, the provincial legislatures with provincial legislation, and the local government institutions (municipal councils) with local legislation (eg. bylaws). The national legislative power vested in Parliament authorises the National Assembly to amend the Constitution, pass legislation and assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.<sup>30</sup> Parliament's authority to enact legislation is bound only by the Constitution.<sup>31</sup>

#### *3.2.2 Executive Authority*

Section 84 of the Constitution encapsulates the powers and functions of the President, naturally including those of Head of State and head of the national executive, the latter being exercised jointly with the Cabinet in virtue of Section 85 of the Constitution, as well as other national legislation, except where the Constitution or an Act of Parliament provides otherwise. Included under the same authority are the following: developing and implementing national policy,

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29 Van der Vyver *"The Separation of Powers"* 1993 SA Public Law 177, 178.

30 Section 44 of the Constitution.

31 Section 44(4) of the Constitution.

coordinating the functions of state departments and administrations, preparing and initiating legislation and performing any other formal executive function.<sup>32</sup>

### 3.2.3 *Judicial authority*

The judicial authority of the Republic vests in the courts according to section 165 of the Constitution. The courts function independently according to their constitutional mandate, which they must therefore fulfil without fear or favour, by which token they are exempt from interference by persons or organs of state.<sup>33</sup> On the contrary, organs of state must assist and protect the courts through legislative and other measures to ensure their independence, impartiality, dignity, accessibility and effectiveness.<sup>34</sup> An order or decision issued by a court shall be deemed binding on all persons and organs of state included in its purview.<sup>35</sup>

Section 167 provides that the Constitutional Court is the highest court in all constitutional and other matters<sup>36</sup> with sole authority to resolve disputes between organs of state in the national or provincial sphere concerning their constitutional status, powers or functions, as well as the constitutionality of parliamentary or provincial bills, or the constitutionality of proposed amendments to the Constitution. A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.<sup>37</sup>

### 3.2.4 *The relationship between the legislative, executive and judicial authorities*

It is imperative at the present juncture to find a balance between policy and the law because courts are continuously placed in a situation where they have to

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32 Section 85 of the Constitution.

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

34 Section 165(4) of the Constitution.

35 Section 165(5) of the Constitution.

36 Section 167 of the Constitution was amended in the *Constitution Seventeenth Amendment Act, 2012* (hereafter: *Seventeenth Amendment Act*) to declare the Constitutional Court the highest court to adjudicate constitutional as well as other matters, provided said Court grants leave to appeal on grounds that the matter raises an arguable point of law of general public importance which said Court ought to consider.

37 Section 167(7) of the Constitution. Various cases, some of which will be discussed in the following chapters, have dealt with the interpretation, protection and enforcement of the Constitution. Benchmark judgments such as *Government of the Republic of South Africa and Others v Grootboom and Others 2001 1 SA 46 (CC)* and *Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721* are examples of cases where the Constitutional Court had to decide upon the correct interpretation of the Constitution, and how the rights entrenched in the Constitution would be upheld.

adjudicate upon issues affecting public policy. The relationship between the court's powers of judicial review of policy and the actions of the executive and the legislature is delicately poised, especially given the justiciable Bill of Rights contained in the Constitution, and therefore making it imperative to guarantee the independence of the judicial authority.

## Chapter Four

### Concepts of judicial activism and judicial deference

#### 4.1 Judicial activism

It must from the outset be made clear that there is no definitive conception of judicial activism.

*Black's Law Dictionary* defines judicial activism as:

a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions... adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.

Another source describes judicial activism as the instance where courts do not confine themselves to reasonable interpretations of law, but instead create law, or when courts do not limit their ruling to the dispute before them, but instead establish a new rule to apply broadly to issues not presented in the specific action.<sup>38</sup>

According to Lino Graglia, Professor of Law at the University of Texas, "judicial activism [means], quite simply and specifically, the practice by judges of disallowing policy choices by other government officials or institutions that the Constitution does not clearly prohibit."<sup>39</sup> In other words, the court is engaging in judicial activism when it reaches beyond the clear mandates of the Constitution to restrict the functions of the other government branches. This summary of the concept will form the starting point of the discussion.

It is helpful to take heed of an explanation given by an American political science professor, Christopher Wolfe, to further illustrate the different interpretations of the concept. According to *Wolfe*,<sup>40</sup> those in favour of judicial activism tend to accord less weight to the original intent of the constitution as framed by the lawmakers

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38 Anonymous, "Judicial Activism" [www.conservapedia.com/Judicial\\_Activism](http://www.conservapedia.com/Judicial_Activism) accessed on 15 April 2013.

39 Graglia, "It's Not Constitutionalism, It's Judicial Activism" 1996 Volume 19 Harvard Journal of Law & Public Policy 293.

40 Wolfe, *Judicial Activism: Bulwark of Freedom or Precarious Security* 1997 1-33. Keenan "Origin and Current Meanings of Judicial Activism" 1464-1465.

than to other elements, such as the hermeneutic scope of the interpreters.<sup>41</sup> They also tend to place less emphasis on adhering to precedent, especially in constitutional matters. Activists also tend to lower procedural hurdles to obtain important and necessary judicial decisions.<sup>42</sup>

Judicial activism may be seen as the perspective where judges creatively (re)interpret the Constitution and other laws to include the judge's own viewpoints with regards to the needs of a contemporary society. It can also be described as the practice by judges not to allow certain policy choices by government officials or other institutions, even though these choices are not expressly prohibited by the Constitution. A court is thus acting judicially activist if it goes further than normally allowed to limit the actions of the other governmental branches.<sup>43</sup>

#### **4.2 Judicial deference**

Unlike the activist approach, judicial deference emphasises the limits of the courts' power by narrowly restricting interpretation of the legislation at issue (eg. the Constitution) in conformity with the concept of *stare decisis* (obligatory deference to previous decisions). Judicial deference is thus the approach that cases should be decided on the narrowest possible grounds, dealing with only the most directly relevant issues, especially political or social controversies.<sup>44</sup>

Deferent judges have a strong propensity for judicial restraint when deciding cases, unless the law is clearly unconstitutional. McLean, in treating the overlap between the concepts of justiciability and deference, respectively, she observes that when a matter is ruled non-justiciable it reflects a position of extreme deference.<sup>45</sup> Jurists who subscribe to judicial restraint show a solemn respect for the doctrine of separation of powers. Judicial restraint is the opposite of judicial activism in that it seeks to limit the power of judges to create new law or policy, or to give a new interpretation to it in order to meet new (and unforeseen) conditions.

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41 In judicial contexts the concept of 'original intent' refers to the principle that when it interprets a text a court should determine what the authors of such text were trying to achieve, and to fulfil that objective, regardless of the actual wording of the relevant text.

42 Wolfe, *Judicial Activism: Bulwark of Freedom or Precarious Security*, Lanham, Rowman & Littlefield (1997) p 3.

43 Keenan *Origin and Current Meanings* 1464-1465.

44 *Webster's New World Law Dictionary*, 2006.

45 McLean, "Constitutional Deference, Courts and Socio-Economic Rights in South Africa" 2009, 26.

### 4.3 Two ends of a spectrum

Judicial activism and judicial deference are polar opposites. In the former case the judiciary exceeds its powers to curtail those of other branches of government, while in the latter case it hems in its powers to avoid frustrating the will of the legislature and the executive.

Although the defining lines between the roles of the legislature, executive and courts are often controversial, some issues clearly fall within a particular branch rather than any other. All branches of state have to respect this distinction, but it cannot mean that courts are absolutely prohibited to make judgments that may have an impact on public policy.<sup>46</sup>

In February 2012 Jeff Radebe, then Minister of Justice and Constitutional Development, published the "Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State"<sup>47</sup> which contains views on judicial activism and judicial deference. According to the Discussion document the purpose of the intended transformation of the judiciary is to ensure that the judiciary is "appropriately positioned" and that judicial activism is limited by constitutionalism.<sup>48</sup> The Discussion Document is divided into several parts, one of which discusses judicial activism and deference under the heading "*The Exercise of Judicial Restraint as an Important Element of Constitutionalism*". The purport of the discussion document is clearly negative, in fact, in some instances even diametrically opposed to judicial activism.

It states that the judiciary has established itself as the foremost arbiter of all forms of dispute, with the result that its role (especially its independence) is often a matter of public debate. To ensure that justice is seen to be done in the resolution of disputes before courts, the environment in which the judiciary and courts operate must conform to certain basic requirements that reinforce the rule of law. Foremost among such concerns is whether or not judges would preside over a

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46 Pieterse "*Coming to Terms with the Judicial Enforcement of Socio Economic Rights*" 2004 South African Journal on Human Rights 383, 402; *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 5 SA 721 para 77, 78.

47 Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State 29 Jeff Radebe, 2012, [http://www.justice.gov.za/docs/other-docs/2012\\_transformation-judiciary.html](http://www.justice.gov.za/docs/other-docs/2012_transformation-judiciary.html), accessed on 22 April 2013.

48 Discussion document Executive Summary 2.

matter fairly and impartially, without any motive for gain or prejudice other than the motive of demonstrating that justice is being done.<sup>49</sup>

It is important to note that notwithstanding the purport of the Discussion Document that the courts have established *themselves* as the definitive arbiter of disputes, it is the Constitution that provides for matters to be adjudicated finally by the Constitutional Court,<sup>50</sup> and that the Supreme Court of Appeal presides finally over appeal matters.<sup>51</sup> According to the Discussion Document, courts should seldom be required to pronounce on matters of public policy in respect of socio-economic rights.<sup>52</sup> However, despite the discussion document's assertion to the contrary, courts are increasingly placed in a position where they *have* to pronounce on matters of public policy affecting socio-economic rights, especially in South Africa where the Constitution subsumes a justiciable Bill of Rights. The statement in the Discussion document is not practicable since some policies created so often necessitate court intervention in the public interest.<sup>53</sup>

The Discussion document also refers to the judgment of *Prince v President of the Cape Law Society and Others*,<sup>54</sup> where Sachs J reflected as follows:

In achieving this balance, this court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere that the Constitution allocates to the Legislature and the Executive, and what falls squarely to be determined by the Judiciary. The search for an appropriate accommodation in this frontier legal territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity.

Being mindful of and “sensitive to considerations of institutional competence and the separation of powers” is all very well, but not to the detriment of the public interest, in which case the judiciary would be obliged by its terms of reference under the Constitution to step in and ensure that the executive and the legislature fulfil their duties to respect, protect, promote and fulfil the rights contained in the Bill of Rights.

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49 Discussion document 29.

50 Section 167 of the Constitution.

51 Section 168 of the Constitution.

52 Discussion document 30.

53 Cases will be discussed where courts rightly intervened.

54 *Prince v President, Cape Law Society and Others* 2000 3 SA 845 (SCA); *Prince v President of the Law Society of the Cape of Good Hope* 2002 1 SACR 431 (CC).



#### 4.4 Counter-majoritarian dilemma

A particularly pertinent issue relating to the present discussion is the *counter-majoritarian dilemma*, which further complicates the task of finding a balance between activism and deference. In countries where the constitution is supreme, like in South Africa, judges are not elected, but are appointed with terms of reference enjoining them to interpret the provisions of the constitution and authorising them through rather broad powers of judicial review, to strike down legislation or disapprove conduct that is irreconcilable with the Constitution. This authorisation, which enables the courts to strike down legislation or disapprove parliamentary conduct, could give rise to the *counter-majoritarian dilemma* as the court nullifies the will of the majority as represented in the legislative and executive branches and therefore allegedly acts unconstitutional.<sup>55</sup>

With reference to the above it seems as though judicial review might be considered illegitimate as the will of the majority is reduced to a matter of purely academic interest. The problem stems from the understanding that a democracy's legitimacy arises from the fact that it implements the will of the majority.<sup>56</sup> Hence, when unelected judges overrule the laws made by elected representatives it seems as though the will of the majority is being undermined; however, in the writer's opinion this position is untenable since the fact remains that the Constitution clearly states that all conduct or law inconsistent with the Constitution is invalid<sup>57</sup>, therefore the courts are clearly enjoined by their terms of reference to ensure that unconstitutionality perpetrated in the enactments or conduct of other branches of government is ruled invalid. It follows that the courts, in particular the Constitutional Court, must have the power to declare any conduct, including legislation and executive decisions of a political nature, invalid to the extent that it is inconsistent with the Constitution.

In 2000 Cora Hoexter suggested a *doctrine of deference* that would be applicable in a closely cooperative arrangement uniformly respected and adhered to by the three branches of government in the interest of protecting the Constitution. She argues that such an arrangement is feasible and appropriate in the present

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55 Devenish "Is the testing right of the courts in South Africa anti-democratic?" <http://www.ifaisa.org> (date unknown) accessed on 17 April 2013.

56 Anonymous <http://www.democracy-building.info> accessed on 22 April 2013.

57 Section 2 of the Constitution.

constitutional order, which requires all sectors of government to collaborate towards achieving the goals of the Constitution.<sup>58</sup> The previous concern to prevent the judiciary from barricading transformation has been steadily replaced by recognition of the essential transformation-strengthening role of the judiciary. According to Hoexter, South Africa has a much clearer understanding today of the essential role of the courts to enforce the constitutional obligation of the executive and legislative branches to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights.<sup>59</sup>

What seems clear is that there is a great need for the branches of government to work together. The judiciary is clearly dependent on the executive and the legislature to give effect to its judgements.<sup>60</sup> There should be a clear understanding of the meaning and consequences of the separation of powers, as well as the meaning and consequences of judicial independence.<sup>61</sup> The Constitution is very clear on the duties and limits of each, but without cooperation between the branches the judiciary may have to intervene and make decisions that may be regarded as activist. The South African Constitution is unambiguous in making judges responsible to decide whether executive and legislative conduct are in agreement with the provisions of the Constitution.<sup>62</sup>

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58 Hoexter *Administrative Law in South Africa* 2012 2<sup>nd</sup> ed 147.

