

Separation of Powers and Judicial Overreach: A South African Perspective

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*Abstract: In recent years, there has been a lot of controversy surrounding the nature and extent of the power of review vested on the courts by the Constitution of South Africa, 1996. The judiciary has been subjected to criticisms from members of the other branches of government, namely the executive and the legislature for allegedly violating the doctrine of separation of powers by overreaching. Allegations of the judiciary compromising its own independence by interfering in matters that do not fall within its terrain have also been made. These criticisms highlight the thin-line which the judiciary, in the context of judicial review, must tread to maintain the delicate balance of its independence and the enforcement of public accountability in the promotion of the principle of constitutionalism. Against this backdrop, this paper seeks to provide an analysis of the doctrine of the separation of powers and the issue of judicial overreach in light of the judgment of the Constitutional Court in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*. The aim is to examine the extent to which the Constitutional Court observed the doctrine of separation of powers in this case. It is concluded that while the principle of non-encroachment into the affairs of other organs of State is an important aspect of the doctrine of separation of powers, it must nonetheless give way to the need to provide protection to the Constitution which is the supreme law of the land.*

Key Words: Judicial review, judicial overreach, separation of powers

Introduction

The doctrine of separation of powers is one of the pillars on which constitutional democracy is anchored. It entails that governmental functions are divided between the legislature, executive and judiciary. The legislative organ makes laws, the executive implements them, and the judiciary interprets laws and adjudicates over disputes. The three organs of government (legislative, executive and judiciary) have equal authority and are independent from one another. They are confined to their constitutional powers and are prevented from usurping power from one another through a system of checks and balances. This system is a countervailing measure for the separation of powers. While the legislature and the executive exercise checks and balances over each other through various methods which foster and promote accountability, the courts perform their part through judicial review of legislation and executive action. Judicial review is the power and competence of the courts to assess and set aside legislative and executive actions for their unconstitutionality. The Constitution of the Republic of South Africa 1996 embodies a Bill of Rights and expressly allows for judicial review. In exercising its powers of judicial review, the courts sometimes arrive at unpopular decisions and accusations of judicial overreach are made. Judicial overreach refers to the claim that courts are overstepping the boundaries of judicial authority by interfering in areas that according to the doctrine of separation of powers, are the prerogative of the executive or legislature. This paper seeks to provide an analysis of the doctrine of the separation

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of powers and the issue of judicial overreach in light of the judgment of the Constitutional Court in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*. The aim is to examine the extent to which the Constitutional Court observed the doctrine of separation of powers in this case.

The doctrine of separation of powers – An overview

The first modern design of the doctrine of separation of powers is to be found in the writings of John Locke. However, it is Montesquieu, the French philosopher who is usually credited with the first formulation of the doctrine of separation of powers (van der Vyver, 1987). The doctrine of separation of powers assumes that power corrupts, and separation of powers is essential to liberty and democracy. Montesquieu rightly held that, “all would be in vain if the same person, or the same body of official, be it the nobility or the people, were to exercise these three powers: that of making laws, that of executing the public resolutions, and that of judging crimes or disputes of individuals” (Cooper, 1994). The end result of the concentration or accumulation of all powers is despotic government, tyranny or suppression of all form of liberty (Levi, 1976). The doctrine of separation of powers, therefore, seeks to prevent the abuse of power within different spheres of government and to foster the accountability of government to the people.

Before 1994, South Africa did not have a framework that constituted a system of effective checks and balances (Mojapelo, 2013). The Westminster system of government which was in place at the time, actively promoted parliamentary supremacy and domination by the executive (*Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South*). During this period, the South African judiciary was used as an institution that gave effect to oppressive laws enacted by the apartheid government. As a result, the judiciary suffered a legitimacy crisis and people lost confidence in it (Hlophe, 1995).

