CRITICAL ANALYSIS OF THE DOCTRINE OF SEPARATION OF POWERS WITH SPECIFIC FOCUS ON THE *ECONOMIC FREEDOM FIGHTERS V SPEAKER OF THE NATIONAL ASSEMBLY 2018 (2) SA 571 (CC)*

By

THABO TRUST MAGABE

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SUERVISOR: PROFESSOR OK ODEKU

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DECLARATION BY SUPERVISOR

I, Prof OK Odeku, hereby declare that this dissertation by Mr Thabo Trust Magabe for the degree of Masters of laws (LLM) in Development and Management Law be accepted for examination.

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PROF OK ODEKU

Date: MAY 2020

DECLARATION BY STUDENT

I, Thabo Trust Magabe, declare that this dissertation for the degree of Masters of Laws in Development and Management Law at the University of Limpopo hereby submitted, has not been previously submitted by me for a degree at this or any other university. This is my own work in design and execution and all material contained herein has been duly acknowledged.

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THABO TRUST MAGABE

MAY 2020

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ABSTRACT

Although the Constitution of the Republic of South Africa, 1996 does not specifically make reference to the phrase “separation of powers”, the constitutional scheme, however, subscribes to the doctrine of separation of powers. The manner in which the Constitution allocates powers and functions to the different organs of the state is indicative of the application of the doctrine of separation of powers. This study was aimed at investigating whether the separation of powers principle was not trampled upon in the light of the decision in *EFF*2. The study finds that there was judicial overreach in *EEF*2. The majority judgment encroached into the exclusive domain of Parliament. The court, in exercising its checks and balances role, failed to observe its own constitutional limits by dictating how Parliament should run its affairs. The study recommends that courts must respect the duties and functions of other organs of the state. Courts must understand that each organ of the state has a duty to perform. Only when an organ of the state has performed a duty or function in a manner that offends or violates the Constitution can the court intervene.

CHAPTER 1: INTRODUCTION

1.1. Introduction and background to the study

The doctrine of separation of powers refers to an instance where government power is divided between organs of state. Public power is divided between the executive, legislative and judicial arms of the state to curtail abuse of power by organs of state.[1] The South African Constitution, 1996[2] makes provision for separation of powers by allocating government functions to different arms of the state. The three arms of the state are legislature, executive and judiciary. Section 41(1)(f) of the Constitution prohibits spheres of government and organs of the state from exercising powers or functions which have not been given to them by the Constitution.

Legislative authority of the Republic in the national sphere of government is vested in the Parliament, in the provincial sphere of government it is vested in the provincial legislature, and in the local sphere of government it is vested in the municipal council.[3] The executive authority of the Republic in the national sphere of government is vested in the President, in the provincial sphere the executive authority is vested in the Premier of the province and in the local sphere of government it is vested in the municipal council.[4] The judicial authority of the Republic is vested in the courts.[5]

However, the Constitution does not provide for a strict separation of powers between the legislature and the executive.[6] While it establishes Parliament as the distinct legislative branch with a specific function of law making and its own personnel, the Constitution also makes provision for the involvement

[1] de Vos and Freedman in Brand *et al* South African Constitutional Law in context 60.
[2] Constitution of South Africa,1996 (hereinafter "the Constitution").
[3] Sec 43 of the Constitution.
[4] Sec 85 of the Constitution.
[5] Sec 165 of the Constitution.
[6] O'regan *PER 2005(1).*

of the executive in the performance of legislative functions.[7] For instance, the Constitution requires the President to assent to legislation passed by the legislature for it to become law.[8] O'regan[9] observes that "…the various branches of government are not hermetically sealed…". She continues to state that:

> [u]nder our constitution, the President is elected by the National Assembly (one of the two houses of Parliament) from among its members at its first sitting after an election. That election is presided over by the Chief Justice. Once the President is elected she or he ceases to be a member of the National Assembly. Moreover it is the National Assembly who may remove the President from an office… .

What becomes clear is that before members of the executive can assume positions as such, they must first be members of the National Assembly. It is only after they have been appointed to ministerial positions that they cease to be members of the National Assembly but they still have the right to participate in the National Assembly. Although they are allowed to participate or speak in the Assembly, Members of the Executive may not vote in the National Assembly.[10] Labuschagne argues that:

> [t]he perpetual fusion of the legislature and the executive in the present South African system still undermines the proper functioning of the separation of powers in principle and in the process the imminent danger of the judiciary becoming involved in the formulation of public policy which is traditionally an executive function.[11]

The relationship existing between organs of the state makes it difficult for a complete separation of powers. In order for them to operate, organs of the state need each other. In the law-making process, members of Cabinet prepare and initiate legislation for introduction in the National Assembly or the National Council of Provinces. After the legislation is debated and

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[7] de Vos and Freedman in Brand *et al* South African Constitutional Law in context 65-66.
[8] Sec 84 of the Constitution.
[9] O'regan *PER 2005(1).*
[10] Sec 54 of the Constitution.
[11] Labuschagne *Politeia vol 23 Issue 3 Jan 2004, 84–102.*

passed it has to be presented to the President to assent to and sign it into law.[12] The President may refuse to assent to and sign the Bill into law if he has reservations about its constitutionality in which case he has to send it back to the National Assembly for reconsideration.[13] If, after reconsideration, the Bill fully accommodates the President's reservations the President must assent to and sign the Bill and if not he must assent to and sign the Bill or refer it to the Constitutional Court for a decision on its constitutionality.[14] Section 79(5) of the Constitution requires the President to assent to and sign the Bill into law in circumstances where the Constitutional Court declares the Bill to be constitutional. Certain instances such as the President's refusal to assent to and sign a Bill into law end up involving all the organs of the state in the law-making process. This demonstrates that the judiciary also has a role to play in the execution of legislative functions through checks and balances.

In *Economic Freedom Fighters v Speaker of the National Assembly*[15] the court ordered the National Assembly to make rules to facilitate a process designed to remove a President from office in accordance with section 89(1) of the Constitution.

Facts of the case

The case emanated from certain improvements which were effected on President Jacob Zuma's Nkandla residence. Among others, the improvements included upgrading security features on the President's home. The Public Protector conducted investigations into the improvements made on the President's Nkandla home. A report dated 19 March 2014 was

[12] O'regan *PER* 2005(1).
[13] Sec 79(1) of the Constitution.
[13] Sec 79(4) of the Constitution.
[15] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* (Hereafter also referred to as *"EFF2").*

released by the Public Protector. The report recommended remedial action against the President.

The remedial action required the President to make payment of a reasonable percentage, to be determined by National Treasury, of costs considered to be of non-security nature. The President was also required to reprimand the Ministers under whose watch the project was handled and funds were abused.

The President did not comply with the remedial action recommended by the Public Protector. The Economic Freedom Fighters then launched an application[16] to the Constitutional Court for an order declaring that the National Assembly violated the Constitution by failing to scrutinise and hold the President accountable and that the President also violated the Constitution by failing to implement the Public Protector's remedial action. The court held that the Public Protector's remedial action is binding in the absence of a court order setting it aside. The court further held that the National Assembly and the President violated the Constitution.

In the present case,[17] the Economic Freedom Fighters, United Democratic Movement (UDM) and Congress of the People (COPE) made an application to the Constitutional Court for orders, among others, declaring that the National Assembly has failed to hold the President accountable for failing to implement the Public Protector's remedial action and that the National Assembly has failed to scrutinise the President for violating the Constitution.

The applicants alleged that after the court ruling in *EFF1* the Speaker took no steps to hold the President accountable. They (the applicants) further

[16] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2016 (3) SA 580 (CC)* (hereafter referred to as *EFF1*).
[17] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC).*

stated that there are no mechanisms put in place to hold the President accountable in terms of section 89(1) of the Constitution.

The majority judgment held that, although there were mechanisms in place to hold the President accountable, these mechanisms were not designed for a section 89(1) impeachment process.

The minority judgment, on the other hand, found the majority judgment to be violating the separation of powers doctrine. When concurring in the minority judgment, Mogoeng CJ classified the majority judgment as being*:*

> … a textbook case of judicial overreach–a constitutionally impermissible intrusion by the judiciary into the exclusive domain of parliament.

According to Mogoeng CJ, the majority judgment encroached into the domain of Parliament by not observing the limits of the judiciary in the exercise of judicial powers. The intrusion by the judiciary into the exclusive domain of Parliament is constitutionally not permissible. The Constitution requires that each organ of the state should exercise powers bestowed upon it and not usurp powers bestowed upon another organ of the state.

In this case, the judiciary went beyond exercising checks and balances permitted by the Constitution. The judiciary dictated to Parliament to exercise its (Parliament's) powers in a certain way. The judiciary did this despite the fact that the Constitution allows Parliament to make its own rules to govern its processes.

The separation of powers is not absolute in South Africa. In *S v Dodo*[18] the Constitutional Court observed that there is no absolute separation of powers under the Constitution between the judiciary, on the one hand, and the legislative and executive on the other. In this case, the High Court had

[18] *S v Dodo 2001(3) SA 382 CC.*

declared section 51(1) of the Criminal Law Amendment Act[19] invalid because it was inconsistent with the Constitution. This section makes provision for the High Court to impose a sentence of imprisonment for life on an accused who is convicted of offences specified in the Act unless the court is satisfied that there are substantial and compelling circumstances which justify the imposition of a lesser sentence.

The High Court had found that this section constitutes an invasion of the domain of the judiciary by the Legislature and that a criminal trial before an ordinary court required an independent court empowered, in the event of a conviction, to weigh and balance all factors relevant to the crime, the accused and the interests of society before the imposition of sentence.

The Constitutional Court held that there was no invasion of the domain of the judiciary by the Legislature since the court is empowered to determine the presence of substantial and compelling circumstances which justified the imposition of a lesser sentence. In other words, if the court is satisfied that there are substantial and compelling circumstances justifying the imposition of a lesser sentence, the court will not be bound to impose the minimum prescribed sentence. The court said the following with regard to separation of powers:

> There is under our constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other. When the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so. No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. It is pre-eminently the function of the Legislature to determine what conduct should be criminalised and punished. Even here the separation is not complete, because this function of the Legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts.[20]

[19] Criminal Law Amendment Act 105 of 1997.
[20] *S v Dodo 2001(3) SA 382 CC* para 22.