59 Hoexter *Administrative Law in South Africa* 2012 2<sup>nd</sup> ed 147, 148.

60 Section 165(4) of the Constitution.

61 Malan, “*Unity of Powers and Dependence of the South African Judiciary*” 2005 Volume 1 De Jure 99, 111.

62 Sections 165 and 167 of the Constitution.

## Chapter Five

### Case law

Some of the most important judgments of the Constitutional Court that cast light on the courts' conceptualising of the judiciary's relationship with the legislature and the executive are discussed in this chapter. It would appear as if the Constitutional Court does not have a clear and defined standard or guideline in respect of evaluating executive decisions and of conceptualising its relationship with the other branches. This is evident from the socio-economic and administrative law matters to be discussed in the paragraphs below. Various decisions of the Constitutional Court will be discussed, from the earliest to the more recent ones. Some will be referred to in detail whereas other cases only require a brief discussion.

#### **5.1 *Soobramoney v Minister of Health, KwaZulu Natal***<sup>63</sup>

In *Soobramoney*, which is considered one of the first socio-economic rights cases, the Court applied a rationality test in order to assess whether the state duly complied with its duties under the Constitution. If it can be established that the state made a rational decision in good faith, then the courts will not interfere.<sup>64</sup>

##### *5.1.1 Facts and litigation background*

In this case the appellant was an unemployed diabetic (male) who suffered from ischaemic heart disease and cerebrovascular disease which caused him to have a stroke in 1996. The appellant sought renal dialysis from the renal unit of the Addington state hospital in Durban. However, the appellant could not be accommodated at the hospital as a result of limited capacity and a variety of other reasons.<sup>65</sup>

In July 1997 the appellant made an urgent application to the Durban and Coast Local Division of the High Court for an order directing the hospital to provide him with continuous dialysis treatment and interdicting the respondent from refusing him admission to the renal unit of the hospital. The appellant claimed that in terms

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63 *Soobramoney v Minister of Health, KwaZulu Natal* 1998 1 SA 765 (CC). (Hereafter: *Soobramoney*).

64 *Soobramoney* para 9.

65 Reasons include the fact that the hospital budget falls short of supplying the necessary dialysis machines. There is a set policy in regard to the use of dialysis resources.

of the Constitution the hospital is obliged to make dialysis treatment available to him. The respondent opposed the application.<sup>66</sup>

In the answering affidavit the respondent stated that the hospital lacks the resources to meet the dialysis demand emanating from all patients suffering from renal failure. Only patients who suffer from acute renal failure, which can usually be cured within four to six weeks if renal dialysis is provided, are given access to renal dialysis at the hospital.<sup>67</sup>

According to the High Court the respondent offered conclusive proof that the treatment sought was prevented by budgetary constraints as claimed, hence the application was dismissed in the High Court.<sup>68</sup>

The appellant appealed directly to the Constitutional Court in terms of rule 18(e) of the Constitutional Court Rules.<sup>69</sup> The appellant based his claim on section 27(3) of the Constitution which provides that '[n]o one may be refused emergency medical treatment' and section 11 which stipulates that 'everyone has the right to life'.<sup>70</sup>

### 5.1.2 Reasoning of the Constitutional Court

The Constitutional Court dealt with section 27(3) and held that it is couched in negative terms, the purport being that it is an inalienable right according to the Bill of Rights contained in the Constitution that medical treatment required in an emergency may not be refused by an institution that can provide such treatment.<sup>71</sup> The Court held that because the applicant suffers from chronic renal failure he would have had to receive treatment two to three times a week and that that was not an emergency which called for immediate remedial treatment. The Court therefore determined that section 27(3) was not applicable to the set of facts.<sup>72</sup>

The Court applied a rationality analysis to assess whether the state had acted according to its mandate in terms of section 27(1)(a) of the Constitution.<sup>73</sup> The

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66 *Soobramoney* para 5.

67 *Soobramoney* para 2.

68 *Soobramoney v Minister Of Health, Kwazulu-Natal* 1998 1 SA 430 (D) 441.

69 *Soobramoney* para 6. Rule 18 of the Constitutional Court Rules determines the requirements and procedures for direct access to the Constitutional Court.

70 *Soobramoney* para 7.

71 *Soobramoney* para 20.

72 *Soobramoney* para 21.

73 Section 27 of the Constitution states that everyone has the right to have access to health care services, including reproductive health care.

Court held that it would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.<sup>74</sup> The Court upheld the traditional viewpoint of separation of powers and determined that it cannot make a decision on how a province should be spending its budget.<sup>75</sup> The Constitutional Court limited its review to the reasonableness of whatever means the state thought appropriate to realise the rights in the Constitution.<sup>76</sup> It was held that courts were not the proper place to resolve personal and medical problems and that there could be no reason for the Court to interfere with the allocation undertaken by those better equipped to deal with such problems.<sup>77</sup>

### 5.1.3 Conclusion

The Court held that although the state was obliged to comply with the provisions framed under section 27 of the Constitution, in the present case it had not been shown that the state's failure to provide renal dialysis for all persons suffering from chronic renal failure, including the appellant, constituted a breach of the said provisions. It was found, therefore, that the appellant was not entitled to the relief sought in the proceedings, with the result that his appeal against the decision of the High Court failed.

## 5.2 *New National Party v Government of the Republic of South Africa and Others*<sup>78</sup>

### 5.2.1 *Facts and litigation background*

The New National Party (NNP) challenged the constitutionality of certain provisions of the *Electoral Act* 73 of 1998 prescribing the documents which citizens must be in possession of to register as voters and to vote.<sup>79</sup> The challenged sections provided that citizens could only register as voters if they had a bar-coded identity document issued after 1 July 1986.<sup>80</sup> The complaint was that

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74 *Soobramoney* para 29.

75 *Soobramoney* para 30.

76 *Soobramoney* para 43.

77 *Soobramoney* para 58, 59.

78 *New National Party v Government of the Republic of South Africa and Others* 1999 3 SA 191 (CC). (Hereafter: *NNP*).

79 *NNP* para 1.

80 *NNP* para 8.

these provisions infringed the right to vote as enshrined in the Constitution.<sup>81</sup> The application was dismissed in the Cape of Good Hope High Court with the result that the applicant applied to the Constitutional Court for leave to appeal against the judgment.

### 5.2.2 *Reasoning of the Constitutional Court*

Yacoob J, for the majority, held that when the electoral scheme is challenged on the grounds that it is unconstitutional, the objector bears the onus of establishing that there is no legitimate governmental purpose or no relationship between the measure and the purpose.<sup>82</sup>

It was held that a statute cannot be said to have 'limping validity', valid one day and invalid the next, depending on changing circumstances.<sup>83</sup> The implementation of an act which passes constitutional scrutiny when it is enacted for the first time may indeed give rise to a constitutional complaint if, as a result of circumstances which become apparent later, its implementation infringes a constitutional right.<sup>84</sup>

It was necessary to examine whether the 'proximate cause' of the infringement of the right is the statutory provision itself, or whether the infringement of the right was attributable to some other cause, such as the failure of a governmental agency to fulfil its responsibilities. If it is established that in light of prevailing circumstances the statutory provision under consideration was itself the proximate cause of the infringement, then that provision shall be deemed to have infringed the right.<sup>85</sup>

### 5.2.3 *Conclusion*

Yacoob J held that a rational connection between the impugned provisions and a legitimate governmental purpose had to be established in the case under review,<sup>86</sup> and that the said provisions did in fact constitute such a link in that it facilitated the

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81 Section 19(3)(a) of the Constitution provides that every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.

82 *NNP* para 19.

83 *NNP* para 22.

84 *NNP* para 22.

85 *NNP* para 22.

86 *NNP* para 25.

exercise of the important right to vote.<sup>87</sup> The appellant failed to provide the proof required and the charge impugning the constitutionality of the provisions failed.<sup>88</sup>

In her dissenting judgment O'Regan J asks whether the electoral scheme is reasonable. She concludes that it is “incongruous” and “inappropriate” that the Constitutional Court should be able to determine whether *citizens*, but not *Parliament*, has acted reasonably. Whereas citizens have an obligation to comply with reasonable regulations made by Parliament, the Constitutional Court must surely then determine whether Parliament acted reasonably in making such regulations.<sup>89</sup> O'Regan J therefore measures the importance of the purpose of the statutory provision against its effect, and asks whether the electoral scheme is reasonable. She goes on to conclude that the scheme is not reasonable and therefore holds that the relevant provisions of the *Electoral Act* are inconsistent with the Constitution.<sup>90</sup>

However, the majority held that decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament.<sup>91</sup> This is fundamental to the doctrine of separation of powers and to the role of courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. Review will occur only if the court is satisfied that the legislation in question is not rationally connected to a legitimate government purpose; in which case review is justified because the legislation is arbitrary and therefore at odds with the rule of law, which is a core value of the Constitution.<sup>92</sup>

### **5.3 Government of the Republic of South Africa and Others v Grootboom and Others<sup>93</sup>**

#### **5.3.1 Facts and litigation background**

In *Grootboom* the Constitutional Court considered the lawfulness of an action by a local government who evicted a group of squatters from private land, thus

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87 *NNP* para 48.

88 *NNP* paras 49, 51.

89 *NNP* para 126.

90 *NNP* para 128

91 *NNP* para 24.

92 *NNP* para 24.

93 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC).

rendering them homeless, although it must be said that the land in question was privately owned and earmarked for formal low-cost housing.<sup>94</sup>

When the respondents applied to the Cape of Good Hope High Court for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation they were indeed granted certain relief.<sup>95</sup> The appellants were ordered to provide shelter for the respondents who included parents and their children. In *Grootboom v Oostenberg Municipality*<sup>96</sup> the local authority and then other respondents were ordered by the High Court to provisionally provide tents, portable latrines and a regular supply of water. This, according to Davis J, would constitute the bare minimum. The correctness of this order was challenged by all spheres of government who represented the current appellants.<sup>97</sup>

Section 28(1)(c) of the Constitution provides that every child has the right to basic nutrition, shelter, basic health care services and social services. Written arguments submitted on behalf of both the appellants and the respondents concentrated on the meaning and impact of the shelter component and the obligation imposed upon the state by section 28(1)(c).<sup>98</sup>

Written argument submitted on behalf of the *amici*, the Human Rights Commission and the Community Law Centre of the University of the Western Cape, sought to broaden the issues by contending that all the respondents were entitled to shelter by reason of the minimum core obligation incurred by the state in terms of section 26 of the Constitution.<sup>99</sup> These rights must be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. They entrench the right of access to land (section 25 of the Constitution), to adequate housing

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94 *Grootboom* para 4.

95 *Grootboom* para 4.

96 *Grootboom v Oostenberg Municipality and Others* 2000 3 BCLR 277 (C). (Hereafter: *Grootboom v Oostenberg Municipality*).

97 *Grootboom v Oostenberg Municipality* para 293A.

98 *Grootboom* para 18.

99 *Grootboom* para 18. Section 26 of the Constitution provides that everyone has the right to adequate housing and that the state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right. It further determines that no one may be evicted from their homes, nor may their homes be demolished without an order of court made after considering all the relevant circumstances. Furthermore no legislation may permit arbitrary evictions.



and to health care, food, water and social security (section 27 of the Constitution).<sup>100</sup>

### 5.3.2 Reasoning of the Constitutional Court

Socio-economic rights are unquestionably justiciable in South Africa, as construed in the *First Certification Judgment*<sup>101</sup> where the Constitutional Court said:<sup>102</sup>

[T]hese rights are, at least to some extent, justiciable. As we have..., many of the civil and political rights enshrined in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.

It is common cause that socio-economic rights are expressly included in the Bill of Rights. Section 7(2) of the Constitution requires the state to “respect, protect, promote and fulfil the rights in the Bill of Rights” and the courts are constitutionally bound to ensure that the said rights are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable, but how to enforce them in a given case. Section 38 of the Constitution empowers the Court to give "appropriate relief" for the infringement of any right entrenched in the Bill of Rights. This very difficult issue must be carefully considered on a case to case basis.<sup>103</sup>

It was held that socio-economic rights must all be read together against the background of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.<sup>104</sup>

In his judgment Yacoob J held in consideration of what is meant by reasonable legislative and other measures that the different spheres of government, namely national, provincial and local, are created under the aegis of the Constitution as indicated in Chapter 3,<sup>105</sup> which imposes the obligation on them to collaborate constructively among themselves in carrying out their constitutional tasks. Housing

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100 *Grootboom* para 19.

101 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC). (Hereafter: *First Certification Judgment*).

102 *First Certification Judgment* para 78.

103 *Grootboom* para 20.

104 *Grootboom* para 24.

105 *Grootboom* para 39.

is a function shared by both national and provincial government.<sup>106</sup> Local governments have the responsibility to ensure that services are provided in a sustainable manner to the communities they govern. Therefore, a reasonable programme must clearly allocate responsibilities and duties to the different spheres of government and ensure that the appropriate financial and human resources are available.<sup>107</sup>

Section 26 of the Constitution provides that the legislative and other measures taken by the state must be reasonable. The national government bears the overall responsibility for ensuring that the state complies with the obligations imposed upon it by section 26. Although it was conceded that the nationwide housing programme fell short of the obligations imposed upon national government and that a reasonable part of the national housing budget should be devoted to meeting the housing need, the court held that the precise allocation is for government to decide in the first place.<sup>108</sup> However, the requirement remains inescapable that every feasible step must be taken to initiate and maintain the building programme required.<sup>109</sup> The effective implementation will require proper cooperation between different spheres of government.<sup>110</sup>

### 5.3.3 Conclusion

The Constitutional Court held that the Constitution enjoins the state to act positively to improve the deplorable conditions some people are living in. Yacoob J stated that he was aware that it is a very difficult task for the state to meet these obligations in the conditions that prevail in South Africa.<sup>111</sup> This is recognised by the Constitution which provides that the state need not go beyond available resources to realise these rights immediately. However, these rights remain implacable, as does the obligation to give effect to them, hence the court must endeavour actively to enforce them.<sup>112</sup>

Yacoob J found it necessary and appropriate to make a declaratory order requiring the state to meet the obligation to devise, fund, implement and supervise

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106 Schedule 4 of the Constitution.

107 *Grootboom* para 39.

108 *Grootboom* para 66.

109 *Grootboom* para 67.

110 *Grootboom* para 68.

111 *Grootboom* para 94.