When the interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993) was enacted into law, South Africa became a constitutional democracy. While the interim Constitution did not mention the term ‘separation of powers’ its structure denoted a division of power between the branches of the state. Furthermore, the Constitutional Principles, which acted as a benchmark for the Constitutional Assembly in drawing the Final Constitution – entrenched the separation of powers in Constitutional Principle VI: “There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.” Like the interim Constitution, the final Constitution does not explicitly refer to the doctrine, though the constitutional design, however, clearly embraces and entrenches it (*Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South*, para 110-111).

Section 8(1) of the Constitution provides, “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.” There is thus, not only a differentiation of the three spheres of government but also a vesting of these functions in different organs of state. Furthermore, Chapters 4 to 8 of the Constitution provide for a clear separation of powers between three spheres of

government. Section 43 vests the legislative authority at the national level in Parliament and at the provincial level in the provincial legislatures. Section 85 and 125 respectively vest the executive authority of the Republic in the President and of the provinces in the premiers of the provinces. Section 165 vests the judicial authority in the courts.

There is, therefore, no doubt that the doctrine of separation of powers forms part of our constitutional system (*South African Association of Personal Injury Lawyers v Heath*, para 22). The doctrine may be regarded as an unexpressed provision that is implied in or implicit to the Constitution. It is noteworthy that there is no universal model of separation of powers (*Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South*, para 108]. The South African model of separation of powers is influenced by the historical context within which the Constitution was adopted (*Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South*, para 106-109). The Constitutional Court has therefore, been developing a model of separation of powers suited for addressing apartheid injustices, promoting and protecting the rule of law and human rights.

Economic Freedom Fighters and Others v Speaker of the National Assembly and Another

It is now opportune to analyse the Constitutional Court's judgment in the case of *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*. This case is connected with the judgment of the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*. The facts of these cases are explained below.

The Facts

In 2014, the Public Protector released a report, *Secure in Comfort – Report on An Investigation into Allegations of Impropriety and Unethical Conduct Relating to the Installation and Implementation of Security Measures by the Department of Public Works and in Respect of the Private Residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province*. This report was based on the Public Protector's investigation into the upgrades to then President Zuma's private residence. Adverse findings were made against the former President and the remedial action which the former President was required to carry out categorically stated. The former President however, failed to comply with the Public Protector's remedial action. This prompted the EFF to institute an application in the Constitutional Court seeking declaratory relief. This included an order declaring that the President had failed to fulfil a constitutional obligation; a declaration that the Public Protector's remedial action had a legally binding effect on the President; an order directing the President to comply with the remedial action and a declaration to the effect that the National Assembly had breached a constitutional obligation. It was contended that the Assembly failed to hold the President to account as it was obliged by section 42(3) of the Constitution. This section requires the National Assembly to, *inter alia* scrutinize and oversee executive action. The court held amongst other things, that the failure by the former President to comply with the remedial action is inconsistent with the Constitution and is invalid. Unsatisfied with the turn of events following this judgment, the applicants lodged a complaint with the Constitutional Court that,

some six months after the Constitutional Court delivered its judgement in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*, no action has been taken by the National Assembly and the President has not been held to account.

Two main issues, therefore, arose for determination by the court. The first issue is whether the National Assembly had failed to put in place mechanisms and processes for holding the President accountable in terms of section 89 of the Constitution. The second issue is whether the Assembly has failed to hold the President to account in that it failed to scrutinize the violation of the Constitution by the President. The court's judgment and reasoning on these issues is discussed below.

The Court's Judgment and Reasoning

Regarding the first issue, the majority of the justices found that section 89(1) of the Constitution implicitly imposes an obligation on the National Assembly to make rules specially tailored for an impeachment process contemplated in that section. Furthermore, that the National Assembly has in breach of section 89(1) of the Constitution failed to make rules regulating the impeachment process envisaged in that section. Section 89(1) of the Constitution provides that, "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."