The court emphasised that when it comes to punishment of an offender, the three organs of the state have interest. The legislative organ makes laws declaring a particular conduct as crime and also determines a punishment to be meted out to the offender. The prosecution, conviction and imposition of the punishment take place in or before a court of law (the judicial organ of the state). In determining what conduct constitutes a crime and what punishment or sentence should be imposed for a particular conduct, the legislature does not encroach on the exclusive domain of the judiciary. The judiciary still exercises its role by checking whether the declaration of a conduct as crime or the punishment determined by the legislature is in compliance with the Constitution or the Bill of Rights.

If the court finds that the punishment determined by the legislature does not comply with the Constitution or the Bill of Rights, the court will declare that punishment to be invalid to the extent of its non-compliance with the Constitution or the Bill of Rights. The court will also not just impose a sentence after conviction without having, first, listened to the accused's representations regarding sentence. At this stage, the court has the opportunity to consider appropriate sentence to be imposed on the accused or offender. After listening to both the state and the offender or accused, the court will then make a judgment.

In other words, the court does not just impose a sentence as determined by the legislature without taking into account mitigating factors presented by the accused, aggravating factors presented by the state and applying its mind. In this way, the court exercises its discretion without being hindered by the legislature or the executive.

The Constitutional Court held further that section 51(1) of the Act was not inconsistent with the Constitution and does not breach the principle of separation of powers. Accordingly, section 51(1) of the Act does not take

away the court's power to impose appropriate sentence after considering the facts placed before it by the parties involved.

1.2. Theoretical Framework

There are two influential philosophers who made fundamental contributions towards the development of the *trias politica (*separation of powers) doctrine, namely John Locke and Baron de Montesquieu.[21]

The first modern design of the doctrine of separation of powers is to be found in the constitutional theory of John Locke (1632-1704).[22] Although John Locke did not use the precise language used in modern scholarship, it could still be seen that his theory of the separation of powers referred to a clear distinction between the legislative, executive and the judiciary.[23]

Montesquieu's ideas on separation of powers were developed over centuries into a norm that comprises four basic principles:

1.2.1 The principle of trias politica: a formal distinction between the branches of government, legislative, executive and judicial.

In terms of this distinction, the legislative authority is the power to make, amend and repeal rules of law. The executive authority is the power to execute and enforce rules of law. The judicial authority is the power to determine what the law is and to apply it.[24]

In *South African Personal Injury Lawyers v Heath*[25] the President had appointed judge Heath to be the head of the Special Investigating Unit. The Constitutional court held that a criminal investigation unit cannot

[21] Labuschagne *Politeia vol 23 Issue 3 Jan 2004 84.*
[22] Van der Vyver *SA Public Law 8 177.*
[23] Ratnapala *The American Journal* 212.
[24] Mojapelo *Advocate* April 2013.
[25] *South African Personal Injury Lawyers v Heath 2001(1) SA 883.*

be headed by a judge. The court held that the duty to investigate and prosecute crime is an executive function and not a judicial one.

1.2.2 The principle of separate personnel functions: each branch of government is staffed with different officials.

The different organs of the state have separate personnel. Judicial officers cannot work as members of the executive or legislature. In *South African Personal Injury Lawyers v Heath*[26] the court ruled that a judicial officer cannot be an investigator and prosecutor of crimes.

1.2.3 The principle of separate functions: each branch of government is entrusted with its core function, namely legislation, administration of state affairs and adjudication.

Where a function is allocated to a particular arm of the state, the other arms of the state should not interfere with the execution of such function unless the exercise of such function offends the Constitution. In *Masetlha v President of the Republic of South Africa*[27] the applicant was dismissed from employment by the President. He brought an application to review the decision to dismiss him. The court held that it was not an administrative decision but an executive decision. The court was reluctant to interfere with the decision of the executive. The court stated that:

> [i]t is clear that the Constitution and the legislative scheme give the President a special power to appoint and that it will be only reviewable on narrow grounds and constitutes executive action and not administrative action. The power to dismiss - being a corollary of the power to appoint - is similarly executive action that does not constitute administrative action, particularly in this special category of appointments. It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national

[26] *South African Personal Injury Lawyers v Heath 2001(1) SA 883.*
[27] *Masetlha v President of the Republic of South Africa 2008(1) SA 566 (CC).*

security. …

This case shows that organs of the state should respect constitutional powers and functions bestowed upon another organ of the state. The only time that the judiciary can intervene in the exercise of powers by another state organ is when such power was exercised in conflict with the Constitution or the law. In this case, the President exercised powers bestowed upon him by the Constitution by appointing and later dismissing the applicant. The President's decision to dismiss could be interfered with by the court if it could be shown that the President abused his powers or acted contrary to the principle of legality.

1.2.4 The principle of checks and balances: each branch is entrusted with special powers to keep a check on the others so that an equilibrium in the separation and distribution of powers may be upheld. The purpose of checks and balances is to ensure that the different branches of government control each other internally and serve as counterweights to the power possessed by other branches of government.[28] According to Maqutu:[29]

> [a] complete separation of powers between the organs of state is unattainable, because the legislature enacts legislation in terms of which the courts must operate and the executive formulates policy on the implementation priorities, along with being tasked to enforce court judgments. Also embedded in the doctrine is the principle of checks and balances which accommodates the 'unavoidable intrusion of one branch on the terrain of another' in order to prevent misuses of power.

Separation of powers is not watertight or absolute in South Africa. Through checks and balances, organs of the state check on the powers performed by another organ of the state. For example, the judiciary may declare legislation passed by Parliament to be invalid if the legislation is inconsistent with the Constitution.

[28] Mojapelo *Advocate* April 2013.
[29] Maqutu *PER 2015 (18).*

1.3. Research Methodology

The method used in this research is qualitative as opposed to quantitative. This study examined existing literature, journal articles, case law and legislation.

1.4. Problem Statement

It seems that the decision in *Economic Freedom Fighters*[30] poses a threat to the principle of separation of powers in South Africa. The decision dictates how the National Assembly has to run its affairs. It does not only deal with the interpretation of the Constitution on responsibilities of the National Assembly but it also dictates how these responsibilities should be carried out. Among others, the court ordered the National Assembly to make rules dealing with the process to remove President from office. Despite admission by the parties in the matter that there are processes in place designed to hold the President accountable, the court held that the National Assembly failed to determine the President's breach of section 89 of the Constitution.

The court made the above orders despite the presence of evidence before it that motions to remove the President from office were tabled in the National Assembly and debated upon. After debates on the motions to remove the President, members of the National Assembly voted and the motions did not succeed. The decision of the court went beyond its judicial review limits. It is significant for this study to check whether the court, by exercising its judicial review powers, usurped powers of the legislature. This research focused on finding answers to the question whether or not there is a threat to the doctrine of separation of powers in South Africa.

[30] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC).*

1.5. Aims and Objectives

The aim of this study is to investigate whether in the light of *EFF2* there is no violation of the doctrine of separation of powers by the judiciary. The study examined the facts of the case in *EFF2,* existing literature and case law. The study concludes that there was violation of the doctrine of separation of powers in *EFF*2.

1.6. Literature Review

According to Currie and de Waal:[31]

> [t]he doctrine of separation of powers requires the functions of government to be classified as either legislative, executive or judicial and requires each function to be performed by separate branches of government. In other words, the functions of making law, executing the law and resolving disputes through the application of law should be kept separate and, in principle, they should be performed by different institutions and persons.

The doctrine is therefore the basis for an institutional, procedural and structural division of public power to create a society in which the abuse of power by government is curtailed and public power is exercised wisely, or at least prudently and not in an abusive manner.[32]

In the *Certification case*[33] the Constitutional Court held that there is no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation of powers that is absolute. The court went further to state that:

> [t]he principle of separation of powers, on the one hand, recognizes the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government

[31] Currie and de Waal *The Bill of Rights Handbook* 18.
[32] de Vos and Freedman in Danie Brand *et al South African Constitutional Law in context* 60.
[33] *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of South Africa 1996 (4) SA 744 (CC).*

> from ursuping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation… .

The doctrine of the separation of powers requires organs of the state to be independent from each other with each organ exercising powers which it is given by the Constitution. Although independent, organs of the state sometimes intrude on the terrain of other branches of the state. This intrusion is justified by the principle of checks and balances. Checks and balances should be performed to ensure that there is no abuse of power by organs of the state.

In *Doctors for Life International v Speaker of the National Assembly*[34] the National Council of Provinces (NCOP) had passed certain health Bills without having first invited written submissions from members of the public and not having conducted public hearings on these Bills. The applicant applied to court to declare these Bills unconstitutional for failure to invite public participation. The court invalidated two health statutes on the basis that the National Council of Provinces did not comply with its constitutional obligation to facilitate public involvement as required in the law making-process. The court acknowledged that Parliament is autonomous and that in accordance with the principle of separation of powers the judiciary should not interfere in its processes unless the Constitution mandates it to do so. In exercising its judicial review power, the court determined whether there was public involvement in the law-making process at the degree required by the Constitution. The court did not dictate to Parliament on how the duty to facilitate public participation should be performed. It left this duty to Parliament to fulfil.

The court stated that:

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[34] *Doctors for Life International v Speaker of the National Assembly (2006) ZACC 111.*

> …courts cannot or should not make orders that have an impact on the domain of the other branches of government. When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that, when it is appropriate to do so, courts may - and if need be must - use their powers to make orders that affect the legislative process.
>
> Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.

Although it is the responsibility of Parliament to make laws, the Constitution empowers the judiciary to declare that a law is invalid if that law is in violation of the Constitution. The court's powers in this regard are limited to checking whether or not the law in question is consistent with the Constitution. If the Constitution prescribes processes that Parliament must follow in the law-making process and Parliament fails to follow such procedure, the court may declare the law to be invalid due to Parliament's failure to follow a constitutionally sanctioned process.

In exercising its powers, the court must also observe its own boundaries. The court must guard against usurping Parliament's powers of law-making. The Constitution allows the judiciary to check if Parliament complied with its constitutional obligations. If the court finds that Parliament complied with its constitutional obligations, it (the court) will not interfere with the legislative process. In the event the court finds that Parliament did not comply with its constitutional obligations, the court is constitutionally bound to make a ruling that Parliament failed to observe constitutional obligations. The court will then make a decision which affects the law-making process.