112 *Grootboom* para 94.

measures to provide relief to those in desperate need.<sup>113</sup> According to section 184(1)(c) of the Constitution the Human Rights Commission, also an *amicus curia* in this case, is obliged to monitor and assess the observance of human rights in the country. During argument, counsel for the Human Rights Commission indeed indicated that it has a duty and is also prepared to monitor and report on state compliance in this matter.<sup>114</sup> The High Court decision was set aside and the Constitutional Court declared that section 26(2) of the Constitution requires the state to implement a comprehensive and coordinated programme to provide housing in compliance with its human-rights obligation to ensure access to adequate housing. The Court further stated that the state housing programme in the Cape Metropolitan Council area fell short of compliance with the obligations imposed on it in terms of the Accelerated Managed Land Settlement Programme. More precisely, the state failed to make reasonable provision within its available resources for people in the area of the Cape Metropolitan Council "with no access to land, no roof over their heads and who were living in intolerable conditions or crisis situations".<sup>115</sup>

#### **5.4 *Minister of Health v Treatment Action Campaign***<sup>116</sup>

##### *5.4.1 Facts and litigation background*

This matter arose from an issue between the Treatment Action Campaign (TAC) and the state as to whether the state had to make nevirapine available to mothers and their newborn babies in public health facilities in certain circumstances and under certain conditions.

On 17 July 2001 the applicants placed on record that the state had decided to make nevirapine available only at a limited number of facilities for research purposes although it was offered to the state free of charge.<sup>117</sup> The Minister was asked to either provide legally valid reasons for not providing nevirapine to the public health sector as required, or to give an undertaking that the compliance sought would be forthcoming. The Minister was further requested to initiate a

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113 *Grootboom* para 96.

114 *Grootboom* para 97.

115 *Grootboom* para 99.

116 *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 5 SA 721. (Hereafter: *TAC*).

117 *TAC* para 11.

programme to enable medical practitioners in the public sector to decide whether to prescribe nevirapine for their pregnant patients and to do so as they deem fit.<sup>118</sup>

In the Minister's reply dated 6 August 2001 the said request was neither refused nor given. No plan or programme was mentioned to extend the availability of nevirapine. The reply detailed governmental concerns regarding the safety and efficacy of nevirapine.

The TAC applied to the then Pretoria High Court, alleging that the National Minister of Health as well as the Ministers of Health for all the provinces were in breach of their Constitutional obligations in failing to provide nevirapine to women outside the designated facilities. On 14 December 2001 the High Court ruled in favour of the TAC and ordered the state to make nevirapine available in all public hospitals and clinics with testing and counselling facilities. The High Court further ordered the state to implement a comprehensive programme to prevent or reduce mother-to-child transmission and to submit reports to the Court detailing the programme.

The High Court held that government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. It was also found that government had acted unreasonably in refusing to make nevirapine available.<sup>119</sup> A declaratory order was therefore issued to enjoin hospitals to provide appropriate medicines to mothers giving birth in such facilities.<sup>120</sup> This judgement had drastic budgetary implications for government, which therefore applied for leave - which was duly granted - to appeal directly to the Constitutional Court, again in terms of rule 18(e) of the Constitutional Court Rules. The object of the appeal was to reverse High Court orders made against government in consequence of charges that government had negligently or wilfully failed to meet an aspect of the HIV/AIDS challenge as required by its constitutional obligations in this regard.<sup>121</sup>

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118 TAC para 12.

119 TAC para 2.

120 TAC para 8,9.

121 TAC para 2.

#### 5.4.2 Reasoning of the Constitutional Court

The Constitutional Court held that the state was obliged in terms of section 27(2) to take reasonable measures in due course towards eliminating or reducing the large areas of severe deprivation that afflict South African society.<sup>122</sup> Section 27(2) provides that the state must take reasonable legislative and other measures, within its available resources at its disposal, to achieve the progressive realisation of rights, including the right to have access to health-care services, according to the provisions of section 27(1).<sup>123</sup> It is incumbent on the courts to safeguard democratic processes of accountability, responsiveness and openness according to section 1 of the Constitution.<sup>124</sup> The Court referred to the *Grootboom* case where it was held that: “[it] is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations”.<sup>125</sup> It was further held that courts are ill-suited to adjudicate matters where court orders could have any number of socio-economic consequences for the community.<sup>126</sup> The Constitution contemplates rather a restrained and focused role for the court, namely, to require that the state adopt suitable measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may sometimes have budgetary implications, but are not in themselves directed at manipulating budgetary dispensations. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.<sup>127</sup>

The Constitutional Court specifically held that in the present case under review it had the bounden duty to determine whether the measures taken in respect of the prevention of mother-to-child transmission of HIV were reasonable.<sup>128</sup>

Counsel for the state contended that the duty of the Constitutional Court in the matter extended only to the issuance of a declaratory order.<sup>129</sup> The Court replied as follows:<sup>130</sup>

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122 TAC para 36.

123 The other rights embodied in section 27 provide for adequate supplies of food and water, as well as social security, including appropriate social assistance if people are unable to support themselves and their dependants.

124 TAC para 36.

125 *Grootboom* para 41.

126 TAC para 38.

127 TAC para 38.

128 TAC para 93.

We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction.

It was further held that South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How these powers should be exercised depends on the circumstances prevailing in each particular case. Due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when appropriate or demanded by circumstances courts may, or may even find themselves constrained to use their wide powers to make orders that affect policy as well as legislation. It was held that the policies adopted by the state in respect of nevirapine provision to mothers who gave birth in private hospitals, failed to meet constitutional standards.<sup>131</sup>

#### 5.4.3 Conclusion

The state was ordered to remove the restrictions that prevent nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics were not research and training facilities.<sup>132</sup> The use of nevirapine to reduce the risk of mother-to-child transmission of HIV had to be permitted and facilitated in cases where the measure was supported by professional medical opinion. This process shall include appropriate testing and counselling if need be.<sup>133</sup> The state was further ordered to make provision for counsellors if necessary, who will be based at public hospitals and clinics other than the research and training facilities.<sup>134</sup> Reasonable measures had to be taken to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite

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129 TAC para 96.

130 TAC para 106.

131 TAC para 125.

132 TAC para 135.

133 TAC para 135.

134 TAC para 135.

the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.<sup>135</sup>

## **5.5 *United Democratic Movement v President of the Republic of South Africa***<sup>136</sup>

### **5.5.1 *Facts and litigation background***

A month after South Africa's national and provincial elections in 1999, three opposition parties, the Democratic Party (DP), the Federal Alliance (FA) and the New National Party (NNP) formed a new party - the Democratic Alliance (DA).<sup>137</sup> However, as members of Parliament and the provincial legislatures were not allowed to change parties without losing their seats, the representatives of the DP, the FA and the NNP continued to represent their original parties in Parliament and the provincial legislatures, even though they operated in alliance.<sup>138</sup> However, in the municipal election held in October 2000 the DP, FA and NNP participated as a single party.

A political realignment took place in November 2001 and the NNP withdrew from the DA. As noted, however, the problem was that local government representatives who wanted to leave the DA as a result of the split were unable to do so without losing their seats.<sup>139</sup>

In June 2002 Parliament passed four acts aimed at allowing members of the national, provincial and local legislatures to change parties without losing their seats; consequently Parliament tabled two constitutional amendments and two supporting statutes to enable the envisaged procedure.<sup>140</sup> Although floor crossing was expressly prohibited by the Constitution,<sup>141</sup> a sub-clause nevertheless stipulated amendment of the Constitution by ordinary legislation to allow members of the national and provincial legislatures to change parties, provided that the

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135 TAC para 135.

136 *United Democratic Movement v President of the Republic of South Africa* 2003 1 SALR 495 (CC). (Hereafter: UDM)

137 UDM para 1.

138 UDM para 1.

139 UDM para 2.

140 UDM para 2, 3.

141 Section 46(1), read with item 23A of Annexure A to Schedule 6 of the 1996 Constitution.

intended measures were carried out within a reasonable period after promulgation of the new Constitution.<sup>142</sup>

The four acts of parliament were the following:<sup>143</sup>

1. The *Constitution of the Republic of South Africa Amendment Act* (Act 18 of 2002 - the *First Amendment Act*), which established limited exceptions to the rule that a municipal councillor who ceased to be a member of the party that nominated him or her lost his/her seat in doing so.
2. The *Constitution of the Republic of South Africa Second Amendment Act* (Act 21 of 2002 - the *Second Amendment Act*), which complements the Membership Act in that it allows the composition of provincial delegations to the National Council of Provinces to be altered if the change is attributable to floor crossing, party splits or party mergers.
3. The *Local Government: Municipal Structures Amendment Act* (Act 20 of 2002 - the *Local Government Amendment Act*), which complements the First Amendment Act by removing references to the bar on floor crossing and making provision for various aspects of local government to accommodate the new system of limited floor crossing.
4. The *Loss or Retention of Membership of National and Provincial Legislatures Act* (Act 22 of 2002 - the *Membership Act*), which removed the former prohibition and enabled a limited system of floor crossing.

The United Democratic Movement (UDM) confronted the above-mentioned legislation tabled by Parliament with an urgent challenge in the Cape High Court. A full bench of the Court suspended the commencement and/or operation of the Acts pending the decision of the Constitutional Court on the application by the UDM to have the Acts declared invalid and unconstitutional.<sup>144</sup>

### 5.5.2 Reasoning of the Constitutional Court

It was beyond dispute that both the *First Amendment Act* and the *Second Amendment Act* were passed in accordance with the special majority prescribed

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<sup>142</sup> UDM para 3.

<sup>143</sup> UDM para 4.

<sup>144</sup> UDM para 8.



by section 74(3) of the Constitution.<sup>145</sup> The point at issue to prove constitutionality, however, was whether the provisions contained within the enactments concerned fell within the embrace of section 74(3), failing which their constitutionality might well be challenged successfully.<sup>146</sup>

The Court reasoned that its brief in the matter was not to decide whether the disputed provisions were appropriate or inappropriate, but whether they were constitutional or unconstitutional,<sup>147</sup> and in addition, what the effect of the disputed legislation was likely to be.<sup>148</sup> It reiterated that the Constitution requires legislation to be rationally related to a legitimate government purpose, failing which it would be inconsistent with the rule of law, and therefore invalid.<sup>149</sup>

Three grounds were relied upon to contend that the amendments did not fall within the scope of section 74(3).<sup>150</sup> Firstly, that the amendments undermined the basic structure of the Constitution and were not sanctioned by any of the provisions of section 74; secondly, that the amendments were inconsistent with the founding values of the Constitution as set out in section 1; and thirdly that the amendments were inconsistent with the voters' rights as vested in citizens in virtue of section 19(3) of the Bill of Rights, which can only be amended in accordance with the provisions of section 74(2). According to section 19(3) every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution. These arguments were also relied upon to challenge the constitutionality of the *Local Government Amendment Act* and the *Membership Act*.

The further contention was that the two constitutional amendments were inconsistent with the founding values of the Constitution in that their provisions, as

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145 According to section 74(3) a provision of the Constitution may be amended by a bill passed by the National Assembly, with a supporting vote of at least two-thirds of its members. It may also be amended by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment relates to a matter that affects the Council, is intended to alter provincial boundaries, powers, functions or institutions; or is intended to amend a provision that deals specifically with a provincial matter.

146 UDM para 13.

147 UDM para 11.

148 UDM para 26.

149 UDM para 50. *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) paras 84-85; *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 3 SA 191 (CC) para 24.

150 UDM para 14.

well as those of the *Membership Act* and the *Local Government Amendment Act*, were inconsistent with a democratic government and the rule of law, and that they were passed in contravention of the provisions of section 74(1) of the Constitution and, in fact did not serve a legitimate government purpose but, rather than to introduce a fair electoral system, were intended to serve the interests of the ruling party, besides which the provisions of the *Membership Act* were considered irrational.<sup>151</sup>

The Court reiterated that according to the provisions of the Constitution the validity of legislation was dependent on clear evidence that it was rationally related to a legitimate government purpose, failing which it would be invalid and inconsistent with the rule of law;<sup>152</sup> moreover on this point the Court held that it cannot be said that the amendments to the legislation or the purpose thereof, are irrational or inconsistent with the founding values of the Constitution and the Bill of Rights.<sup>153</sup> The court held that the retention and loss of membership is indeed a legitimate purpose in respect of which Parliament has the power to legislate and pass constitutional amendments.<sup>154</sup>

In terms of item 23A(3) of Schedule 2 of the Constitution Parliament has the authority to pass legislation to make it "possible for a member of the legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature." This legislation, however, has to be passed "within a reasonable period after the Constitution took effect." It was held that whatever the reason for the restriction to a "reasonable" period dating from proclamation of the Constitution, it did constrain Parliament to act accordingly.<sup>155</sup> The amendments were passed in June 2002, which was approximately five years after the effective date of the Constitution. This time lapse was considered beyond the bounds of a "reasonable" period, which effectively rendered the amendments invalid.<sup>156</sup> In this regard the court stated:

In determining what is a reasonable period within which such legislation could be passed, it is necessary to have regard to all relevant facts and circumstances. The relevant considerations depend in the first instance

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151 *UDM* para 20 and 22.

152 *UDM* para 55; *NNP* para 24.

153 *UDM* para 74 and 75.

154 *UDM* para 58.

155 *UDM* para 101.

156 *UDM* para 105, 109.

upon the nature of the task that has to be performed, and in the second instance upon the object for which the time is given. Here the task to be performed was the passing of legislation to modify transitional provisions that had a limited life. Although regard must be had to the difficulties confronting a young Parliament faced with the need to transform many of the laws of the country and bring them into line with the political changes which have taken place since 1994, there is nothing to suggest that this was the reason for the delay in amending Item 23A. Having regard to all the circumstances, we are unable to conclude that an amendment passed more than five years after the Constitution came into force, to change a provision which had only another two years to run, was passed within a reasonable period.<sup>157</sup>

### 5.5.3 Conclusion

The Court concluded that the objection to the validity of the *Membership Act* had to be upheld, but that the other objections had to be dismissed as they were considered consistent with the Constitution.<sup>158</sup> The Court referred to section 172(1) of the Constitution and reiterated as stated in *Fose v Minister of Safety and Security*<sup>159</sup> that it may be necessary for courts to fashion orders to ensure that effect is given to constitutional rights, and that a pressing consideration when making orders affecting constitutional matters was<sup>160</sup>

...the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy...in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature. Whether, and to what extent, a court may interfere with the language of a statute will depend ultimately on the correct construction to be placed on the Constitution as applied to the legislation and facts involved in each case.<sup>161</sup>

The Court held that similar considerations apply in the present case where the nature of a just and equitable order must be decided in circumstances where constitutional challenges have failed. This conclusion was deemed a necessary consequence as the eventuality warned against in the above citation had occurred in that the said interim orders did in fact obtrude onto the field reserved by the Constitution for the legislature. The Court decided that it would be just and

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157 *UDM* para 105.

158 *UDM* para 114.

159 1997 3 SA 786 (CC); 1997 7 BCLR 851 (CC) at para 19.

160 *UDM* para 155.

161 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) para 66.

equitable to allow a window period of fifteen days to enable floor crossing in the local government sphere.<sup>162</sup>

## **5.6 *President of the Republic of South Africa and Another v Modderklip Boerdery***<sup>163</sup>

### *5.6.1 Facts and litigation background*

Modderklip is a farm adjoining the Daveyton Township in Benoni on the East Rand. During the 1990s, residents began to settle on the strip of land between the township and Modderklip farm because of overcrowded conditions in the township. The strip became known as the Chris Hani informal settlement. The Municipality evicted the residents of the Chris Hani settlement and in May 2000 about 400 of them moved onto Modderklip farm where around 50 informal dwellings were then erected.<sup>164</sup>

The Benoni City Council alerted Modderklip Boerdery (Pty) Ltd (Modderklip) in that time of the unlawful occupation of its land and gave it notice in terms of section 6(4) of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land* 19 of 1998 requiring it to institute eviction proceedings against the unlawful occupiers. Modderklip refused to institute eviction proceedings as it considered Benoni City Council to be responsible for the eviction in question. Modderklip intimated, however, that it would cooperate with the City Council to the extent required to take steps to evict the unlawful occupiers. The City Council neither responded to the communication from Modderklip, nor took the steps suggested by Modderklip.<sup>165</sup>

Modderklip laid charges of trespass against the occupiers. Those convicted were given warnings by the court and were released, only to go back to the farm and resume occupation.<sup>166</sup> Modderklip continued to search for ways to resolve the problem, for example by seeking assistance from several organs of state, but to no avail.<sup>167</sup> In October 2000 Modderklip applied to the then Johannesburg High Court

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162 *UDM* para 117.

163 *President of the Republic of South Africa and Another v Modderklip Boerdery* 2005 5 SA 3 (CC). (Hereafter: *Modderklip*.)

164 *Modderklip* para 3.

165 *Modderklip* para 4.

166 *Modderklip* para 5.

167 *Modderklip* para 6.

for an eviction order that was granted in April 2001, giving the occupiers two months to vacate the farm.<sup>168</sup> Compliance was not forthcoming, however, nor was an appeal lodged against it at that stage. In the meantime the number of occupiers advanced to a figure of approximately 40 000 of whom about a third were alleged to be illegal immigrants. At that stage the extent of illegal occupation amounted to about 50 hectares of Modderklip's property.<sup>169</sup>

After the High Court order a writ of execution was issued at Modderklip's instance. However, the sheriff indicated that she would need a R1.8 million deposit to secure the costs of the evictions. Modderklip refused to pay this amount as it far exceeded the value that could reasonably be attached to the occupied land. Modderklip then approached the President and the Ministers of Safety and Security, of Agriculture and Land Affairs, and of Housing, respectively, but to no avail. A request to the police to enforce the eviction went unheeded because that agency regarded the matter as a private civil dispute between Modderklip and the occupiers. At this stage Modderklip approached the Pretoria High Court as it was in possession of an eviction order that it could not execute.<sup>170</sup>

In the Pretoria High Court, the essence of the relief sought was that the state should be ordered to enforce the eviction order.<sup>171</sup> The High Court declared that Modderklip's property rights under section 25(1) of the Constitution had been violated by the illegal occupation and the failure of the occupiers to comply with the eviction order.<sup>172</sup> Section 25 of the Constitution provides that no one may be deprived of property except in terms of law of general application, and that no law may permit the arbitrary deprivation of property.

According to the High Court the state had breached its obligations in terms of section 26(1) and 26(2), together with section 25(5) of the Constitution which provides that access to adequate housing is a universal right, and that it is incumbent on the state to take reasonable legislative and other measures, within the ambit of its resources, to achieve progressive realisation of this right. The state's non-compliance with its legal obligations in this regard amounted to

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168 *Modderklip* para 7.

169 *Modderklip* para 8.

170 *Modderklip* para 9.

171 *Modderklip* para 11.

172 *Modderklip* para 15.

unlawful expropriation of Modderklip's property and also infringed Modderklip's rights to equality in terms of the provisions of section 9 of the Constitution, in that it caused Modderklip to bear the burden of providing accommodation for the occupiers, a function that is clearly incumbent on the state.<sup>173</sup> The High Court imposed a structural interdict requiring the state to present a comprehensive plan to the Court and to the other parties indicating the steps it would take to implement the court order. It was against this judgment and order that the state applied for leave to appeal to the Supreme Court of Appeal.<sup>174</sup>

In general, the Supreme Court of Appeal agreed with the findings of the Pretoria High Court, especially that Modderklip's rights to property and the rights of the occupiers to have access to adequate housing had been infringed.<sup>175</sup> The state's objection to these findings was the subject of its appeal to the Constitutional Court.

#### 5.6.2 *Reasoning of the Constitutional Court*

The Constitutional Court contended that the state, and the state alone, held the key to the solution of Modderklip's problem, and that there was no possibility that the eviction order issued by the Johannesburg High Court could be carried out unless the state took an active part in it.<sup>176</sup> As regards sections 25 and 26 of the Constitution, the Court held unanimously that besides the provision of mechanisms and institutions with which to enforce rights,<sup>177</sup> the state's further obligation is to take reasonable steps to the extent of its capacity to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, hence undermining the rule of law.<sup>178</sup> The Court held that it was unreasonable for a private entity like Modderklip to be placed in the quandary of having to bear a burden that should be borne by the state,<sup>179</sup> and that the conclusion that followed inevitably from the state's failure to act appropriately in circumstances where the private rights of a single property owner were infringed at the risk of disrupting the public peace and stability was that Modderklip, and others in Modderklip's position, would have to rule out the possibility of relying on

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173 *Modderklip* para 15.

174 *Modderklip* para 16.

175 *Modderklip* para 18.

176 *Modderklip* para 42.

177 *Modderklip* para 43.

178 *Modderklip* para 43.

179 *Modderklip* para 45.

the state and its organs to protect them from invasions of their property. This could be a recipe for anarchy.<sup>180</sup>

The circumstances of this case should have made it obvious to the state that the normal mechanisms employed to execute an eviction order could not be relied upon. There were tens of thousands of people with nowhere to go. To execute the order and evict all the people "would cause unimaginable social chaos and misery and untold disruption".<sup>181</sup> It would also be inconsistent with the rule of law.<sup>182</sup> The Court asked whether the state had an obligation in these circumstances to do more than it had done to satisfy the requirements of the rule of law. It concluded that it was indeed unreasonable of the state to stand by and do nothing in the present circumstances where Modderklip could do nothing more to evict the occupiers.<sup>183</sup>

The Court recognised the difficulty of those charged with the provision of housing. But the state is constitutionally obliged to progressively ensure access to housing or land for the homeless. Progressive realisation of access to adequate housing, as provided for in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital.<sup>184</sup> According to the Court, no acceptable reason was provided for the failure by the state to assist Modderklip.<sup>185</sup> In terms of section 34 of the Constitution the state was obliged to take reasonable steps to ensure that Modderklip received effective relief,<sup>186</sup> including resolution of any dispute in a fair public hearing before a court of law or, where appropriate, another independent and impartial tribunal or forum. The Court held that the state could have expropriated the property, as offered by Modderklip, or could have provided other land. The state, however, failed to do anything and accordingly breached Modderklip's constitutional rights to an effective remedy as required by the rule of law and section 34 of the Constitution.<sup>187</sup>

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180 *Modderklip* para 45.

181 *Modderklip* para 47.

182 *Modderklip* para 47.

183 *Modderklip* para 48.

184 *Modderklip* para 49.

185 *Modderklip* para 50.

186 *Modderklip* para 51.

187 Section 1(c) provides that the rule of law is a founding value of our Constitution.

### 5.6.3 Conclusion

The Court held that Modderklip's entrenched right under section 34 of the Constitution, read with section 1(c) of the Constitution was infringed by the state's failure to provide an appropriate mechanism to carry out the eviction ordered by the Johannesburg High Court.<sup>188</sup> It declared further that Modderklip was entitled to payment of compensation by the Department of Agriculture and Land Affairs for damages incurred as a result of the illegal occupation, and that the occupiers were entitled to occupy the land until alternative land had been made available to them by the state or other authorities.<sup>189</sup>

## 5.7 *Kaunda and Others v President of the Republic of South Africa*<sup>190</sup>

### 5.7.1 Facts

The applicants in this matter were sixty nine South African citizens who were held in Zimbabwe on a variety of charges. The respondents were the President of the Republic of South Africa, various cabinet ministers and the Director of Public Prosecutions. The applicants were arrested in Zimbabwe on 9 March 2004. A group of 15 men were arrested in Equatorial Guinea and accused of being mercenaries and plotting a coup against the President of Equatorial Guinea. The majority of detainees are South African nationals. The applicants feared that they would be extradited from Zimbabwe to Equatorial Guinea and put on trial. They contended that if this happened, they would not get a fair trial and, if convicted, stand the risk of being sentenced to death.<sup>191</sup>

According to the applicants, they were employed to act as security guards in the Democratic Republic of the Congo (DRC) for a company conducting mining operations. Mines in the DRC were subject to attacks by rebel armies and therefore required protection. The applicants boarded a plane in South Africa to fulfil their contracts to act as security guards in the DRC. According to the applicants, their plane was to refuel at Harare, pick up cargo and then fly to its final destination, the DRC. The applicants were, however, arrested at Harare airport

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188 *Modderklip* para 68.

189 *Modderklip* para 68.

190 *Kaunda and Others v President of the Republic of South Africa* 2006 4 SA 235 (CC). (Hereafter: *Kaunda*)

191 *Kaunda* paras 1, 2.



before the cargo had been loaded.<sup>192</sup> Serious allegations were made about the conditions in which the applicants were held since their arrest.<sup>193</sup>

In the High Court of Pretoria the applicants sought orders aimed at compelling the government to make representations on their behalf to the governments of Zimbabwe and Equatorial Guinea, and to take steps to ensure that their rights to dignity, freedom and security of the person and fair conditions of detention and trial are respected and protected in Zimbabwe and Equatorial Guinea. The application was dismissed whereupon the applicants lodged an urgent application with the Constitutional Court to appeal directly against the decision of the High Court.

#### 5.7.2 *Reasoning of the Constitutional Court*

The primary aim of the applicants was to avoid being extradited to Equatorial Guinea and being tried in Zimbabwe or Equatorial Guinea. The applicant's first claim was to require the South African government to take steps to have them extradited to South Africa so that any trial they might face could be conducted in South Africa. Their other claims were directed to their conditions of detention and to trial procedures should they be put on trial in Zimbabwe or Equatorial Guinea.<sup>194</sup>

The question raised by the applicant's first claim was whether the Constitution bounded the state to protect the applicants in relation to: the complaints they had regarding their conditions of detention in Zimbabwe, the prosecution faced there, as well as the possibility of them being extradited to Equatorial Guinea and sentenced to death if found guilty on charges faced. These issues, according to the Constitutional Court, involved the reach of the Constitution and the relationship between the judiciary and the executive and the separation of powers between them.<sup>195</sup>

The applicants demanded from the South African government to seek assurances from the governments of Zimbabwe and Equatorial Guinea regarding prosecutions or contemplated prosecutions in those countries. The applicants contended that the Constitutional right they had entitled them to make these demands. By failing

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<sup>192</sup> *Kaunda* para 9, 10.

<sup>193</sup> *Kaunda* para 12.

<sup>194</sup> *Kaunda* para 17.

<sup>195</sup> *Kaunda* para 19.

to comply with the demands the South African government breached the applicants' constitutional rights.<sup>196</sup>

The Constitutional Court held that the issues raised by the applicants involved the relationship between South Africa and Zimbabwe and Equatorial Guinea as well as the nature and extent of South Africa's obligations to citizens beyond its borders.<sup>197</sup>

Traditionally, international law acknowledges that states have the right to protect their nationals beyond their borders, but are under no obligation to do so. This principle was relied upon by the respondent's counsel to support its contention that the applicants' claims are misconceived.<sup>198</sup> According to the Constitutional Court, the respondent's argument came down to this: the applicants approached the government for assistance and not the courts. If this is done, the government will consider their requests, however, the government is the sole judge of what should be done in any given case and when and in what manner assistance that is given should be provided.<sup>199</sup>

The nature and scope of diplomatic protection has been the subject of investigations by the International Law Commission.<sup>200</sup> While it has been suggested that the traditional approach to diplomatic protection should be developed to recognise in certain circumstances that a state should have a legal duty to exercise diplomatic protection on behalf of the injured person, currently the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such.<sup>201</sup>

The Constitutional Court then considered the question whether, according to South African law, the applicants have a right to diplomatic protection from the

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196 *Kaunda* para 21.

197 *Kaunda* para 22.

198 *Kaunda* para 23.

199 *Kaunda* para 24.

200 This was requested in 1996 by the General Assembly of the United Nations to undertake this task. Special Rapporteurs and working groups were involved in the investigations the outcome of which is referred to in reports of the International Law Commission. The report dealing with issues relevant to the Kaunda matter is the report published in 2000, Report of the International Law Commission on the work of its fifty-second session, 1 May to 9 June and 10 July to 18 August (2000) A/55/10 (ILC report). *Kaunda* para 25.