The three arms of the state exist in order to ensure that there is an element

of checks and balances to hold each other accountable.[35] The Constitution does not make use of the phrase "separation of powers" explicitly but it is implied or implicit in the Constitution.[36] Ngcobo states that:

> [o]ur constitution does not require an absolute, categorical division of institutions, powers and functions. It contemplates that there will be some encroachment upon one branch by another branch or branches, resulting in the lines between the branches being blurred at times. That is why there are checks and balances in place to ensure the effective, efficient and constitutional discharge of power and functions by government as a whole.

The manner in which the Constitution allocates powers to different organs of the state allows organs of the state to intrude into each other's terrain. This intrusion is one which is constitutionally permissible when checks and balances powers are exercised. Checks and balances powers ensure that government performs effectively and efficiently.

The three branches of government perform separate functions and they exercise governmental power.[37] Langa writes that:

> [t]he legislative branch cannot be responsible for the execution of the laws it makes, nor may it decide on the disputes such laws may provoke. In this arrangement, the role of an independent and impartial judiciary becomes critical. Without it, proper restraint on the unilateral exercise of governmental authority by the other two branches of government would be difficult indeed.[38]

The doctrine of separation of powers means that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction.[39] In *Glenister v President of the Republic of South Africa,*[40] the court stated that "…the courts are the ultimate guardian of the Constitution". The applicant in this matter launched an application to the High Court for an order setting aside the decision of the Cabinet to originate legislation aimed at dissolving the Directorate of Special Operations known as scorpions. The High Court dismissed the

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28 Munzhedzi *The Role of separation of powers in ensuring public accountability in South Africa: Policy Versus Practice 80-86.*
[36] Ngcobo *STELL LR 2011(1) 38.*
[37] Langa *SAJHR (2006) 22.*
[38] Langa *SAJHR (2006) 22.*
[39] Mojapelo *Advocate* April 2013.
[40] *Glenister v President of the Republic of South Africa 2009(1)287 (CC).*

application on the ground that it lacked jurisdiction. The applicant then approached the Constitutional Court. The court held that it was a necessary component of the doctrine of separation of powers to ensure that branches of the government exercise their power within constitutional bounds. The court stated that:

> In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.[41]

The court added:

> Whether this court should intervene at this stage must therefore be guided by the principle of separation of powers. The principle of checks and balances focuses on the desirability that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. The system of checks and balances operates as a safeguard to ensure that each branch of government performs its constitutionally allocated function and that it does so consistently with the Constitution. …

Before a court can intervene in another organ's domain, it must consider the principle of the separation of powers. The court must not exercise powers belonging to another organ of the state. The only time a court should intervene is when an organ of the state has acted contrary to the obligations imposed by the Constitution. The courts also have a duty to ensure that organs of the state do not exercise powers they do not have. In other words, organs of the state should not go beyond the powers allocated to them by the Constitution.

According to Mhango[42] it is not certain whether the judiciary has developed clear guidelines on matters falling outside its competence. There is no

[41] *Glenister v President of the Republic of South Africa 2009(1)287 (CC) para 33.*

[42] Mhango MO "Separation of powers and the political question doctrine in South Africa: A comparative Analysis" (2018) unpublished LLD Thesis submitted at the University of South Africa, page 231.

certainty on whether the judiciary adjudicates on such matters or should defer to relevant branches of government entrusted with such powers by the Constitution. Mhango argues that:

> [t]he uncertainty in South Africa is exacerbated by the fact that the Constitution expressly granted the courts the power of judicial review as opposed to courts organically developing it over time like in other jurisdictions. The effect of this is that the judiciary has been disinclined to organically develop the institution of judicial review, including its limitations, like in other jurisdictions.

Mhango's above sentiments demonstrate the fact that without clear guidelines as to the judiciary's judicial review limit, it will be difficult to determine which issues the judiciary is competent to deal with and which ones the judiciary should not deal with. Issues which do not require resolution through the application of the law should not be subjected to judicial scrutiny except in circumstances where it can be shown that there was violation of the Constitution.

In *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another,*[43] the Constitutional Court found that the appointment of a special master by the Land Claims Court did not constitute an impermissible intrusion into the domain of the executive. In this case, labour tenants had applied to the Land Claims Court for intervention after the Department did not process their claims for a long time. The Land Claims Court granted an order in terms of which a special master was also appointed to serve as the agent of the court to exercise supervisory powers of the court in order to ensure implementation of the court order. On Appeal, the Supreme Court of Appeal found that the appointment of a special master was foreign to South African law and that it offended the separation of powers principle. The Constitutional Court agreed with the order of the Land Claims Court on the appointment of the special master. Accordingly, the Constitutional Court did not find that the

[43] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another 2019 (11) BCLR 1358 (CC).*

appointment of a special master was offensive to the doctrine of separation of powers.

Although the decision reached in *EFF*2 constitutes an impermissible intrusion into Parliament's terrain according to the Chief Justice, Woolman submits that the *EFF*2 decision should be understood to be the Constitutional Court's ongoing efforts to keep the train on the tracks – by ensuring that the state, specific state actors and 'well-connected' private actors abide by the rule of law and are held accountable to both the Constitution and the people that they serve.[44]

1.7. Outline of chapters of the Study

This mini-dissertation consists of five chapters. Chapter one deals with introduction and background to the study. Chapter two deals with the legal framework for the doctrine of separation of powers. Chapter three looks at the impediments to the application of the doctrine of separation of powers. Chapter four discusses the *Economic Freedom Fighters* case upon which the study is based. Chapter five deals with conclusion and recommendations.

1.8. Conclusion

Government authority is divided among the different arms of the state in South Africa. This separation of powers is not watertight. As guardian of the Constitution, the judiciary has the power to ensure that unconstitutional encroachment into another organ's terrain by one organ is declared invalid. In doing so, the court should also monitor and respect its own limitations.

[44] Woolman S "A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect that Brought Down a President" Constitutional Court Review available at http://www.saflii.org/za/journals/CCR/2018/19.pdf (date of use 02 December 2020).

CHAPTER 2: LEGAL FRAMEWORK OF THE DOCTRINE OF SEPARATION OF POWERS IN SOUTH AFRICA

2.1. Introduction

This chapter concentrates on the sources of the doctrine of separation of powers in South Africa. It investigates the legal instruments which govern separation of powers in South Africa. The interim Constitution of the Republic of South Africa[45] made provision for the separation of powers. The interim Constitution required that there should be division of power between the different arms of the state.[46] The Constitution of the Republic of South Africa, 1996 does not have a specific provision dealing with separation of powers explicitly but allocates functions to different organs of the state. Although the 1996 Constitution does not specifically make reference to separation of powers, it creates a system in which there is separation of powers by determining powers to be exercised by the different organs of the state. The Constitution also creates a system of checks and balances. The exercise of a power by one organ of the state is checked by another to ensure that there is no abuse of state power.

Schedule 4 of the interim Constitution contains constitutional principles which guided the drafting of the Constitution. Constitutional principle vi provided that:

> [t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

Constitutional Principle VI is one of the constitutional principles which were negotiated at the Multi-Party negotiating process in the early 1990's and annexed to the Interim Constitution.[47]

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[45] The Constitution of the Republic of South Africa, Act 200 of 1993 (Hereafter "the interim Constitution").
[46] Schedule 4 of the interim Constitution.
[47] O'regan *PER* 2005(1).

The Constitution of South Africa, 1996 was required to comply with the constitutional principle vi. In the *certification case,*[48] the Constitutional Court had to consider whether the final Constitution did comply with constitutional principle vi. The court found that the Constitution complied with the constitutional principle in the manner in which it was drafted. The Constitution makes division of powers between the executive, legislative and judicial arms of the state. The division of power is such that it is not watertight. In certain instances, the different organs of the state interact with each other. The different organs of the state will be considered below.

2.2. The Executive Authority

The Constitution vests the executive authority of the Republic in the President.[49] The President exercises this authority with the other members of Cabinet.[50] The Constitution describes the functions of the executive authority. In terms of section 85, the executive authority is responsible for:

> 85 (1) …
> (2) …
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
> (b) developing and implementing national policy;
> (c) co-ordinating the functions of state departments and administrations;
> (d) preparing and initiating legislation…

Section 86 of the Constitution deals with the election of President. Section 86 provides that:

> 86 (1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.
> (2) The Chief Justice must preside over the election of the President, or designate another judge to do so. …

[48] *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of South Africa 1996 (4) SA 744 (CC).*
[49] Sec 85(1) of the Constitution.
[50] Sec 85(2) of the Constitution.

In order for a person to occupy the position of President such a person must first be a member of the National Assembly. This is so because the Constitution requires that the election of President should be from among the members of the National Assembly. Another arm of the state, the judiciary, also plays a role in the election of the President. The Constitution provides that the election of President must be presided over by the Chief Justice or another judge designated by the Chief Justice.

Both the legislative and judicial arms of the state play important roles in the process of electing President. A person to be elected as President must first be a member of the National Assembly. Members of the National Assembly must elect a President from among themselves. The Chief Justice (judiciary) presides over the election of President.

The executive authority is, among others, responsible for preparing and initiating legislation. The function of legislating is predominantly the function of the legislative arm of the state. In terms of section 84 of the Constitution, the President is also responsible for assenting to and signing Bills into law. In other words, unless a Bill is assented to and signed by the President it will not become law. Members of the executive are accountable to Parliament both collectively and individually for the exercise of their powers and performance of their functions.[51]

In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others,*[52] the Constitutional Court had the opportunity of considering the powers of the President.

[51] Sec 92(2) of the Constitution.
[52] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC).*

The President published notices in the *Government Gazette* announcing that a commission of inquiry into the administration of rugby was appointed and that the Commissions Act 8 of 1947 would apply to the commission. Regulations were also made for the operation of the commission. The South African Rugby Football Union (SARFU), two of its unions and the president of both SARFU and one of the unions applied to the High Court to set the notices aside. The High Court required the President to testify orally. The Constitutional Court cautioned that the dignity and status of the President must be protected. The Constitutional Court stated that:

> [w]e are of the view that there are two aspects of the public interest which might conflict in cases where a decision must be made as to whether the President ought to be ordered to give evidence. On the one hand, there is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of State and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that the courts are not impeded in the administration of justice.