201 *Kaunda* para 28, 29.

state, and can require it to come to their assistance in Zimbabwe or Equatorial Guinea if they are extradited to that country.<sup>202</sup>

Counsel for the applicants contended that their Constitutional rights to dignity, life, freedom and security of the person, including the right not to be treated or punished in a cruel, inhuman or degrading way, and the to a fair trial,<sup>203</sup> are being infringed in Zimbabwe and are likely to be infringed if they were to be extradited to Equatorial Guinea.<sup>204</sup> Section 7(2) of the Constitution was relied on, where the state is required to "respect, protect, promote, and fulfil the rights in the Bill of Rights". It was contended that it was the South African government's obligation to protect the above rights of the applicants, and the only way it can do so in the circumstances is to provide them with diplomatic protection.<sup>205</sup>

The Constitutional Court accepted that the state has a positive obligation to comply with the provision of section 7(2). But, the Constitutional Court held that this does not mean that the rights of the nationals under the Constitution accrue to them when they are outside of South Africa, or that the state has an obligation under section 7(2) to "respect, protect, promote, and fulfil" the rights in the Bill of Rights which extends beyond its borders. The CC held that:

There may be special circumstances where the laws of a state are applicable to nationals beyond the state's borders, but only if the application of the law does not interfere with the sovereignty of other states. For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state's own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty. Section 7(2) should not be construed as imposing a positive obligation on government to do this.<sup>206</sup>

Section 3 of the Constitution provides the following:

- (1) There is a common South African citizenship.
- (2) All citizens are —
  - (a) equally entitled to the rights, privileges and benefits of citizenship; and

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202 *Kaunda* para 30.

203 Sections 10, 11, 12 and 35 respectively.

204 *Kaunda* para 31.

205 *Kaunda* para 32.

206 *Kaunda* para 44.

(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.”

The Constitutional Court held that whilst there is no enforceable right to diplomatic protection, South African citizens are entitled to request South Africa for protection under international law against wrongful acts of a foreign state.<sup>207</sup> This entitlement to request diplomatic protection has certain consequences. If citizens have a right to request government to provide them with diplomatic protection, then government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution.<sup>208</sup> However, the Court held that this is a terrain in which courts must exercise discretion and recognise that government is better placed than they are to deal with such matters.<sup>209</sup>

There may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in these circumstances where evidence is clear it would be difficult, and in extreme cases impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court could order the government to take appropriate action.<sup>210</sup> According to the Constitutional Court, a court cannot tell the government how to make diplomatic interventions for the protection of its nationals.<sup>211</sup>

The Constitutional Court held that a decision as to whether, and if so, what protection should be given, is an aspect of foreign policy which is essentially the function of the executive. The Court stated:

The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than

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207 *Kaunda* para 60.

208 *Fedsure* para 56.

209 *Kaunda* para 67.

210 *Kaunda* para 70.

211 *Kaunda* para 73.

judges, and which could be harmed by court proceedings and the attendant publicity.<sup>212</sup>

The Court also held that this does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection. The exercise of all public power is subject to constitutional control.<sup>213</sup> If a decision was irrational, a court could intervene, but this does not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection.<sup>214</sup> If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. The Constitutional Court made it clear that there may possibly be other grounds as well and these illustrations should not be understood as a closed list.<sup>215</sup> The Court further held that in light of some of the submissions made in this matter, government has a broad discretion in such matters which must be respected by the courts.<sup>216</sup>

### 5.7.3 Conclusion

After engaging with each of the applicants' claims, the Court dismissed the applicant's appeal and confirmed the decision of the High Court.<sup>217</sup> The South African government did have an obligation to cooperate with Zimbabwe and Equatorial Guinea in the prevention and combating of crime, but is under no obligation to apply for the extradition of the applicants from Zimbabwe.

South African nationals are entitled to request the South African government to provide protection against acts which violate accepted norms of international law and the government is obliged to consider such requests and deal with them appropriately.<sup>218</sup> Decisions made by the government in these matters are subject to constitutional control, but courts required to deal with such matters will give particular weight to the government's special responsibility for and particular

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212 *Kaunda* para 77.

213 *Kaunda* para 78.

214 *Kaunda* para 79.

215 *Kaunda* para 80.

216 *Kaunda* para 81.

217 *Kaunda* para 144.

218 *Kaunda* para 144.

expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters.<sup>219</sup>

It was not disputed that requests for assistance by the applicants to the South African High Commission have been taken up, and that the South African High Commission made representations to the Zimbabwean authorities about the applicants being assaulted, humiliated, abused, and denied proper access to their lawyers. How to respond to these events which have taken place requires great sensitivity, calling for government evaluation and expertise. The Court held that it would not be appropriate in the circumstances of this case for the Court to require or propose any approach with regard to timing or modalities different to that adopted by government. The applicants have also failed to establish that the government's response to requests for assistance is inconsistent with international law or the Constitution.<sup>220</sup>

In a separate, concurring judgment, Ngcobo J held that section 3(2)(a), read with section 7(2) of the Constitution, the government does have a duty to provide diplomatic protection to South African nationals abroad. This duty arises from section 3(2)(a) which provides that all South African nationals are equally entitled to the rights, benefits and privileges of citizenship. According to this judgment, a compelling argument can be made for the proposition that states have, not only a right but, a legal obligation to protect their nationals abroad against an egregious violation of their human rights.<sup>221</sup>

In a dissenting judgment, O'Regan J, (Mokgoro J concurring) held that there is a duty, in terms of section 3(2) of the Constitution, for the state to provide diplomatic protection to its nationals in order to prevent the violation of their fundamental human rights under international law. O'Regan J held that because the duty can only be carried out by the government in its conduct in foreign relations, the executive must be afforded considerable latitude to determine how the duty ought to be carried out.<sup>222</sup> O'Regan J held that given the ample evidence that the applicants may be extradited to Equatorial Guinea and the real risk of receiving an unfair trial which might result in a death sentence, it would be appropriate to issue

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219 *Kaunda* para 144.

220 *Kaunda* para 144.

221 *Kaunda* para 169.

222 *Kaunda* para 244.

a declaratory order holding that the government is under a duty to afford diplomatic protection to the applicants to protect them from egregious violations of international law.<sup>223</sup>

While Sachs J concurred in the main judgment and the order made, he also agrees with the additional points in substance in the separate judgments. He held that it would be a strange interpretation of the Constitution that suggested that adherence by the government, in any of its activities, to the foundational human rights norms of international law that led to the creation of a democratic South Africa, was merely an option and not a duty.<sup>224</sup> According to Sachs J, this matter does not require a declarator concerning the government's obligations. He held that the government has a clear and unambiguous duty to do whatever is reasonably within its power to prevent South Africans abroad, however grave their alleged offences, from being subjected to torture, grossly unfair trials and capital punishment. He further held that, at the same time, government must have an extremely wide discretion as to how best to provide what diplomatic protection it can offer.<sup>225</sup>

## **5.8 *Mazibuko & Others v City of Johannesburg & Others***<sup>226</sup>

### *5.8.1 Facts and litigation background*

The applicants in this case were five residents of the Phiri neighbourhood in Soweto and the respondents the City of Johannesburg (the City) and Johannesburg Water (Pty) Ltd (Johannesburg Water).<sup>227</sup> The case revolved around two major issues: first, whether the City's policy in relation to the supply of free basic water to the extent of six kilolitres per month to every account holder in the city (the Free Basic Water Policy) was in conflict with section 27 of the Constitution or section 11 of the *Water Services Act* 108 of 1997. Second, whether the installation of prepaid water meters by the respondents in Phiri was unlawful.<sup>228</sup>

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223 *Kaunda* para 269.

224 *Kaunda* para 274.

225 *Kaunda* para 275.

226 *Mazibuko & Others v City of Johannesburg & Others* 2010 4 SA 1 (CC). (Hereafter: *Mazibuko*)

227 *Mazibuko* para 4 and 5.

228 *Mazibuko* para 6.

Johannesburg Water estimated that between one quarter and one third of all the water it purchased was distributed to Soweto, but that only one percent of revenue was generated from Soweto. One of the reasons for this was that many of the residents in Soweto did not pay their consumption charges. It held further that an estimated 75 percent of all water pumped into Soweto was unaccounted for.<sup>229</sup> It was therefore decided that a plan needed to be developed to change the pattern of water usage in Soweto.<sup>230</sup>

The goals set for the plan were to reduce unaccounted water usage, to rehabilitate the water network, to reduce water demand, and to improve the rate of payment.<sup>231</sup> The previous system of deemed consumption charges was to be abandoned. There were three levels of service provision. Service Level 1 included a tap within 200 metres of each dwelling. Service Level 2 consisted in providing a tap in the yard of a household which has restricted water flow so that only 6 kilolitres of water are available monthly. Service Level 3 consisted in a metered connection. The choice available to residents was Service Level 2 or a prepaid meter, but the first applicant claimed that this choice had not been offered to her.<sup>232</sup>

The project was approved by the City in May 2003 and implemented in Phiri from February 2004. Community facilitators were appointed to conduct house visits and explain the project and its implications carefully to every household.<sup>233</sup> It was evident from the applicant's case that the project was not without problems. On being visited by a community facilitator Mrs Mazibuko, the first applicant, was told that a prepaid meter would be installed at her premises. She refused the meter and was allegedly not informed of the option of a yard tap. The water supply was cut off from the end of March and only reconnected in October when she applied for a prepaid meter.<sup>234</sup>

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229 *Mazibuko* para 12.

230 *Mazibuko* para 13.

231 *Mazibuko* para 13.

232 *Mazibuko* para 14.

233 *Mazibuko* para 15.

234 *Mazibuko* para 16.



The City stated that it had only cut off the water supply of residents who refused a prepaid meter as well as a yard tap, and that seven days' notice had been given of the intention to cut the water supply.<sup>235</sup>

Section 27(1)(b) provides that everyone has the right to have access to sufficient food and water. Section 27(2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights provided for in section 27.<sup>236</sup>

The *Water Services Act* was passed to regulate the right of access to water and the state's obligations in this regard. Section 3 of the *Water Services Act* provides the following:

- (1) Everyone has a right of access to basic water supply and basic sanitation.
- (2) Every water services institution must take reasonable measures to realise these rights.
- (3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.
- (4) The rights mentioned in this section are subject to the limitations contained in this Act.

The definition of "basic water supply" provided in section 1 of the *Water Service Act* states that "'basic water supply' means the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene".

The National Water Standards Regulations relating to compulsory national standards and measures was published by the Minister in terms of section 9 of the *Water Services Act*.<sup>237</sup> Regulation 3 provides the following:

The minimum standard for basic water supply services is—

- (a) the provision of appropriate education in respect of effective water use; and
- (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month—

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<sup>235</sup> *Mazibuko* para 17.

<sup>236</sup> *Mazibuko* para 19.

<sup>237</sup> Regulations relating to compulsory national standards and measures to conserve water, *Government Gazette*, Gazette No 22355, Notice R509 of 2001 (8 June 2001) published in terms of section 9 of the *Water Services Act* 108 of 1997).

- (i) at a minimum flow rate of not less than 10 litres per minute;
- (ii) within 200 metres of a household; and
- (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

In 2006 an application was lodged in the High Court on grounds that the City's policy of supplying six kilolitres of free water to each household in the City did not conform to the requirements contained in section 27 of the Constitution, and that the installation of prepaid meters was unlawful.<sup>238</sup>

The High Court handed down judgment in favour of the applicants and held that the introduction of prepaid meters constituted administrative action<sup>239</sup> and the installation was unlawful because no provision for it was contained in the City's Water Services bylaws.<sup>240</sup> As the prepaid meters halt water supply once the free basic supply has been exhausted and until the resident purchases credit, the High Court held that the prepaid meters gave rise to the unlawful and unreasonable discontinuation of the supply of water.<sup>241</sup> It was further contended that the prepaid system was discriminatory in that Soweto residents were not given the option of accepting the credit meters provided by the City to residents in other areas.<sup>242</sup> The High Court held that the procedure followed by the City to install the meters was unlawful and unfair, and the City's Free Basic Water policy, together with its policy on indigent residents, was irrational and unreasonable.<sup>243</sup> The City was ordered to furnish the applicants and all similarly placed residents of Phiri with a free basic water supply of 50 litres per person per day.<sup>244</sup>

The respondents took their suit to the Supreme Court of Appeal,<sup>245</sup> which held unanimously that because the City's policy had been informed by the misconception that it was not obliged to comply with the requirement imposed according to regulation 3(b), namely to provide the minimum free amount to those who could not afford to pay, the policy had been influenced by a material error of

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238 *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae)* 2008 4 All SA 471 (W). (Hereafter: *Mazibuko* High Court judgment).

239 *Mazibuko* High Court judgment para 63-70.

240 *Mazibuko* High Court judgment para 82.

241 *Mazibuko* High Court judgment para 92 and 93.

242 *Mazibuko* High Court judgment para 94 and 155.

243 *Mazibuko* High Court judgment para 150.

244 *Mazibuko* High Court judgment para 183.5.1.

245 *Mazibuko* para 28.

law and should be set aside.<sup>246</sup> The Supreme Court of Appeal determined that the quantity of water required for dignified human existence in compliance with section 27 of the Constitution was 42 litres per day.<sup>247</sup> The formulation of the water policy was referred back to the City to be revised in light of the previous determination.<sup>248</sup> The Supreme Court of Appeal held that the city had no authority in law to install the prepaid meters, and that the cut-off occurring on exhaustion of the free allowance constituted an unlawful discontinuation.<sup>249</sup> The Supreme Court of Appeal declared the installation of the prepaid meters unlawful but suspended the order for two years to give the City an opportunity to rectify the situation by amending its bylaws.<sup>250</sup>

The applicants appealed to the Constitutional Court. They wanted the High Court order reinstated and appealed against suspension of the Appeal Court Order.<sup>251</sup> The respondents did not oppose the application for leave to appeal, but when the Constitutional Court granted leave to appeal the respondents applied conditionally for leave to cross appeal. The respondents applied for leave to appeal the Appeal Court order which reviewed and set aside the City's Free Basic Water policy as unlawful, as well as the declaration that 42 litres of water per person per day would constitute "sufficient water" within the meaning of section 27(1) of the Constitution. They also sought leave to appeal conditionally against the Appeal Court order declaring prepaid meters unlawful, as well as the order requiring the respondents to pay, jointly and severally, the costs of the application and of the legal team.<sup>252</sup> Further, since the papers in that case had been finalised, the respondents also asked for leave to tender new evidence relating to changes in the water policy.<sup>253</sup>

It was held that the applicants' request for leave to appeal, as well as the respondents' request for leave to cross appeal, should be granted. The request to submit new evidence was denied.<sup>254</sup>

### 5.8.2 Reasoning of the Constitutional Court

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246 *City of Johannesburg and Others v Mazibuko and Others (Centre on Housing Rights and Evictions as amicus curiae)* 2009 3 SA 592 (SCA). (Hereafter: *Mazibuko SCA judgment*).

247 *Mazibuko SCA judgment* para 24.

248 *Mazibuko SCA judgment* para 43.

249 *Mazibuko SCA judgment* 55-58.

250 *Mazibuko SCA judgment* para 58 -60.

251 *Mazibuko* para 30.

252 *Mazibuko* para 32.

253 *Mazibuko* para 33.

254 *Mazibuko* para 39.

The Constitutional Court stated that the extent of the state's positive duty under section 27(1)(b) and section 27(2) must be determined.<sup>255</sup> It reiterated that as in *Grootboom* and *TAC*, the state is required in virtue of these constitutionally guaranteed rights to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, (housing in the case of *Grootboom* and medical treatment in *TAC*) within available resources.<sup>256</sup>

O'Regan J held further on behalf of the Court that with the passage of time and depending on context, the purport of socio-economic rights would vary of necessity.<sup>257</sup> It was stated that the concept of reasonableness as contemplated in section 27(2) places context at the centre of an enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.<sup>258</sup> It was held, too, that determination of the exact purport of a socio-economic right is primarily a matter for the legislature and the executive.<sup>259</sup>

The Constitution provides that legislative and other measures have to be the primary instrument for the realisation of socio-economic rights. It is positively incumbent on the state to respond to the basic socio-economic needs of the people by adopting reasonable legislative and other measures to that end. The rights set out in the Constitution acquire content when these measures are adopted, and that content is subject to the constitutional standard of reasonableness.<sup>260</sup> If government takes no steps to realise socio-economic rights the court will enjoin the government to take such steps. It was held that a reasonableness challenge requires government to explain the choices it has made and divulge the information that was considered, as well as the process followed to determine its policy.

According to O'Regan J this case is an excellent example of the government adhering to these requirements.<sup>261</sup> The City continued to review and revise its policy in light of its administrative experience and information gained from research. The court therefore held that in light of the measures taken by the state

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255 *Mazibuko* para 48.

256 *Mazibuko* para 50.

257 *Mazibuko* para 60.

258 *Mazibuko* para 60.

259 *Mazibuko* para 61.

260 *Mazibuko* para 66.

261 *Mazibuko* para 71.

it could not find that the policy was unreasonable as formulated at the time this matter was heard by the High Court.<sup>262</sup>

### 5.8.3 Conclusion

The Court dismissed the arguments adduced by the applicants to the effect that the policy adopted by the City of Johannesburg and the introduction of prepaid meters were unlawful.<sup>263</sup> The Court held that the applicants had failed to establish any unlawful conduct on the part of the City and therefore set aside the orders of the Supreme Court of Appeal and the High Court, and upheld the respondents' cross-appeals.<sup>264</sup>

## 5.9 *Glenister v President of the Republic of South Africa and Others*<sup>265</sup>

### 5.9.1 Facts and litigation background

In *Glenister* the Constitutional Court had to decide upon the validity of two statutes which brought about the dissolution of the Directorate of Special Operations (DSO), a specialised crime fighting unit located within the National Prosecuting Authority (NPA), and its replacement with the Directorate of Priority Crime Investigation (DPCI), which is located within the South African Police Service (SAPS).<sup>266</sup>

These two statutes, referred to in the judgment as the impugned laws, had the combined effect that the DSO, which was established in 2001 to supplement the efforts of existing law-enforcement agencies in combatting organised crime, would be disbanded, and the DPCI would be established instead.<sup>267</sup> The applicant, Mr Glenister, argued in the first instance in the High Court, and then appealed to the Constitutional Court after the High Court held that it lacked jurisdiction in relation to challenges based on constitutional obligations. Mr Glenister contended that the impugned laws were unconstitutional, irrational, unreasonable and unfair,

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262 *Mazibuko* para 102.

263 The arguments advanced on behalf of the applicants to illustrate that the introduction of prepaid meters was unlawful are dealt with in paras 105-147.

264 *Mazibuko* para 158., 171.

265 *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC). (Hereafter: *Glenister*).

266 *Glenister* para 1.

267 *Glenister* para 2.

and that they undermined the structural independence of the NPA.<sup>268</sup> The respondents contended the opposite, however, insisting that the impugned laws were rational.<sup>269</sup>

### 5.9.2 Reasoning of the Constitutional Court

In *Glenister*, it was again emphasised that the legislative activities of parliament were subject to the stricture that a rational or cause-effect relationship had to be demonstrable between legislation and a governmental purpose.<sup>270</sup> However, the court held that for a measure to pass the test of rationality, legislation need not be reasonable or appropriate.<sup>271</sup> The Court declared the object of enhancing the investigative capacity of the South African Police Service in relation to national priority and other crimes by establishing the DPCI to be a legitimate governmental purpose<sup>272</sup> and therefore held that the challenge based on rationality had to be dismissed. Mr Glenister also contended that the impugned laws infringed the provisions of section 179 of the Constitution.<sup>273</sup>

In this case, the main judgment was handed down by Ncgobo CJ, but the majority judgment was handed down by Moseneke DCJ and Cameron J.<sup>274</sup> Ncgobo CJ dealt with every argument raised by the applicant, but held in each instance that the argument must fail because the location of the DPCI in the SAPS does not render the NPA unable to operate without fear, favour or prejudice as contended by the applicant.<sup>275</sup> Neither does section 179 of the Constitution require that a specialised crime fighting unit be established within the NPA.<sup>276</sup>

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268 *Glenister* para 17.

269 *Glenister* para 20.

270 Reference is made to the NNP-case. *Glenister* para 55.

271 This was also held in *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and 2000 2 SA 674 (CC)* paras 86 and 89-90 and *New National Party* above n 42 para 24.

272 *Glenister* paras 56, 57, 69, 70.

273 Section 179(2) of the Constitution, in relevant part, provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. Section 179(4) determines that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. Section 179(5)(a) provides that the National Director of Public Prosecutions must determine prosecution policy with the concurrence of the Cabinet member responsible for the administration of justice and in consultation with the Directors of Public Prosecutions, such policy to be observed in the prosecution process.

274 *Glenister* para 161.

275 *Glenister* para 81.

276 *Glenister* para 77.

Ncgobo CJ then considered the matter of establishing an independent body as an obligatory exercise. Argumentation in this instance hinged in part on section 7(2) of the Constitution which imposes an obligation on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights".<sup>277</sup> It was held that the rationale based on section 7(2) raised the question whether an obligation on the state could be read into the Constitution where it was not expressly stated in that enactment.<sup>278</sup> However, Ncgobo CJ was not prepared to do so and concluded that the argument based on a constitutional obligation to establish an independent anti-corruption unit was insubstantial.<sup>279</sup>

The question, it was held, was not whether the DPCI was fully independent, but whether it enjoyed an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms designed to ensure that it 'discharges its responsibility effectively', as required by the Constitution".<sup>280</sup> Ncgobo CJ answered this question in the affirmative.<sup>281</sup> The challenge based on the violation of constitutional rights was also dismissed.<sup>282</sup>

Moseneke DCJ and Cameron J agreed on behalf of the majority with the background, the contentions of the parties and the issues, as well as the manner in which Ncgobo J disposed of the applications for direct access, condonation and leave to appeal.<sup>283</sup> The majority also concluded that the impugned laws could not be invalidated on grounds of irrationality, and that Parliament was not obliged in terms of section 179 of the Constitution to locate a specialised anticorruption unit only within the NPA.<sup>284</sup>

However, the majority held that two questions remained outstanding. First, does the Constitution impose an obligation on the state to establish and maintain an independent body from the executive to combat corruption and organised crime? Secondly, if so, then the further determination had to be made whether the DPCI

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277 The Court deals with the first part of the argument in detail in *Glenister* paras 82 -103, but no discussion of it is required for purposes of this project.

278 *Glenister* para 109.

279 *Glenister* para 113. In considering the argument based on section 7(2), the Constitutional Court referred to international law as well as section 205 of the Constitution which does not require an independent anticorruption unit. *Glenister* paras 110-112.

280 *Glenister* para 125.

281 *Glenister* para 156.

282 *Glenister* para 157.

283 *Glenister* para 161.

284 *Glenister* para 162.

met the requirement of independence? The majority decided in the affirmative that the independence requirement had not been met, hence it followed that the impugned laws were unconstitutional.<sup>285</sup>

Section 39(1)(b) of the Constitution provides that international law must be consulted when the Bill of Rights is interpreted. The majority judgment leaned heavily on relevant international law throughout its judgment. Concerning a report prepared in 2007 by the Organisation for Economic Co-Operation and Development): *Specialised Anti-corruption Institutions: Review of Models*<sup>286</sup> the majority held that international law, 'through the interlocking grid of conventions, agreements and protocols...unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence'.<sup>287</sup> The relevant passage reads that

...the state must create an anti-corruption entity with the necessary independence, and that this obligation is constitutionally enforceable. It is not an extraneous obligation, derived from international law and imported as an alien element into our Constitution: it is sourced from our legislation and from our domesticated international obligations and is therefore an intrinsic part of the Constitution itself and the rights and duties it creates.<sup>288</sup>

The majority further held that the failure of the state to create a sufficiently independent anticorruption unit encroached on constitutionally guaranteed rights, such as the right to equality, human dignity, freedom, security of the person, administrative justice and socio-economic rights. The majority opposed the view held by Ngcobo J to the effect that the Constitution did not require the state to create an independent anticorruption entity,<sup>289</sup> but held instead that the provisions under which the DPCI was established did not endue it with sufficient autonomy in that regard, hence it fell short of qualifying as the independent instrument required to protect and fulfil the rights in the Bill of Rights. More specifically the contention was that its structure and functioning rendered it vulnerable to political influence as

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285 *Glenister* para 163.

286 *Glenister* para 187. This was a report, prepared in 2007 by the Organisation for Economic Co-operation and Development (OECD), in which models of specialised anticorruption institutions implemented worldwide demonstrated cognisance of the main criteria anticorruption agencies had to meet to be effective in terms of independence, specialisation, adequate training and resources. The OECD drew criteria from the provisions of the United Nations Convention as well as the Council of Europe Criminal Law Convention on Corruption.

287 *Glenister* para 192.

288 *Glenister* para 198.

289 *Glenister* para 199.



a result of the conditions of service imposed on its members, and on its head in particular.<sup>290</sup>

It was concluded that the statutory structure creating the DPCI was in conflict with Parliament's constitutional obligation to create an independent anticorruption unit. The majority did not presume to prescribe exact measures to Parliament for the fulfilment of its obligation.<sup>291</sup>

### 5.9.3 Conclusion

The impugned provisions were declared unconstitutional and invalid to the extent that they did not render the DPCI sufficiently independent.<sup>292</sup>

## 5.10 *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*<sup>293</sup>

### 5.10.1 Facts and litigation background

In 2007 an extensive upgrade of roads in the economic hub of Gauteng Province was approved as part of a highway construction project known as the Gauteng Freeway Improvement Project (GFIP). The upgrades were done by an organ of state, namely the South African National Roads Agency Limited (SANRAL).<sup>294</sup> Extensive civil engineering work, the widening and improvement of roads, new on- and off-ramps and the erection of gantries equipped with an electronic open-road tolling system (e-tolling) were all part of the GFIP.<sup>295</sup>

The need for the GFIP was not in dispute. All parties agreed that the proposed upgrade was necessary and that it fell to the state to decide how it would be financed. Government then made a policy decision that the expenditure related to the GFIP would be funded by tolling roads on a "user pay" principle. The respondents took issue with this decision and contended instead that the project should be financed through a fuel levy.<sup>296</sup>

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290 *Glenister* para 208.

291 *Glenister* para 248.

292 *Glenister* para 251.

293 *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 6 SA 223 (CC). (Hereafter *National Treasury and Others v OUTA and Others*).

294 *National Treasury and Others v OUTA and Others* para 1.

295 *National Treasury and Others v OUTA and Others* para 3.

296 *National Treasury and Others v OUTA and Others* para 5.

In 2012 the then North Gauteng High Court was approached by the Opposition to Urban Tolling Alliance (OUTA), together with the South African Vehicle Renting and Leasing Association, the Quadpara Association of South Africa, the South African National Consumer Union and the National Consumer Commission with an urgent application for an interim interdict to prevent SANRAL from tolling the Gauteng roads.<sup>297</sup> The High Court granted the interim interdict pending the final determination of the respondent's application to review and set aside the decisions of SANRAL and the Transport Minister to classify Gauteng roads as toll roads and to petition the Director-General to grant certain environmental approvals related to the GFIP. The National Treasury and SANRAL then approached the Constitutional Court with an urgent application to appeal the judgment and order of the High Court.<sup>298</sup>

The respondents, Opposition to Urban Tolling Alliance (OUTA), argued that the political or economic significance of the decisions at issue did not carry sufficient weight to warrant judicial deference.<sup>299</sup>

#### 5.10.2 Reasoning of the Constitutional Court

The Court referred to its judgment in *International Trade Administration Commission v SCAW South Africa*<sup>300</sup> which again followed an earlier statement in *Doctors for Life International v Speaker of the National Assembly and Others*<sup>301</sup> and warned that:

Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.<sup>302</sup>

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297 *National Treasury and Others v OUTA and Others* para 7.

298 *National Treasury and Others v OUTA and Others* para 7 and 8.

299 *National Treasury and Others v OUTA and Others* para 39.

300 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC). (Hereafter: *ITAC v SCAW South Africa*).

301 *Doctors for Life International v Speaker of the National Assembly and Others* 2006 6 SA 416 (CC).

302 *ITAC v SCAW South Africa* para 95.