Organs of the state ought to respect each other and the powers allocated to them by the Constitution. The Constitutional Court warned against making orders which disrespect the office of the President as head of the state. The fact that organs of the state should respect each other does not mean that they must not discharge their constitutional responsibilities. In this case, the Constitutional Court found that the President could be called for oral evidence or presentation if it was in the interest of justice. The Constitutional Court disagreed with the High Court's approach of calling the President to present oral evidence.

In *Mazibuko v Sisulu and Others*,[53] the appellant applied for an order that the Speaker of the National Assembly be directed to ensure that a tabled

[53] *Mazibuko v Sisulu and Others NNO 2013 (6) SA 249 (CC).*

motion of no confidence in the President is scheduled for debate and a vote before the National Assembly on or before the last day of its 2012 annual sitting. The Constitutional Court upheld the High Court's finding that on a proper reading of the rules the Speaker acting alone had no residual power to schedule a motion of no confidence in the President for a debate and a vote in the assembly, and therefore dismissed the appeal. The Constitutional Court said that:

> … the importance of a motion of no confidence to the proper functioning of our constitutional democracy cannot be gainsaid. The primary purpose of a motion of no confidence is to ensure that the President and the national executive are accountable to the Assembly made up of elected representatives. Thus a motion of no confidence plays an important role in giving effect to the checks and balances element of our separation-of-powers doctrine. One of the vital purposes of enshrining the doctrine of separation of powers is to limit the power of a single individual or institution and to make the branches of government accountable to one another.[54]

The principle of checks and balances allows the other organs of the state to see if one organ of the state abuses its power or exercises powers it does not have. In this sense organs of the state become accountable to one another and abuse of power is avoided.

In terms of the Constitution, only the National Assembly can remove the President from office. The Constitution provides thus:

> 89 (1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of –
> (a) a serious violation of the Constitution or the law;
> (b) serious misconduct; or
> (c) inability to perform the functions of office.

The executive authority of a province is vested in the Premier of that province.[55] At a municipality level, the executive authority vests in Municipal Council.[56] The doctrine of separation of powers requires that when functions

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[54] *Mazibuko v Sisulu and Others NNO 2013 (6) SA 249 (CC) para 21.*
[55] Sec 125(1) of the Constitution.
[56] Sec 151(2) of the Constitution.

have to be performed by the Executive, the other organs should respect this allocation and not interfere with it.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism,*[57] the Constitutional Court refused to encroach into the domain of the Executive. In this case, the applicant was dissatisfied with the allocation of fishing quotas it had received in the 2001 allocation process for the 2002 to 2005 fishing seasons and it sought to review that allocation. The review succeeded in the High Court, but on appeal that judgment was overturned by the Supreme Court of Appeal (SCA). The case raised the question of the extent to which such a decision could be reviewed under the new constitutional order.

The court stated that:

> [i]n treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

[57] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC).*

The court emphasised the need for organs of the state to respect each other. Courts should not conduct themselves in a manner that suggests that they are wiser than the other organs of the state in matters falling within the exclusive competence of such state organs. Where decisions having been taken by other organs of the state on matters falling within their exclusive domain, courts should not interfere unless it can be shown that such decisions violate the Constitution. In other words, courts should exercise a higher degree of care when dealing with matters involving the exercise of power by other organs of the state.

2.3. The Legislative Authority

The Constitution vests the legislative authority of the Republic in the national sphere of government in Parliament,[58] legislative authority of the provincial sphere of government is vested in the provincial legislature[59] and in the local sphere of government, in the Municipal Council.[60]

The main function of the legislative arm of the state is to make the law. This function is outlined in section 44 of the Constitution which provides that:

> (1) The national legislative authority as vested in Parliament –
> (a) confers on the National Assembly the power –
> (i) to amend the Constitution;
> (ii) to pass legislation with regard to any matter…
> (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government…

The power to make the law is the exclusive domain of the legislative arm of the state. In terms of section 44 of the Constitution only the legislative arm of the state is empowered to make the law. No other organ of the state is given the power to make the law. At a national level, the National Assembly

[58] Sec 44 of the Constitution.
[59] Sec 104 of the Constitution.
[60] Sec 156 of the Constitution.

has the power to amend the Constitution, pass legislation and to assign any of its legislative powers, except the power to amend the Constitution, to any sphere of government.

In *United Democratic Movement v President of the Republic of South Africa and others*[61] the court considered the effect of an order of the High Court suspending the operation of a piece of legislation in view of the doctrine of the separation of powers.

The applicant had brought an application to the High Court for an order to suspend certain 'floor-crossing' legislation from operating, pending an application to the Constitutional Court to declare the legislation to be unconstitutional. The High Court granted the application. The Constitutional Court subsequently heard the parties on the desirability of it hearing the matter as a Court of first instance and whether it could make an order prior to hearing the main application which would stabilise the situation pending the hearing of the main application.

The court observed that:

> … It is clear that the respondents' appeal against the orders made by the Cape High Court raises a constitutional issue of substance - when, if ever, a High Court may make an order suspending the coming into operation of a constitutional amendment or an Act of Parliament. The question raised is a particularly sensitive one in the light of the doctrine of the separation of powers. The legislative authority of the national sphere of government is vested in Parliament in terms of s 43 of the Constitution but the suspension of the coming into operation of a piece of legislation has the effect of defeating the will of the elected legislature and hampering its ability to exercise the legislative authority conferred upon it by the Constitution. …

The Constitutional Court was reluctant to interfere with the functioning of the legislative arm of the state. According to the court, suspending the coming into operation of a piece of legislation violates Parliament's exercise of

[61] *United Democratic Movement v President of the Republic of South Africa and others (African Christian Democratic Party and Others intervening; Institute for Democracy in South Africa and Another as Amici Curiae 2003 (1) SA 488 (CC).*

legislative authority. The court respected the fact that law-making falls within the exclusive terrain of Parliament.

In *President of the Republic of South Africa and Others v United Democratic Movement,*[62] the first appellant had signed four Acts of Parliament into law. The effect of two of the Acts is to suspend, during certain specified periods, the anti-defection provisions contained in item 23A(1) of Schedule 2 relating to the National Assembly and provincial legislatures. The first of these 'window periods' of suspension was to commence on the coming into force of the legislation. Provision is also made for consequential changes to a provincial legislature's delegates to the National Council of Provinces. The purpose of the other two Acts is to allow defection, during the same periods, from political parties in the local sphere of government. The respondent brought an urgent application in the Cape High Court for the suspension of the Acts on the ground that these Acts were unconstitutional. The order was granted by the High Court.

The order of the High Court in this regard had the effect of interfering with law making. On appeal the Constitutional Court said the following:

> Having regard to the importance of the Legislature in a democracy and the deference to which it is entitled from the other branches of government, it would not be in the interests of justice for a Court to interfere with its will unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation. Where the legislation amends the Constitution and has thus achieved the special support required by the Constitution, Courts should be all the more astute not to thwart the will of the Legislature save in extreme cases.

Unless it is necessary and constitutionally permissible to do so, a court should not interfere with the functioning of the legislative arm of the state.

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[62] *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others intervening; Institute for Democracy in South Africa and Another as Amici Curiae* 2003 (1) SA 472 (CC).

In this case, the court held that if required procedures have been followed in terms of the Constitution, courts should not interfere with the legislature.

Although given different functions by the Constitution, organs of the state are interrelated. There are instances where organs of the state need each other in order to function. For instance, before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution.[63] Members of a provincial legislature are required to swear or affirm faithfulness to the Republic and obedience to the Constitution before they begin their functions in the legislature.[64] The oath or affirmation must be administered by the Chief Justice or another judge designated by the Chief Justice.[65] In other words, in order for the legislative arm of the state to start operating after an election, the judicial arm has to first administer an oath or affirmation to the members of the National Assembly or Provincial Legislature. The functions of the legislature must be respected by the other organs of the state. The other branches or organs of the state should be careful not to intrude into the domain of the legislative arm of the state.

The National Assembly has the power to make rules regulating the conduct of its business. The Constitution allows the National Assembly to make or design its own proceedings and procedures.[66]

2.4. The Judicial Authority

The Constitution vests the judicial authority of the Republic in the courts.[67] Section 165 of the Constitution provides that:

> (1) The judicial authority of the Republic is vested in the courts.

[63] Sec 48 of the Constitution.
[64] Sec 107 of the Constitution.
[65] Schedule 2 of the Constitution.
[66] Sec 57 of the Constitution.
[67] Sec 165 of the Constitution.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

Judges are appointed by the President as head of the Executive.[68] In terms of section 174(3), the President has to consult with the Judicial Service Commission and the leaders of parties represented in the National Assembly before he appoints the Chief Justice and Deputy Chief Justice. Before he appoints the President and the Deputy President of the Supreme Court of Appeal, the President as head of the Executive has to consult with the Judicial Service Commission. The President appoints the other judges of the various courts.

Section 177 of the Constitution deals with the removal of judges and provides that:

(1) A judge may be removed from office only if-
    (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
    (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.
(2) The President must remove a judge from office if there is a resolution calling for that judge to be removed.
(3) The President, on advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

The Judicial Service Commission, which the President as head of the Executive must consult with prior to appointing the Chief Justice, deputy Chief Justice, President and Deputy President of the Supreme Court of Appeal as well as all other judges, is made up of, among others, the Chief Justice, cabinet member responsible for the administration of justice, six

[68] Sec 174 of the Constitution.

persons designated by the National Assembly and four persons forwarded by the President.[69]

The executive and legislative arms of the state play a crucial role in the appointment of judges. In other words, the Constitution dictates that the executive and legislative arms of the state should play a role in setting up the judicial arm of the state. Similarly, the Constitution dictates that the Judiciary should play a role in setting up the legislative and executive arms of the state. The Constitution does this by requiring the President to swear an oath or affirm faithfulness to the Republic and obedience to the Constitution. Members of the National Assembly are also required to swear an oath or affirmation. The oath or affirmation is administered by the Chief Justice or another judge designated by the Chief Justice.