On a balance of convenience a determination had to be made concerning whether and to what extent the restraining interdict granted by the High Court would encroach upon the exclusive terrain of another branch of government.<sup>303</sup> A court must be satisfied that the balance of convenience is favourably disposed towards the granting of a temporary interdict before it can bring the measure to bear; and all relevant factors must be carefully considered in making a decision concerning the status of the balance of convenience.<sup>304</sup> It was further held that the separation of powers must be the foremost concern in granting an interim interdict to restrain the exercise of governmental powers.<sup>305</sup>

Provided there is no *mala fides*, fraud or corruption in the matter, the granting of an interim interdict must be subject to a determination that the court may encroach on the terrain of another branch of government in acceding to the request that an interdict be imposed. There must be absolute clarity that the prospective encroachment is in order when granting said interdict.<sup>306</sup>

### 5.10.3 Conclusion and judgment

The interim interdict granted by the High Court was set aside because grounds for the court to intervene as discussed above were not created by granting the interdict. It was held that the extent to which motorists in Gauteng would be prejudiced in the absence of an interdict would be less than that incurred by the National Executive Government, National Treasury and SANRAL if the interdict were granted.<sup>307</sup>

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303 *National Treasury and Others v OUTA and Others* para 47.

304 *National Treasury and Others v OUTA and Others* para 55.

305 *National Treasury and Others v OUTA and Others* para 68.

306 *National Treasury and Others v OUTA and Others* para 71.

307 *National Treasury and Others v OUTA and Others* para 72.

## Chapter Six

### An analysis against the background of judicial activism and judicial deference

The representation of cases given above falls short of the comprehensive elaboration of particulars rehearsed in the judgements referred to. The facts as well as the reasoning and conclusion of the court in each case are outlined with a view to gauging the extent to which the Constitutional Court engaged in activism or deference. The purpose of the following discussion is to show that on balance (ie. as regards the cases reviewed here) the Constitutional Court tends substantially towards a deferential rather than an activist position.

A material consideration that probably had a bearing on the Court's position is that by and large the complexity of the matters at issue demanded considerable expertise and penetration. The judgements pronounced in these cases are in fact landmark decisions to which reference is made in subsequent cases of relevance. These judgements will now be discussed with a view to deciding their relevance as examples of judicial activism or deference. Analysis reveals no consistent pattern linking cases with regard to judicial activism or judicial deference.

#### **6.1 Considering the degree of activism or deference**

In *Grootboom*, even though a declaratory order was made, the Court did not attempt to prescribe a particular solution to the problem of providing emergency shelter. Instead, the state was ordered to devise, fund, implement and supervise measures to meet its constitutional obligation to provide relief to those in desperate need. Perhaps this is where the balance is to be found; acknowledging that the court is not competent to determine exactly how emergency shelter should be provided, yet stating unequivocally that the extant measures taken by the state do not meet its constitutional obligation.

McLean discusses the *TAC* case in great detail.<sup>308</sup> She does so in light of the principle of judicial deference rather than activism. She points out that in initiating a discussion of the separation of powers the Court raised two preliminary issues,

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308 McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* 2009 127.

the first being the deference owed by the courts to policy decisions taken by the executive; the second being the order to be made by the Court in virtue of the powers vested in it where it finds that the executive has failed to comply with its constitutional obligations.<sup>309</sup>

McLean regards this part of the judgment as ground-breaking because the Constitutional Court's consideration of the question concerning 'how deference, or the doctrine of separation of powers, relates to the approach which it should adopt in the adjudication of socio-economic rights' was unprecedented.<sup>310</sup>

Another argument proffered by the state was that the only appropriate remedy would be for the court to issue a 'declaration of rights,' as policymaking was the sole prerogative of the executive.<sup>311</sup> The court reacted as follows:<sup>312</sup>

This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others.<sup>41</sup> All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.

Where policies are challenged as irreconcilable with constitutional provisions and values, courts have to consider whether the state has complied with its constitutional obligations and must pass judgement accordingly if it finds non-compliance. If non-compliance constitutes intrusion into the executive it is deemed an intrusion mandated by the Constitution itself.<sup>313</sup>

In *TAC* the Court distinctly ordered removal of the restrictions preventing the availability of nevirapine for purposes of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training facilities.<sup>314</sup> It was further ordered that the state must make provision if necessary for counsellors based at public hospitals and clinics other than the research and training facilities to be trained for the counselling necessary for the

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309 *TAC* para 22.

310 McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* 2009 128.

311 *TAC* para 96-97.

312 *TAC* para 98.

313 *TAC* para 99.

314 *TAC* para 135.

use of nevirapine to reduce the transmission risk mentioned.<sup>315</sup> The Court not only ordered the state to amend its policies, but actually did so on its behalf.

Roux commented in this instance that the Constitutional Court not only vindicated the constitutional rights at issue, but did so with 'apparent ease', which was quite remarkable against the politically fraught background.<sup>316</sup>

By contrast Brand contends from the position of judicial deference in this case that the Constitutional Court did not decide whether, to forestall later transmission, a breast-milk substitute should be provided to HIV positive women who have given birth at public health facilities and have not transmitted the dreaded virus to their children at birth.<sup>317</sup> The complexity of the issue<sup>318</sup> and the "perceived technical incapacity of the Court, *as opposed to the legislature and executive* properly to analyse and decide the issue" are certainly cogent reasons not to decide this question.<sup>319</sup>

Conceded that the Court did not decide the question as set out above and that the court rather deferred the question to the 'legislature and executive to analyse and decide the issue', it can be said with relative certainty that the *TAC*-case is construed as a judicially activist decision rather than a deferential decision. Unlike the decision in *Grootboom*, the Court expressly ordered the measures to be implemented by the state in *TAC*.

When Langa ACJ (as he was then) held in *Modderklip* that it was unreasonable of the state to stand by and do nothing in the circumstances, and moreover, award constitutional damages, it seemed as if a change could be expected in future cases relating to executive decisions. The Constitutional Court stated unequivocally that the state had failed to meet its constitutional obligations. Nevertheless, although the Court awarded constitutional damages and ordered that the occupiers were entitled to occupy the land until the state made alternative land available, the Court specified neither the date by which the state had to

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315 *TAC* para 135.

316 Roux, "*Principle and Pragmatism on the Constitutional Court of South Africa*" 2009 *International Journal of Constitutional Law* 37. (Hereafter Roux).

317 Brand, *Judicial Deference and Democracy in Socio-Economic Right Cases in South Africa* 618, 619.

318 *TAC* para 128.

319 Brand, *Judicial Deference and Democracy in Socio-Economic Right Cases in South Africa* 619.

provide land as ordered, nor where the land had to be located. The Court gave the executive the opportunity to give content to the measures ordered in its judgement and refrained from prescribing the specifics of the ordered measures.

The *Glenister* judgement is classified and clearly also criticised as an example of judicial activism. Reactions to the *Glenister* decision highlighted the very different perceptions of the proper roles of the three branches of government. Once again judges were accused of interfering with executive decisions. Ziyad Motala called the *Glenister* judgement 'a low watermark in South Africa's constitutional jurisprudence'.<sup>320</sup> Given the crucial necessity in a democratic dispensation that judges refrain from overstepping the boundaries between the three branches of government, Motala argued that 'a court should not be making policy choices on the structure of the investigating authority'.<sup>321</sup>

Pierre de Vos defended the judgement by stressing the duty of judges to decide what the Constitution means. Although it is not the task of the Court to decide what policies the other branches of government should adopt, it is definitely the Court's duty, when called upon to do so, to decide whether the policies adopted are consistent with the Constitution. If requirements are not met, it is the Court's duty to declare the policy invalid.<sup>322</sup> Langa J determined on behalf of the court that the Constitution contains no explicit provision regarding the separation of powers. In the *First Certification Judgement*<sup>323</sup> it was emphasised that there is no universal model for the separation of powers and that no absolute separation exists in a democratic system where checks and balances induce limitations on one division of the government by the other.

In *Soobramoney* the position adopted by the Court on closer examination was that it would not interfere with the decision not to provide dialysis but would leave such matters to others who were better equipped to deal with them. The majority took the view that medical rationing involved "areas where institutional modesty

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320 Motala, "Divination through a strange lens" 27 March 2011 <http://www.timeslive.co.za> accessed on 29 April 2013.

321 Motala, "Divination through a strange lens" 27 March 2011 <http://www.timeslive.co.za> accessed on 29 April 2013; Viljoen, Beyond the Law: Multi-disciplinary Perspectives on Human Rights 29-33.

322 De Vos, "How not to criticise a court judgement" [www.constitutionallyspeaking.co.za](http://www.constitutionallyspeaking.co.za). accessed on 23 April 2013.

323 *First Certification Judgment* para 108.

requires us to be especially cautious". The competency of political organs to set budgets was assumed in this instance. Dr Katheringe Young at Boston College Law School commented that in this instance deference was consistent with a theory of democratic accountability.<sup>324</sup>

In the *NNP* case the Constitutional Court insisted that although courts may be constrained in some instances to fashion orders to uphold constitutional rights, emphasis was placed on the fact that respect to the principle of separation of powers is paramount and that deference was owed to the legislature in devising remedies.

Yacoob J disagrees with O' Regan J's dissenting judgment in *NNP* that judgement should hinge on the principle of reasonableness since the reasonableness of statutory provisions was usually relegated to the exclusive domain of Parliament.<sup>325</sup> This is fundamental to the doctrine of separation of powers and the role of the courts in a democratic society. He commented further that courts did not review provisions of Acts of Parliament on grounds of their reasonableness, except if they were satisfied that the legislation concerned was not rationally connected to a legislative government purpose.<sup>326</sup>

Roux contends that the statement by Yacoob J contradicts both the express language of the 1996 Constitution and the Court's standard of review adopted later in relation to socio-economic rights.<sup>327</sup> He finds it difficult, reading O'Regan's powerful dissenting judgment, to come to any other conclusion than that the majority failed to give a principled reading of the Constitution. Roux states.<sup>328</sup>

It is not just that the majority opted for a deferential standard of review. It is that the reasons in support of its preferred standard were so perfunctory.

He contends that even though the Court's decision in *UDM* went against the state in one respect, it established no obstacle in principle that prevented amendment of the Constitution to allow floor-crossing. As a result, floor crossing became

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324 Young "*Constituting Economic and Social Rights*" (Oxford University Press) 2012 Oxford 145.

325 *NNP* para 24.

326 *NNP* para 24.

327 Sections 26(2) and 27(2) both provide that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

328 Roux41.



immediately permissible in the local government sphere, and after a further constitutional amendment to remedy the defect in the supporting statute, floor crossing became permissible in both national and provincial legislatures.<sup>329</sup> The Court stated as follows:<sup>330</sup>

This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional. It ought not to have been necessary to say this for that is true of all cases that come before this Court. We do so only because of some of the submissions made to us in argument, and the tenor of the public debate concerning the case which has taken place both before and since the hearing of the matter.

In *Kaunda*, the Constitutional Court held that while South Africa did have an obligation to cooperate with Zimbabwe and Equatorial Guinea in the prevention and combating of crime, there is no obligation to apply for the extradition of the applicants from Zimbabwe. South African nationals are entitled to request the South African government to provide protection against acts which violate accepted norms of international law and the government is obliged to consider such a request and dealt with it appropriately.

While the majority noted that international law had not yet imposed a duty on governments to provide diplomatic protection, the minority judgments were prepared to find such a duty under the Constitution. Ngcobo J held that there is a compelling argument to be made that states have, not only a right, but a legal obligation to protect their nationals abroad against an egregious violation of their human rights.<sup>331</sup> O'Regan, with Mokgoro J concurring, also held that there is a duty, in terms of section 3(2) of the Constitution, for the state to provide diplomatic protection to its nationals in order to prevent the violation of their fundamental human rights under international law. Sachs J found that it would be a strange interpretation of the Constitution if it is suggested that adherence by the government to the fundamental human rights norms of international law that led to the creation of a democratic South Africa, was merely an option and not a duty.

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329 Roux42.

330 *UDM* para 11.

331 *Kaunda* para 169.

Du Plessis<sup>332</sup> commends the Constitutional Court on its judgment that the government has a duty under the Constitution to properly consider requests for assistance and to respond rationally thereto. This is a different interpretation of the judgement than that of Roux which refers to Kaunda as one of the politically controversial cases in which the Constitutional Court compromised on principle to avoid confrontation with the political branches.<sup>333</sup> Roux refers to section 7(1) of the Constitution<sup>334</sup> and states that over a "strong dissent" from O'Regan J, the majority held that section 7(1) should be interpreted literally to mean that South Africans enjoy the protection of the Bill of Rights only when they are physically in South Africa. According to Roux, the majority presented this reading as though no other interpretation of section 7(1) were even remotely possible. "The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application beyond our borders."<sup>335</sup>

In his discussion of the Kaunda case, Roux refers to various other Constitutional Court judgments where the Constitutional Court expressed a preference for interpreting the Bill of Rights and other Constitutional provisions in a "generous" and "purposive" way.<sup>336</sup> By following this approach, any ambiguity in the constitutional text must be resolved in favour of the interpretation that gives best effect to the purposes and values underlying the new constitutional era. In Kaunda, however, Roux states that the majority relies on the literalist approach it elsewhere condemns.<sup>337</sup> At the very least, Roux states, the phrase "all people in our country" in section 7(1) of the Constitution is ambiguous and thus needed to

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332 Du Plessis, "John Dugard and the Continuing Struggle for International Human Rights" 2010 South African Journal on Human Rights 292, 295.

333 Roux 38.

334 Section 7(1) of the Constitution: "The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

335 Kaunda para 37.

336 Roux refers to the cases of *S v Zuma* 1995 2 SALR 642 (CC) paras 13-18; *S v Makwanyane* 1995 3 SALR 391 (CC) paras 9, 10; *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 4 SALR 877 (CC) para. 100; and *Mashavha v President of the Republic of South Africa* 2005 2 SALR 476 (CC) para 32

337 *S v Mhlungu and Others* 1995 3 SALR 867 (CC) at para. 8, *Shabalala v. Attorney-General, Transvaal* 1996 1 SALR 725 (CC) para. 27, *Transvaal Agricultural Union v. Minister of Land Affairs* 1997 2 SALR 621 (CC) para. 44, and *United Democratic Movement v President of the Republic of South Africa* 2003 1 SALR 495 (CC) para 113.

be purposively construed in light of the Constitution's underlying values. He states:<sup>338</sup>

The majority's disinclination to embark on such a reading is indicative of its sensitivity to the separation of powers issues raised by the case. Denied the luxury of a political question doctrine, the majority uses its literalist reading of section 7(1) as a device to avoid the institutionally awkward consequences of the application of the Bill of Rights.

O'Regan J<sup>339</sup> highlighted the difficulty the Constitutional Court had in finding an appropriate balance in *Kaunda* between two powerful principles of our constitutional order, both relevant to the doctrine of separation of powers. The first is the need to protect the executive domain from impermissible intrusion by the judiciary, and the other is the need to ensure that citizens' rights are protected elsewhere. By referring to the cases of *President of the RSA v Hugo*<sup>340</sup> and *President of the RSA v South African Rugby Football Union*<sup>341</sup> O'Regan states that the Court recognised that presidential powers conferred specifically on the President by section 84(2) of the Constitution, are justiciable under our Constitution despite their clear executive character. In *Hugo*, the Court held that the power to pardon offenders was justiciable, and in *SARFU*, the Court held that the power to appoint commission of enquiry was similarly justiciable on limited grounds. O'Regan J states:<sup>342</sup>

The role of the courts in our constitutional democracy, as is foreshadowed by some of the provisions in the text of the Constitution, referred to earlier is clearly to protect the Constitution and to hold both the executive and legislature accountable to the provisions of the Constitution. Nevertheless, in *Kaunda*, *SARFU* and *Hugo*, the court recognised that there are clear constitutional reasons why the justiciability of purely executive decisions is far narrower than that of administrative decisions, and that it is appropriate for courts to defer to the executive's special role and expertise in purely executive matters.

According to Roux, the difference between the majority decision in *Kaunda* and O'Regan J's dissenting decision can be traced to a disagreement about how best to trade off the competing concern of legal legitimacy and institutional security. He states that the majority in *Kaunda* took the view that the separation of powers

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338 Roux 45.

339 O'Regan "Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution" FW de Klerk Memorial Lecture, Potchefstroom, 10 October 2005 (Hereafter: O'Regan)

340 1997 4 SA 1 (CC). (Hereafter: *Hugo*).

341 2000 1 SA 1 (CC). (Hereafter: *SARFU*).

342 O'Regan 20.

supplied a legally valid reason for reducing the level of principle, whereas O'Regan J's dissent is premised on a more absolutist conception. He states:<sup>343</sup>

For her, where the issue for decision falls squarely within the Court's competence, as any issue involving the interpretation of the Bill of Rights must, the separation of powers doctrine has little relevance. At most, it requires the Court to be conscious of the possible impact of its decision on the political branches' ability to perform their constitutional functions. The doctrine can never be used, however, as a justification for compromising on principle.

It is not the purpose of this study to comment on the stance taken by a judge in relation to specific constitutional principles. It is, however, worth noting that the different interpretations of section 3(2) of the Constitution in Kaunda create uncertainty when analysed against the background of separation of powers.

McEldowney contends that Kaunda underlines the essence and often the limitations of review offered by the courts. There are practical limitations on what government may be ordered to do and diplomatic considerations as to what is deemed to be most effective.<sup>344</sup> The remit of constitutional duties is often vague and according to McEldowney, it is doubtful that even if diplomatic assistance was required by the Court, it would have made a difference. He states that even the most activist of judicial action had to concede that limitations existed as to how a practical difference might be achieved. The importance of finding a consensus, applying underlying rights and values and advancing democracy places responsibilities on the legislature and the executive as well as the courts. According to McEldowney there is evidence that the South African court is expressing an underlying desire for democratic institutions to be allowed to perform their role unhindered by judicial activism.

It may be true that it would have made no difference if the majority in Kaunda held that a duty is placed on the state to provide diplomatic assistance. The practical difficulties experienced by courts to ensure compliance with its orders are not disputed, but this cannot prevent a court from complying with its obligation to ensure that constitutional values are given effect to.

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343 Roux 46.

344 McEldowney '*One-party dominance and democratic constitutionalism in South Africa*' Tydskrif vir die Suid-Afrikaanse Reg 2013, 269, 287.

In *Mazibuko*, which has probably been among the most difficult cases handled by the Court, the principle was reiterated with emphasis that the policy-making function of the two other arms of government should be respected, and it was found that the charge that the City of Johannesburg had acted unlawfully could not be sustained.

Equality and socio-economic development have been two main goals for the government since 1994. The Bill of Rights embodied in the Constitution enshrines both these principles. Devenish<sup>345</sup> believes that the Bill of Rights indubitably 'judicialises' politics, which means that interpretation thereof entails a special political activity that covers a broad spectrum. Brand contends that in *Mazibuko* the Court again declined to engage with the substantial particulars of shoring up the right to have access to sufficient water on grounds that the issue was best left to the legislature and the executive.<sup>346</sup>

However, in the *National Treasury and Others v OUTA and Others*<sup>347</sup> the Constitutional Court determined that the separation of powers was a pivotal concern of South Africa's constitutional democracy and therefore imposed the obligation on the country's courts to ensure that the branches of government complied with the law and refrained from encroaching on the domains of the executive and the legislature, except where such encroachment is permissible and required in terms of the Constitution.

It seems clear from the above that although observance of the principle of separation of powers cannot be watertight in practice and the Constitution contains no explicit provision to that effect, the principle is nevertheless indispensable for a constitutional democracy and should be upheld by all spheres of government in that they should endeavour by all means to refrain from encroaching on each other's domains.

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345 Devenish "Constitutional and Political Developments" 1997 South African Human Rights Yearbook 16.

346 *Mazibuko* paras 63 and 159. Brand, "Judicial Deference and Democracy in Socio-Economic Right Cases in South Africa" 2011 Volume 3 Stellenbosch Law Review 615, 619.

347 *National Treasury and Others v OUTA and Others* para 44.

## Chapter Seven

### Conclusion

In the constitutional democracy prevailing in South Africa public power ultimately vests in the Constitution<sup>348</sup> and the branches of government must respect each other's domains and terms of reference. In exercising its legislative authority Parliament "must act in accordance with, and within the limits of, the Constitution",<sup>349</sup> and the supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled."<sup>350</sup> Courts are required by the Constitution "to ensure that all branches of government act within the law" and fulfil their constitutional obligations.<sup>351</sup> The Constitutional Court "has been given the responsibility of being the ultimate guardian of the Constitution and its values."<sup>352</sup> Courts are not only authorised, but are obliged to intervene to prevent violation of the Constitution.<sup>353</sup>

In exercising the above role courts are continuously faced with a dilemma: on the one hand they are enjoined to protect constitutional rights, to which end they have to pronounce judgements that encroach on the domains of the other two branches of government in certain instances; but at the same time they are constrained to act within their terms of reference and refrain from undue interference in the affairs of other branches of government. The essential question, therefore, is a matter of the extent to which intervention/encroachment, when justifiable and necessary, is appropriate? It is an essential component of the separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of state does not exceed the terms of reference prescribed by the Constitution for each of them, but in doing so they have to take careful heed of the limits of their own terms of reference.<sup>354</sup>

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348 *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) para 19, 20; *Doctors for Life International v Speaker of the National Assembly and Others* 2006 6 SA 416 (CC) para 38.

349 Section 44(4) of the Constitution.

350 Section 2 of the Constitution

351 *UDM* para 25.

352 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 4 SA 147 (CC) at para 72.

353 *ITAC v SCAW South Africa* para 92.

354 *ITAC v SCAW South Africa* para 93.

Hoexter<sup>355</sup>, who proceeds from an administrative-law perspective, maintains that judicial activism is not a satisfactory answer to the challenges posed by a constitutional democracy, but the same could probably be said with equal validity from the perspective of socio-economic rights. Since all actions are in some degree subject to review the courts need to explain their intervention or non-intervention in administrative as well as socio-economic issues.<sup>356</sup> However, Hoexter emphasises that the explanation must be honest and open instead of rigidly formalistic as in the former dispensation. Given the strong constitutional protection vouchsafed for socio-economic rights, judges should not avoid intervention in the adjudication of policy issues in that area.<sup>357</sup>

Thus, a threat is issued to the rule of law and the separation of powers when the judiciary declares legislative or executive conduct invalid, just as the *counter-majoritarian dilemma* suggests. In particular, when it prescribes courses of action to the executive or legislature. The threat subsists in the judiciary's effective encroachment on the divisions between its own and the executive domain, which may be a fine line but nevertheless a critical reality. The writer contends, however, that the separation of powers might sometimes be used perhaps too easily, to justify or argue for judicial deference.

Brand<sup>358</sup> observes that courts have employed a strategy of deferring *to the other branches of government* in matters that they considered beyond their capacity, or a threat to democratic principles, or a threat to their institutional integrity or security, or a threat to the principle of the separation of powers.

As observed in the *First Certification Judgement*,<sup>359</sup> there is no universal model for the separation of powers, and in a democratic dispensation where demarcations between branches are induced by checks and balances there is no definitive separation. But the need for branches of government to work together cannot be disputed. Where the judiciary is dependent on the executive and the legislature to give effect to its judgments, cooperation is essential. This consideration seems to be the key to finding a balance - acknowledging that the separation of powers is

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355 Hoexter "Administrative Law in South Africa" 2012 2<sup>nd</sup> ed 147.

356 Hoexter "Administrative Law in South Africa" 2012 2<sup>nd</sup> ed 148.

357 Hoexter "Administrative Law in South Africa" 2012 2<sup>nd</sup> ed 148.

358 Brand, "Judicial Deference and Democracy in Socio-Economic Right Cases in South Africa" 2011 Volume 3 Stellenbosch Law Review 615, 618.

359 *First Certification Judgment* para 108.

paramount to a constitutional democracy and the rule of law enshrined in the Constitution, yet accepting the principle that it is incumbent on the courts to ensure that executive and legislative power is not usurped.

According to Hugh Corder “the formulation of socio-economic rights [in the Constitution] clearly anticipates a relatively extensive but nuanced judicial role for their appropriate realization, and the judges have generally not disappointed.”<sup>360</sup>

The long history of apartheid and the role of the judiciary therein, as well as the radical transformation basis laid by the Constitution, persuaded Corder that what can be seen in South Africa today is a special type of judicial activism. The indication of this can be found in section 39 of the Constitution.<sup>361</sup> It is worth noting that section 39 merely requires the South African judge “when interpreting” the Constitution to do what judges should normally do when interpreting a Constitution, that is, to give effect to its values. This is not necessarily synonymous with judicial activism; nevertheless, it does make it much easier for a judge to adopt a stance that might be viewed as activist. In a number of cases decided since 1996 where the judges have evidently adopted an activist approach, they have frequently invoked expressions such as “constitutional values,” and “the spirit, purport and objects of the Bill of Rights,” which appear in section 39 of the Constitution.<sup>362</sup>

Although the activist approach may be commendable in South Africa, due cognisance must nevertheless be taken of the danger inherent in unrestrained judicial activism, especially if judges incorporate their personal viewpoints in judgements to further their political preferences. Activism of this nature could have far-reaching political consequences that may do extensive harm to the institutional integrity of the separate branches of government, and ultimately to the integrity and stability of the state as a whole.

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360 Corder *Principled Calm amidst a shameless storm: The Limits of the Judicial Regulation of Legislative and Executive Power*. Corder *Judicial Activism of a Special Type: South Africa's Top Courts Since 1994*, 341.

361 When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. International law must be considered and foreign law may be considered.

362 Quansah and Fombad “*Judicial Activism in Africa: Possible Defense against Authoritarian Resurgence*” <http://www.ancl-radc.org.za> accessed on 9 September 2013.



Ackerman J was of opinion that in due course courts would develop their own model for the separation of powers which will be suitable for South Africa's specific system as enshrined in the Constitution. A model which will be formed by both South Africa's history as well as the new dispensation and a balance between the need to control the government by means of the separation of powers and the inducement of checks and balances, on the one hand, and prevention of the diffusion of power, on the other hand, to the extent that the government would find it impossible to take appropriate measures in time to protect the interests of the public.<sup>363</sup>

As pointed out by the Discussion Document, Courts are continuously placed in a position where they have to pronounce on the question as to whether constitutional rights have been infringed. Policy matters come into play as well as public interest and the "proper role of the courts" in South Africa's constitutional democracy. In light of the role of the courts and their mandate to uphold the Constitution, it should, supposedly, not be very difficult for the court to hold the executive accountable for not progressively realising constitutional rights. But, somewhere along the very muddled lines of balancing the separation of powers with other competing constitutional principles it has been, and still is, a somewhat tiresome exercise to determine the circumstances in which the Constitutional Court will choose to actively give effect to the constitutional rights, and the circumstances where it would defer its decision to the executive who can "properly analyse and decide the issue".<sup>364</sup>

The primary duty of the courts is towards the Constitution and the law which they must honour without fear, favour or prejudice. As already noted, the Constitution requires that the state respect, protect, promote and fulfil the rights in the Bill of Rights. Courts must consider, where state policy is challenged because of its inconsistency with the Constitution, whether in formulating and implementing policy the state has complied with its duties as required in section 7(2). If a court concludes in any given situation that the state has not met these requirements it must of necessity pronounce judgement accordingly.

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363 *De Lange v Smuts NO and Others* 1998 3 SA 785 para 60.

364 Brand, "Judicial Deference and Democracy in Socio-Economic Right Cases in South Africa" 2011 Volume 3 Stellenbosch Law Review 615, 619.

It is not at all suggested that courts should unduly trespass on the terrain of the executive, but where the interpretation and enforcement of constitutional rights are concerned, it is contended that, as stated by Roux, any ambiguity in the constitutional text must be resolved in favour of the interpretation that gives best effect to the purposes and values underlying the Constitution. If this requires that courts intrude upon the executive terrain, it is an intrusion mandated by the Constitution itself.<sup>365</sup>

It is the uncertainty created by the never ending list of Constitutional Court judgments that necessitates a balance to be found between judicial activism and judicial deference.

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<sup>365</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 5 SA 721 para 99.

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