The courts are the ultimate guardian of the Constitution. Courts have the power to declare any law or conduct unconstitutional.[70] Courts have the power to review conduct of the other organs of the state to the extent that the conduct is inconsistent with the Constitution. In exercising their judicial review powers, courts should know their own limits or boundaries.

In *Mazibuko v Sisulu*[71] the court observed that courts should be careful not to exceed their constitutional bounds. The court stated further that:

> …the principle of separation of powers forbids the Judiciary from intervening in matters that fall within the domain of Parliament except where the intervention is mandated by the Constitution. This is what our constitutional order requires. Therefore in exercising their review power, the courts should always observe constitutional bounds within which they are permitted to act. For the Constitution is not only supreme but also binds all arms of government.

The doctrine of separation of powers underlies the principle of judicial independence: the idea that only the judicial branch of government should discharge judicial functions and that it should do so free of interference by

[69] Sec 178 of the Constitution.
[70] Sec 172 of the Constitution.
[71] *Mazibuko v Sisulu and Others NNO 2013 (6) SA 249 (CC).*

the other two branches. Independence also expresses the idea that the judiciary should decide disputes impartially and without bias.[72] The judicial arm of the state should not step into the terrain of the other branches of the state unless it is constitutionally allowed to do so.

In *Soobramoney v Minister of Health, Kwazulu Natal,*[73] the court refused to order the Minister of health to provide dialysis treatment to a patient whose health condition was not requiring emergency health care. The appellant in this case was a 41-year-old diabetic suffering from ischaemic heart disease, cerebro-vascular disease and irreversible chronic renal failure. In order to prolong his life, the appellant sought dialysis treatment from public hospital.

The hospital did not admit him to its dialysis programme since it did not have enough resources for patients who suffer from chronic renal failure. According to the hospital's policy, patients suffering from acute renal failure which could be treated and remedied by renal dialysis were admitted automatically to the renal dialysis programme. In order to qualify for automatic admission to the dialysis programme, a patient had to be eligibile for a kidney transplant. If patients were eligible for transplant, they would be provided with dialysis treatment until they find a donor and kidney transplant is completed.

In terms of the hospital's guidelines, patients were not eligible for kidney transplants unless free of significant vascular or cardiac disease. Since the appellant suffered from ischaemic heart disease and cerebro-vascular disease he was not eligible for a kidney transplant. The appellant then made an urgent application to the High Court for the Hospital and the Minister of Health to be ordered to admit him to the hospital and provide him with

[72] Currie and de Waal *The Bill of Rights Handbook* 20.
[73] *Soobramoney v Minister of Health, Kwazulu Natal 1998 (1) SA 765 (CC).*

dialysis treatment. The application was unsuccessful. The appellant appealed to the Constitutional Court. The appeal did not succeed.

The Constitutional Court did not want to step into the terrain of the executive branch of the state by ordering the minister to provide medical care despite the fact that it would go beyond the available resources of the state. The Constitutional Court said that:

> ...[a] court will 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.[74]

Later in the judgment, the court stated that:

> [c]ourts are not the proper place to resolve the agonising personal and medical problems that underlie these choices. Important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious. … The provisions of the bill of rights should furthermore not be interpreted in a way which results in Courts feeling themselves unduly pressurised by the fear of gambling with the lives of claimants into ordering hospitals to furnish the most expensive and improbable procedures, thereby diverting scarce medical resources and prejudicing the claims of others.[75]

When adjudicating, courts should be careful not to venture into policy formulation which is the role of the executive or law making which is performed by the legislative arm. *Government of the Republic of South Africa and Others v Grootboom*[76] presents a temptation that may lead a court to encroach into the domain of the other organs of the state in the area of justiciable socio economic rights. In this matter, the Respondents left their place of residence which was congested and in a devastating state. They occupied a privately-owned land which was earmarked for development. The owner of the land applied for and was granted an eviction order against the Respondents. When the eviction was carried out, the respondents were

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[74] *Soobramoney v Minister of Health, Kwazulu Natal 1998 (1) SA 765 (CC)* para *29.*
[75] *Soobramoney v Minister of Health, Kwazulu Natal 1998 (1) SA 765 (CC* para 58.
[76] *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC).*

left stranded and without accommodation.

The respondents applied to the High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The High Court held that section 28(1)*(c)* of the Constitution obliged the State to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children. The High Court held further that this obligation existed independently of and in addition to the obligation to take reasonable legislative and other measures in terms of section 26 of the Constitution and that the State was bound to provide this rudimentary shelter irrespective of the availability of resources.

The appellant appealed the decision of the High Court to the Constitutional Court. In determining the obligations imposed by the Constitution on the state in the provision of housing or the progressive realisation of the right in section 26 of the Constitution, the Constitutional Court said:

> …The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on s 26 in which it is argued that the State has failed to meet the positive obligations imposed upon it by s 26(2), the question will be whether the legislative and other measures taken by the State are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.[77]

The legislative and reasonable measures imposed on the state by section 26(2) of the Constitution are measures to be taken by the Executive and the Legislature. When the court is called upon to determine whether or not the

[77] *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)* at para 41.

executive or legislature has complied with its constitutional obligations, it (the court) should not require the legislature or executive to do more than is reasonable. In other words, if the measures taken by the state are reasonable under the prevailing circumstances, the court should not interfere with the decisions taken by the state.

In order to exercise self-restraint and not exceed its boundaries, a court should know what functions should be performed by which organ of the state. One arm of the state should not dictate to the others what the latter should do but the court may order compliance with constitutional obligations in the event of breach. In *Grootboom*[78] the court was alive to the responsibility which rested on the Executive to ensure compliance with the obligations imposed by section 26 of the Constitution. Sachs J said:

> The national government bears the overall responsibility for ensuring that the State complies with the obligations imposed upon it by s 26. The nationwide housing program falls short of obligations imposed upon national government to the extent that it fails to recognise that the State must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall program focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.

The court recognised the responsibility that is bestowed on the national sphere of government to decide on allocation of the national housing budget. The court cannot interfere with the exercise of the power by the Executive to decide on the allocation of budget unless the exercise is unreasonable and violates the Constitution or the Bill of Rights.

In *Mazibuko NO v Sisulu,*[79] the High Court warned against the politicisation of the judiciary. In this case, the applicant, as leader of the opposition and on behalf of eight opposition parties, brought an urgent application that first respondent be directed to ensure that a tabled motion of no confidence in

[78] *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC).*
[79] *Mazibuko NO v Sisulu and Others NNO 2013 (4) SA 243 (WCC).*

the President be scheduled for debate and a vote before the National Assembly on or before the last day of its annual sitting. The applicant alleged that 'procedural machinations' frustrated the scheduling of the debate and argued that, notwithstanding the National Assembly Rules not providing for breaking the resulting deadlock, the first respondent had a residual power to order scheduling of the debate.

Davis J said:

> [c]ourts do not run the country, nor were they intended to govern the country. Courts exist to police the constitutional boundaries, as I have sketched them. Where the constitutional boundaries are breached or transgressed, courts have a clear and express role; and must then act without fear or favour. There is a danger in South Africa, however, of the politicisation of the judiciary, drawing the judiciary into every political dispute as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication. In the context of this dispute, judges cannot be expected to dictate to parliament when and how it should arrange its precise order of business matters. What courts can do, however, is to say to parliament: 'you must operate within a constitutionally compatible framework; you must give content to s 102 of the Constitution; you cannot subvert this expressly formulated idea of a motion of no confidence; however, how you allow that right to be vindicated is for you to do, not for the courts to so determine'.

Organs of the state should run their own affairs and exercise powers given to them by the Constitution. Courts should not interfere with the functioning of the other branches of the state. Courts should be resorted to when organs of the state have breached their constitutional obligations or boundaries. In instances where an organ of the state has exercised a power given to it by the Constitution within constitutional bounds, it is undesirable for the court to come in. Courts should not dictate how the other organs of the state should exercise their constitutional powers.

In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,[80] the Constitutional Court dealt with a situation where the High Court had encroached into the domain of the Executive. The court cautioned

[80] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC).*

that courts must know their boundaries as ultimate guardians of the Constitution.

In this case, the Minister of Trade and Industry, acting on a recommendation made by the predecessor of ITAC imposed anti-dumping duties on steel cable and similar products manufactured by Bridon International Ltd UK. Such duties would, under the Anti-Dumping Regulations of 2003, endure for a period of five years unless a sunset review investigation was initiated prior to the expiry of the five-year period, which would have allowed ITAC to extend it for a maximum of 18 months for a review of the duties and the making of recommendations to the Minister.

In February 2007, just before the expiration of the five-year period, SCAW, a South African manufacturer of competing products, asked ITAC for a sunset review that would maintain the anti-dumping duties in question. Contrary to SCAW's expectations, ITAC recommended the termination of the anti-dumping duties pertaining to Bridon in October 2008.

Three days later, SCAW made a High Court application for an interim interdict pending the final determination of a review application restraining ITAC from forwarding its recommendations to the Minister and restraining the Minister of Finance from implementing ITAC’s recommendation. The High Court granted both interdicts. The matter ultimately came to the Constitutional Court on appeal. The Constitutional Court said:

> [i]n our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.
>
> It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their own power.

Courts have a duty to intervene when there is a violation of the Constitution by the other arms of the state. This is done so that organs of the state may act within constitutional bounds. Sometimes, courts are tempted to encroach into the terrain of other organs of the state whilst performing their checks and balances function. As the ultimate guardians of the Constitution, courts have to ensure that they do not exceed their own powers.

2.5. Conclusion

The separation of powers principle is recognised and applied in South Africa. Constitutional Principle vi required that there should be separation of powers. The Constitution makes provision for division of power by allocating specific powers and functions to different organs of the state.

South Africa's jurisprudence is also indicative of the recognition and respect for the principle of separation of powers. The court as the guardian of the Constitution has the empower to intervene to guard against violation of the Constitution.

CHAPTER 3: IMPEDIMENTS TO THE DOCTRINE OF SEPARATION OF POWERS

3.1. Introduction

The doctrine of separation of powers as provided for in the Constitution was based on the principles of the separation of government into three branches being the legislative, executive, and judiciary with the conception that each branch performs unique and identifiable functions that are appropriate to each and the limitation of the personnel of each branch to that branch, so that no one should serve in more than one branch simultaneously. To a great extent, the Constitution effectuated these principles, however critics objected to what they regarded as a curious intermixture of functions in for example, the veto power of the President over legislation and his role of appointment of executive officers.[81]

Throughout much of history, the "political branches" have contended between themselves in application of the separation-of-powers doctrine. Many notable political disputes turned on questions involving the doctrine because the doctrines of separation of powers and of checks and balances require both separation and intermixture, the role of the judiciary in policing the maintenance of the two doctrines is problematic. It is only in recent decades that cases involving the doctrine of the separation of powers have been regularly decided by Courts. Previously, informed understandings of the principles have underlain judicial construction of particular clauses or guided formulation of constitutional common law. That is the non-delegation doctrine was from the beginning suffused with a separation-of-powers premise, and

[81] Klug H "Separation of powers, accountability and the role of independent constitutional institutions".

the effective demise of the doctrine as a judicially enforceable construct reflects the Court's inability to give any meaningful content to it.

Separation of powers is one of the essential principles that have brought democracy and constitutionalism, yet a system that is divided in powers. It could be said that the sole purpose of the separation of powers is to protect liberty from tyranny. Due to constitutional review, the doctrine of the separation of powers has emerged in constitutional jurisprudence as the different branches and institutions of government begin to exercise power and challenges are brought to test the extent of these powers in different contexts.[82]

Although traditional approaches to the political idea and legal doctrine of the separation of powers focus on the checks and balances between the legislature, executive and judiciary, the problem of political and legal accountability is no longer contained within these institutional parameters and increasingly constitutional designers have created additional mechanisms and institutions in their efforts to ensure the desired goals of accountability, responsiveness and openness in the exercise of governmental authority. These institutions are referred to as chapter nine institutions because they are contained in chapter nine of the Constitution. One such institution is the office of the Public Protector. The remedial action of the Public Protector is binding unless reviewed and set aside by an order of court.[83]

The best understanding of the role of chapter nine institutions in the structure and functioning of the constitutional order requires a recognition of how the separation of powers applies to these institutions. Just as the traditional branches are interlinked and thus serve to check and balance each other's powers, so this fourth branch, dedicated to the task of enhancing public

[82] Klug H "Separation of powers, accountability and the role of independent constitutional institutions".
[83] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2016 (3) SA 580 (CC).*

accountability, is interlinked with the other branches in different ways and is itself part of the structure of checks and balances within the constitutional order.

The Constitution plays a much broader role in governance, a role that is essential to good governance. It is the Constitution that empowers all the institutions of government, providing an institutional framework through which power is to be exercised and controlled. While most constitutions today provide an institutional framework for the exercise of power within the state, it is a fairly unique feature of the South African Constitution that it provides for a range of interacting institutions, beyond the traditional three-way division of executive, legislature and courts, as a means to secure good governance.[84]

The revolutionary nature of the Constitution lies not only in the expansive framework of rights it guarantees, or the unique system of co-operative government to manage the relationship between regional, local and national levels of government, but also in the constitutionalising of a set of independent institutions whose role is to uphold the progressive vision of the Constitution in the face of the ordinary pressures of political horse-trading and interest group politics. The design of the Constitution and its specific institutional framework is meant to provide a form of governance more responsive to the needs of those who have been historically excluded.

3.2. Challenges Judicially observed

In *National Treasury and Others v Opposition to Urban Tolling Alliance,*[85] the respondents applied to the High Court for urgent interdict to restrain South African National Roads Agency (SANRAL) from levying and

[84] Kende MS "Corruption cases and separation of powers in the south African courts and U.S Supreme Court".

[85] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC).*

collecting toll on the Gauteng roads until their application to review and set aside the decisions of *(a)* SANRAL and the Transport Minister to declare the Gauteng roads as toll roads; and *(b)* the Director-General to grant certain environmental approvals related to the Gauteng Freeway Improvement Project (GFIP) was determined finally. The GFIP was approved by cabinet for SANRAL to upgrade roads in the economic hub of the Gauteng Province. The High Court granted the interdict.

On appeal the Constitutional Court found that the High Court stepped into the exclusive terrain of the Executive branch of the state. The High Court granted the interdict without checking what implications the interim order would have on the separation of powers doctrine. The Constitutional Court said that:

> …the order has wide-ranging consequences for national finances and the management of our country's sovereign debt. At the behest of a court order, the national executive is prevented from fulfilling its statutory and budgetary responsibilities for as long as the interim order is in place. In effect, the order compels a reallocation of otherwise budgeted funds to satisfy the financial exigency. Thus the grant of the interdict has a direct and immediate impact on separation of powers as well as ongoing irreparable financial and budgetary harm.[86]

The effect of the interim order granted by the High Court in the matter was that the court had interfered with the functioning of the executive organ of the state. The executive organ of the state was functioning in terms of legislation which was never challenged as being invalid. Despite the fact that the legislation in terms of which the executive exercised a power was never challenged, the High Court granted an order interdicting the executive from exercising its powers. This type of an intrusion into the domain of the executive by the courts is not constitutionally permissible. The High Court failed to respect the functioning of the Executive and to observe its own constitutional bounds. The court interdict against the Executive in this

[86] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) para 27.*

matter as granted by the High Court made government to spend more because the order prevented government from collecting revenue.

Later in the judgment, the Constitutional Court added that:

> [t]he balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.[87]

When dealing with a matter that involves the exercise of authority by an organ of the state, the court must consider and respect the doctrine of separation of powers. The court should determine whether the power was exercised by the appropriate organ and if so, whether the relevant organ of the state did not exceed its constitutional boundaries in the exercise of such power. If the court finds that the power was exercised by the relevant authority and such power was exercised in a reasonable manner, the court should not interfere.

The High Court order was accordingly set aside on account of it being offensive to the separation of powers. A proper application of the separation of powers is hindered when an organ of the state encroaches on the exclusive domain of another. In certain instances, the courts are unable to limit their own power and they end up in the domain of the Executive or Legislature.

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[87] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) para 47.*

In *National Director of Public Prosecutions and Others v Freedom Under Law,*[88] the High Court had reviewed and set aside four decisions taken by or on behalf of the first three appellants in favour of the fourth appellant, and directed the first three appellants to reinstate criminal prosecutions and disciplinary proceedings against him. The Supreme Court of Appeal held that the High Court encroached into the exclusive domain of the Executive. The court stated that the doctrine:

> …precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime, while the Commissioner is the authority mandated to manage and control the SAPS. … the court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons. Suffice it to say that in my view this is not one of those rare occasions, and I can find no compelling reason why the executive authorities should not be given the opportunity to perform their constitutional mandates in a proper way. The setting-aside of the withdrawal of the criminal charges and the disciplinary proceedings has the effect that the charges and the proceedings are automatically reinstated, and it is for the executive authorities to deal with them. The court below went too far.

The High Court had usurped the powers of the Executive. It is not constitutionally justifiable for the court to make decisions on behalf of the National Director of Prosecutions and the South African Police Services. The High Court failed to observe its constitutional boundaries and encroached into the exclusive terrain of the Executive. The Supreme Court of Appeal disagreed with the decision of the High Court. The SCA found that the High Court went too far. The High Court exercised powers which belong to another branch of the state.

In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*[89] the Minister had made and published Regulations for a Transparent Pricing System for Medicines and Scheduled Substances

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[88] *National Director of Public Prosecutions and Others v Freedom Under Law 2014 (2) SACR 107 (SCA).*

[89] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC).*

under the Medicines and Related Substances Act 101 of 1965 in the *Government Gazette* in April 2004. The New Clicks, and the Pharmaceutical Society of South Africa and others, launched separate applications in the High Court for orders declaring the regulations unconstitutional and invalid on various grounds. Some of the grounds attacked the procedures used by the Pricing Committee and the substance of the regulations promulgated by the Minister on the Pricing Committee's recommendation. A notice to abide the decision of the High Court was filed by the Pricing Committee. The High Court dismissed the consolidated applications, the minority holding that the regulations should be set aside on various grounds. The Supreme Court of Appeal held that the regulations were invalid and of no force and effect.

When the matter came to the Constitutional Court, the court warned that:

> [l]egislative administrative action is a special category of administrative action. It involves the making of laws and the taking of policy decisions for that purpose. Under our Constitution these are decisions which are within the domain of the Executive, to whom Parliament has delegated its law-making power. Whilst the exercise of this power is subject to constitutional control, it is important that the special role of the executive in exercising this power be acknowledged, and that courts 'take care not to usurp' it.

The Constitutional Court urged courts not to usurp powers belonging to other organs of the state. Although the courts have a duty to check that powers are exercised within constitutional bounds, they must not exercise powers which belong to other organs of the state. Courts should respect constitutional powers bestowed upon other organs of the state.

3.3. Conclusion

Courts are the major actors in the challenges faced by the doctrine of separation of powers. As custodian of the Constitution, the judiciary has a duty to ensure that organs of the state exercise their powers within constitutional bounds. But in exercising the checks and balances role, courts end up performing functions bestowed on the other organs of the state. The judiciary must observe their own limits and avoid usurping power constitutionally allocated to another organ of the state.

CHAPTER 4: DISCUSSION OF *ECONOMIC FREEDOM FIGHTERS AND OTHERS V SPEAKER OF THE NATIONAL ASSEMBLY AND ANOTHER 2018 (2) SA 571 (CC)*

4.1. Introduction

In *EFF*1, the Constitutional Court made an order that a remedial action issued by the Public Protector is binding unless reviewed and set aside.[90] Pursuant to this ruling, the Economic Freedom Fighters and other political parties applied to the Constitutional Court complaining that the National Assembly failed to perform its constitutional duty of holding the President to account for failure to implement the Public Protector's remedial action.

The genesis of this application lies in the investigations made by the Public Protector into the improvements made on President Jacob Zuma's private residence at Nkandla. A report dated 19 March 2014 was issued by the Public Protector. This report contained remedial action taken by the Public Protector against the President. Among others, the remedial action included that the President should pay a reasonable percentage of costs spent on improvements which did not relate to security. The President was also required to reprimand Ministers under whose watch the project was carried out and funds were misused. According to the Public Protector's report, the President would be assisted by National Treasury in determining what a reasonable percentage would be.

[90] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2016 (3) SA 580 (CC).*

The President did not implement the remedial action recommended by the Public Protector. Instead, the President instructed the Minister of Police to conduct investigations into the Nkandla project to determine the costs of the non-security measures. A report was produced. In terms of this report, the President was absolved from any wrong doing. The National Assembly adopted this report. The Public Protector's report was accordingly second guessed. The Economic Freedom Fighters then launched an application[91] to the Constitutional Court to declare that the National Assembly violated the Constitution by failing to scrutinise and hold the President accountable. They also sought an order declaring the President's conduct of not implementing the remedial action to be in violation of the Constitution.
The court held that the Public Protector's remedial action is binding and that the National Assembly and the President violated the Constitution.

After the judgment in *EFF*1 was delivered certain activities occurred in the National Assembly. These activities included:

a. On 05 April 2016, the leader of the Democratic Alliance moved a motion to remove the President from office in terms of section 89(1) of the Constitution. The basis for this motion was the President's alleged serious violation of the Constitution for having failed to implement the remedial action taken by the Public Protector. The motion was debated and voted upon. It was unsuccessful.
b. The President attended sessions organised by the National Assembly where he was asked questions and he provided answers to the questions asked.
c. In November 2016, a motion of no confidence in the President was moved. This motion was debated and voted upon. It did not succeed.

[91] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2016 (3) SA 580 (CC).*

d. A motion of no confidence in the President was moved on 08 August 2017. Members of the National Assembly deliberated and voted on the motion. The motion was defeated.

The applicants applied to the Constitutional Court for an order, among others, declaring that the Speaker of the National Assembly did not put in place appropriate measures and processes for holding the President to account for not implementing the Public Protector's remedial action and that the Speaker should design measures and processes which would be used for holding the President to account. The majority court granted the application. The majority judgment found that there were no mechanisms and processes designed to deal with an impeachment in terms of section 89(1) of the Constitution. The majority judgment concluded that the Speaker did not hold the President accountable as required by section 89(1) of the Constitution.[92]

4.2. Majority judgment

In holding that the Speaker did not put in place measures and processes which satisfy requirements of an impeachment process in terms of section 89(1) of the Constitution, the majority court acknowledged the existence of mechanisms and processes designed by the National Assembly to hold the President accountable and that it is not correct to view the National Assembly as having done nothing in holding the President to account.[93]

The majority judgment's approach to the matter is based not on whether mechanisms, measures and processes for holding the President accountable exist but on whether such mechanisms and processes satisfy

[92] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 208.
[93] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 199.

the requirements of section 89(1) impeachment process. In fact, the question asked by the majority judgment on this issue is whether the mechanisms and processes which are available were designed specifically to deal with a process referred to in section 89(1) of the Constitution. Section 89(1) of the Constitution deals with the removal of the President from office. Section 89(1) of the Constitution empowers the National Assembly to remove the President from office only on the grounds of:

(a) A serious violation of the Constitution or the law;
(b) Serious misconduct; or
(c) Inability to perform the functions of office.

According to the majority judgment there should be an inquiry into the existence of a ground listed in section 89(1) before the removal of a President can occur. In other words, the National Assembly should first investigate serious misconduct committed by President and then make a ruling that the conduct is indeed serious before the impeachment process envisaged in section 89(1) can be embarked upon. If the removal is not preceded by an investigation and a finding that the conduct the President is alleged to have committed is serious and in compliance with the requirements of section 89(1), the removal of the President will be unconstitutional and may be set aside on review. In this regard Jafta J, writing for the majority, records that:

> … the process envisaged in section 89(1) involves necessarily an antecedent determination by the Assembly to the effect that one of the listed grounds exists. This is because those are grounds for the President's removal.[94] …
>
> ... Without accepting that one of the listed grounds existed, the Assembly could not authorise the commencement of a process, which could result in the removal of the President from office. Moreover, it does not appear from the papers that the President was afforded the opportunity to defend himself. Without knowing whether the Assembly holds the view that the President has committed a serious violation of the Constitution, it would be difficult for him to mount an effective defence. The procedure followed by the Assembly here

[94] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 204.

does not accord with section 89.[95]

According to the majority judgment, the starting point should have been to investigate the existence of a ground to remove the President from office. If a ground listed in section 89 of the Constitution has been found to exist, the Assembly would then authorise the commencement of a process aimed at the removing the President. The majority judgment's analysis of the facts in this matter presents a problem. The problem presented lies in the necessity of an investigation of a fact that has already been uncovered and has become common knowledge. The Constitutional Court had already ruled in *EFF*1 that the President violated the Constitution by having failed to implement the remedial action of the Public Protector. This was common knowledge. It was debated in the National Assembly. The President even instructed the Minister of Police to institute a parallel investigation into the non-security upgrades effected on his Nkandla home and the costs associated therewith. The report by the Minister absolved the President of any wrong doing.

Several motions of no confidence and a motion to remove the President from office were moved, debated and voted upon. Question and answer sessions were also held where the President was in attendance. The President answered questions in the National Assembly relating to the Public Protector's report. These motions were dealt with in accordance with rules designed by the National Assembly. There was no submission on the papers filed in court or during argument that the Speaker prevented the leader of the opposition or any other member of the National Assembly from moving a motion of no confidence in or for removal of the President. In conclusion Jafta J held that:

> …section 89(1) implicitly imposes an obligation on the Assembly to make rules specially tailored for an impeachment process contemplated in that section. And, I hold that the Assembly has in breach of section 89(1) of the Constitution

[95] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 205.

> failed to make rules regulating the impeachment process envisaged in that section.

Plain reading of section 89(1) of the Constitution does not suggest that special rules dealing with impeachment in terms of the section have to be made. In any event the Constitution empowers the National Assembly to make its own rules to regulate the conduct of its business in the Assembly.[96]

The majority court dealt with the matter as if it involved President in general and not a specific President despite the facts being clear that the President in question was President Jacob Zuma. The Public Protector's remedial action which triggered this application was taken against President Jacob Zuma and not any other President. The motions of no confidence and motions for removal from office were made against President Jacob Zuma. Resultantly, the court application was made against the Speaker for failing to hold President Zuma accountable. The Chief Justice records that:

> This case has never been about impeachment in general. It has always been about the impeachment of President Zuma. It is context-sensitive or situation-specific. Little, if any, room therefore exists for over-indulging in generalities about motions for impeachment. Most applicants have stated that an impeachment ground is well- established and self-evident, and that mechanisms to facilitate the process exist. All of the above has the benefit of the President's repeatedly stated position on the seriousness or otherwise of the Nkandla saga. Well-documented or electronically recorded evidential material on Nkandla including the President's side of the story exists. And it might well suffice for the second Nkandla impeachment motion, if only this Court were to allow the Assembly, including applicants, to examine that material and form its own opinion.[97]

This case was concerned with impeachment of a specific President, Jacob Zuma. The majority dealt with the case as if it is an impeachment matter in general and not affecting a specific person. According to the Chief Justice, the court had to approach the matter with the understanding that they are dealing with facts which arose from a particular context. The facts arose from the Speaker's alleged failure to hold President Jacob Zuma

[96] Sec 57 of the Constitution.

[97] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 278.

accountable. This alleged failure arises from the security upgrades effected to President Zuma's Nkandla residence. The Nkandla saga is the basis upon which the application was brought to court. This case was not about the possibility of any President committing a misconduct or one of the grounds found in section 89 of the Constitution.

4.3. An Indepth Analysis of the Minority Judgment

The minority judgment disagreed with the findings of the majority judgment. According to the minority judgment, there are already mechanisms and processes designed to hold the President to account.[98] These are mechanisms and processes which have always been used by the applicants in the past. In fact, even before launching this application the applicants used these mechanisms and processes.

The minority judgment held that the Speaker did hold the President to account. Zondo DCJ, for the minority, said that:

> The fact that on 5 April 2016 a motion for the removal of the President was moved, deliberated and voted upon but was defeated in the National Assembly and the fact that on 10 November 2016 and on 8 August 2017 motions of no confidence in the President were moved, deliberated and voted upon but were defeated prove that the National Assembly did not just sit idle and do nothing as the applicants claim but that it acted upon the President's conduct and held him accountable. The fact that those motions were defeated does not detract from the fact that the National Assembly did hold the President accountable. In the applicants' supplementary affidavit the deponent says that it is not the applicants' case that a motion for the removal of a President in terms of section 89 must succeed before it can be said that the National Assembly has held the President accountable. The applicants' position must be the same as well in regard to motions of no confidence in the President which are moved, deliberated and voted upon but are defeated.

According to Zondo DCJ, the National Assembly took steps to hold the President to account. This is evident from the fact that on different dates motions of no confidence were moved. A motion to remove the President was also moved. These motions were debated and voted upon in the National Assembly. The moving, debating of and voting upon motions of no

[98] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 43.

confidence are indicative of the steps taken by the national Assembly in holding the President to account. The applicants brought this application after several unsuccessful motions were moved, debated and voted on. If the applicants' complaint is indeed that there were no appropriate mechanisms and processes available for holding the President accountable as required by section 89(1) of the Constitution, these motions of no confidence and for the removal of the President would have not been held.

In fact, it would appear that the application to court was triggered by the fact that the motions failed. If the motions had succeeded it is unlikely that this matter would have been brought to court. Zondo DCJ states that:

> It cannot be, and I think the applicants accept this, that, if the motion of no confidence in the President succeeds, the National Assembly will be said to have held the President to account but, if the motion is defeated, it would be said that the National Assembly has not held the President to account. Whether the National Assembly has held the President to account through a motion of no confidence in him or not cannot depend upon the result of the vote. If this is correct, then the fact that motions of no confidence in the President were moved, deliberated and voted upon on 10 November 2016 and 8 August 2017 means that the National Assembly did hold the President to account through such motions.[99] …

Mogoeng CJ, who concurred in the minority judgment, characterised the majority judgment as a "textbook case of judicial overreach…". According to the Chief Justice, the majority judgment "is at odds with the dictates of separation of powers…". The majority judgment dictated what the National Assembly, another arm of the state, should do in the exercise of its authority. According to Mogoeng CJ:

> … [i]t is just as insensitive to this doctrine to hold that impeachment grounds must always be determined by the Assembly before the debate and voting on a motion of impeachment could take place. And it is even more so when the consequential order then directs the Assembly to make rules that would effectively regulate the process as so prescribed. This, in circumstances where that conclusion is resoundingly negated by the deposition of almost all applicants to the effect that the seriousness of the constitutional violation in relation to Nkandla is "self- evident" or "well-established". Without any inquiry

[99] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 93.

> these parties represented in the Assembly were able to determine the existence of an impeachment ground. Yet the second judgment in effect says that it is constitutionally impermissible for them to do so.[100]

The minority judgment approaches the matter from the angle that the National Assembly has rules which are designed for the purpose of holding the President to account for his actions. The minority views the flexibility of the mechanisms and processes which are in place to allow not only the National Assembly but also any member of the National Assembly to hold the President to account. These processes allow for an *ad hoc* committee to be established. The applicants participated in an *ad hoc* committee in the past without hindrance. In this application, the applicants suggest that an *ad hoc* committee should be established to investigate the President's conduct. This step, the minority held, is available to the National Assembly and does not require court intervention. Zondo DCJ clarified thus:

> In the applicants' founding affidavit the EFF, UDM and COPE have suggested through the deponent to that affidavit that at least an ad hoc Committee of the National Assembly should be established "to investigate the President's conduct in light of the judgment of [this Court] (including whether he misled Parliament)". If the three parties wanted an ad hoc Committee of the National Assembly to be established to undertake that task for the purposes of the section 89 procedure, there was no need for them to come to Court. This is so because such a Committee may be established by the National Assembly – a body in which they have members. All that was needed to achieve that was that any member of any one of the three applicants in the National Assembly move a motion for the establishment of such a Committee and specify the task of the Committee in the motion and achieve a *two thirds majority* required support among the members of the National Assembly. The ad hoc Committee would then undertake the task of establishing whether at least one of the grounds listed in section 89 is present and report back to the National Assembly. The National Assembly would then decide whether it removes the President or not. If it decides to remove the President, the President will be removed from office. If it decides not to remove him, he will continue in office. I have already quoted the relevant parts of Part 15 of the Rules of the National Assembly which deal with ad hoc Committees. There is no need to repeat that exercise.[101]

The applicants have accepted in their papers that an *ad hoc* committee may be established to investigate the existence of a ground listed in section 89

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[100] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 224.
[101] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 124.

and whether or not the President misled Parliament. An *ad hoc* committee was ever established and used in the past. The Applicants were represented in the *ad hoc* committee and they participated. The applicants, being political organisations, have representatives in the Assembly. Members of the National Assembly are entitled to participate in the National Assembly in accordance with the rules of the National Assembly.[102] Since the applicants accept that they could establish *ad hoc* committee in order for the National Assembly to hold the President accountable, they could have done so without even approaching the court. As a result it was not appropriate for the majority court to dictate to the National Assembly to make rules or mechanisms for holding the President accountable.

4.4. Judicial Overreach

The minority judgment finds the majority judgment to be offensive to the separation of powers doctrine. The minority judgment accuses the majority of encroaching into the exclusive domain of Parliament. According to the minority, this encroachment into the domain of Parliament is not sanctioned by the Constitution and therefore not justifiable. Mogoeng CJ labels the majority judgment in the following manner:

> …The second judgment is a textbook case of judicial overreach - a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament.[103] …

The minority holds that it is not necessary for the court to enter into the affairs of Parliament in cases where the issues involved require Parliament to exercise its authority in terms of its own rules. In this case, the minority held, Parliament had solutions to its own problems and it was not necessary for the applicants to rush to court. Mogoeng CJ, in support of the minority, stated the following:

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[102] Sec 57 of the Constitution.

[103] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 223.

> When approached for intervention, this Court's role is to help only those who are constitutionally incapable of helping themselves. And, if the solution has already been provided and it is within the applicants' remit to address their own problem effectively, this Court is duty-bound to let them do it themselves. Mindful of the dictates of separation of powers, this ought to be even more so when help-seekers are the bearers of the primary constitutional responsibility, in another arm of the State, to do what they seek to achieve through an order of this Court. The running of State affairs is a trilateral responsibility – shared by the Executive, the Legislature and the Judiciary. It would be quite concerning if a court were to grant an order that does not serve or advance any practical purpose and in circumstances where that order deals with what has been achieved already or could be improved on if only cooperation were forthcoming from applicants, in a process that is already under way.[104]

The evidence before court was to the effect that there are mechanisms in place through which the National Assembly can hold the President to account. Some of these mechanisms were already used to hold the President to account. Mogoeng CJ emphasises that parties should come to court only when they have problems which they do not have solutions to. In the present case, the parties have solutions to their problems. The parties are aware that there are parliamentary processes and mechanisms of holding the President to account. Prior to coming to court, the applicants moved motions in the National Assembly. After they were debated and voted upon, these motions were defeated. A court approached under these circumstances should resist temptation to enter into the exclusive terrain of the legislative organ of the state.

The question that arises is whether the decision reached by the majority in this matter amounts to judicial overreach. In other words, does the majority judgment limit itself to the interpretation of section 89(1) of the Constitution or does it do more? The answer is found in the determination of the issues before the Constitutional Court. The nature of relief sought by the applicants and the court's answer thereto will assist in determining whether or not the majority judgment did more than what it was constitutionally mandated to do.

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[104] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 236.

The majority judgment granted the relief sought by the applicants despite evidence having been presented that there were mechanisms and processes in place to hold the President accountable. A closer reading of the minority judgment reveals that the cause of complaint is that the majority judgment dictates to Parliament the manner in which Parliament should run its affairs. The majority, on the other hand, justify their judgment by saying that:

> …the second judgment does nothing more than interpret section 89(1) and direct the National Assembly to act in accordance with the Constitution. It attempts to provide the National Assembly with guidance on the tools necessary to enable it to fulfil its constitutional duty, to hold the President to account in the direst of situations. It does not seek to tell the National Assembly how to use those tools.[105]

Among others, the majority judgment orders the National Assembly to design rules consistent with section 89(1) of the Constitution in circumstances where the National Assembly already has rules which can be and are used to hold the President to account.

In *Magidiwana and Others v President of the Republic of South Africa,*[106] the Constitutional Court refused to enter into the domain of the executive. In this case, the President had set up a commission of inquiry pursuant to the injuries sustained and killings that occurred at Marikana. The applicants sought funding from the Minister of Justice and Constitutional Development and the Legal Aid South Africa in respect of legal fees for participation in the commission.

The Minister refused to fund because there was no legal framework in terms of which the ministry could fund the applicants. The Legal Aid South Africa

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[105] *Economic Freedom Fighters and others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC)* para 285.

[106] *Magidiwana and Others v President of the Republic of South Africa and Others (CCT 100/13) [2013] ZACC 27; 2013 (11) BCLR 1251 (CC).*

also declined the request for legal aid on the bases that the legal Aid South Africa was operating under financial constraints and that their policy did not allow for commissions of inquiry. The applicants then brought an urgent High Court application for the respondents to provide legal aid at state expense. The court dismissed the application. The applicants then took the matter to the Constitutional Court on appeal. The Constitutional Court stated:

> This means that unfairness may arise when adequate legal representation is not afforded. But this does not mean that courts have the power to order the executive branch of government on how to deploy state resources.[107]

Although the court understands that a party not afforded legal representation may suffer prejudice, it has to respect the decisions of the executive branch of the state in instances where the executive's decision does not violate the Constitution.

4.5. Conclusion

Having regard to the various steps taken by the National Assembly in holding the President to account regarding the report issued by the Public Protector, it is concluded that the decision arrived at by the majority court encroached into the exclusive domain of Parliament. It was not necessary for the majority court to order the National Assembly to design "requisite processes and mechanisms" for holding the President accountable because there is evidence on record that there are already mechanisms and processes used for holding the President to account.

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[107] *Magidiwana and Others v President of the Republic of South Africa and Others (CCT 100/13) [2013] ZACC 27; 2013 (11) BCLR 1251 (CC)* para 16.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

This study concludes that the doctrine of separation of powers was trampled upon in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC).* The basis for this conclusion is that the majority judgment went beyond just interpreting the provisions of section 89(1). The Court dictated what steps the National Assembly must take over and above the mechanisms, measures, steps and processes the National Assembly already uses in holding the President accountable. The rejection of the already existing mechanisms and processes by the majority judgment is mind boggling. This is so because the applicants' complaint that the President violated the Constitution was already dealt with in various processes of the National Assembly. Opposition parties participated in the motions of no confidence in the President and in the motion for the removal of the President. What becomes more questionable on the part of the applicants is the fact that they approached the Constitutional Court after their unsuccessful motions were tabled, debated and voted on. This study agrees with the views held by the minority that the majority judgment encroached into the exclusive terrain of Parliament.

5.2. Recommendations

It is recommended that, whilst they are the ultimate guardians of the Constitution, courts must observe their own boundaries. Courts must not allocate to themselves superior wisdom of being able to run all state affairs in total disregard of the dictates of separation of powers. Courts should exercise their "checks and balances" powers but in doing so should be careful not to usurp powers constitutionally allocated to another organ of the state.

When approached to adjudicate on a matter involving the exercise of power by another organ of the state, courts should first determine whether such

powers were exercised within constitutional bounds. If the power was exercised within constitutional bounds, courts should refrain from interfering with the functioning of the other branches of the state.

In exercising their power to observe constitutional compliance, courts should resist a temptation to dictate how other organs of the state should run their affairs. Courts should limit themselves to ordering constitutional compliance and leave the organ of the state concerned to exercise its constitutional powers.

The different organs of the state should respect the doctrine of separation of powers and understand their own powers and functions.

Courts should also consider deferring matters not falling within their competence to organs that are best placed to resolve such matters. Some matters require resolution by political means and not through the application of the law. Once a court determines that a particular matter requires a political solution, it should defer such a matter to be dealt with politically.

If courts do not consider deferring matters requiring resolution by other means than application of the law, South African courts run a risk of being flooded with cases whose resolutions could have been effectively done elsewhere. The risk is also that genuine legal matters are and will be delayed whilst courts are grappling with issues falling outside their competence. Another serious challenge is that in the process of dealing with these cases, state resources which could have been effectively channeled to deal with genuine matters are exhausted on issues whose resolution could have been dealt with elsewhere.

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