With regard to the second issue, the finding was that the National Assembly has failed to hold the President to account following delivery of judgment in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*. This amounted to Parliament failing in its constitutional duty to scrutinise and oversee the actions of the executive (hence a breach of section 42(3) of the Constitution) and to provide for mechanisms to ensure that executive organs of State are accountable to it (hence a breach of section 55(2)(a) of the Constitution). Section 55(2)(a) states that the National Assembly must provide mechanisms to ensure that that all executive organs of State in the national sphere of government are accountable to it. The court directed the National Assembly to comply with section 237 of the Constitution (the section provides that the all constitutional obligations must be performed diligently and without delay) and make rules regulating the removal of a president in terms of section 89(1) without delay.

In an unprecedented move, Mogoeng CJ in his dissenting judgment described the judgment as a "textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament."

It is thus important to examine the extent to which the Constitutional Court observed the doctrine of separation of powers in this case as the failure by the courts to exercise restraint on themselves, or defer

matters to relevant functionaries, results in the judiciary overreaching its constitutional mandate by overstepping the bounds of its power.

Commentary

It has been highlighted that the principle of separation of powers demands that all government branches, including the judiciary, must observe the limits of their power. In as much as they have wide powers of review, the judiciary have a constitutional obligation to keep within the limits of their authority (*Doctors for Life International v Speaker of the National Assembly*, 2006). They must not hastily intrude into executive or legislative territory if the dispute could be easily resolved by reference to the relevant organ of state. In what has come to be termed judicial deference, the courts take extreme precaution when interfering with the functions of the executive and the legislature (Okpaluba, 2004). For instance, in *Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly and Others*, Davis J stated, "I regret the need to emphasise this point, but it appears to me to be vital to the future integrity of the judicial institution. An overreach of the powers of judges, their intrusion into issues which are beyond their competence or intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the state deal with these matters, can only result in jeopardy for our constitutional democracy." In *Glenister v President of the Republic of the South Africa*, the court stated, "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 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. But even in these circumstances, courts must observe the limits of their power." The Court in *Malema and Another v Chairperson of the National Council of Provinces and Another* also noted that the power of judicial review did not mean that the courts "should readily substitute their opinions for those of Parliament or Parliamentary officials in relation to matters entrusted to them." In *S v Van Rooyen* the Court stated that, "In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial powers have been given to the judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of separation of powers requires that the judiciary, in its comments about the other arms of state, show respect and courtesy, in the same way that other branches of government are required to show respect and courtesy to it."

Thus, not only has the courts affirmed the doctrine of separation of powers in making rulings that affect the executive and legislature, they have also articulated their position with regard to the appropriate extent to which they may venture into decisions of the other two branches of government within the separation of powers doctrine. Furthermore, the courts have stepped aside where the Constitution so requires. The courts have certainly attempted to explain the separation of powers, abide by its precepts, and defer to the other branches of government when appropriate as shown in the discussed case law.

In the case under discussion, *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*, the "impermissible judicial overreach," as described by Mogoeng CJ, speaks to

the interpretation of section 89(1) of the Constitution, which relates to the removal of the President from office. It is argued that the National Assembly had failed in its constitutional duty. Therefore, the intrusion by the judiciary into the affairs of Parliament in this case, was one mandated by the Constitution. The judiciary did not descend into the arena on a whim, but on a clear and dutiful mandate by the Constitution. In *Minister of Health and Others v Treatment Action Campaign and Others* the court stated that any interference into the terrain of the executive for purposes of enforcing a right in the Constitution was required by the Constitution itself.

In light of the above discussion, it may be argued that the wide powers bestowed upon the courts by the Constitution makes the judiciary (i) disproportionately powerful and (ii) violates the doctrine of separation of powers. These issues will be discussed *seriatim* below:

- (i) Whether or not the powers vested in the judiciary inevitably makes the judiciary invariably more powerful than the executive and the legislature

It is only the judiciary that can decide the nature, extent and applicability of the doctrine of separation of powers. In this light, the judiciary can be seen as retaining a monopoly in ascertaining the magnitude of its powers and whether or not it is permissible for it to interfere in matters involving the legislature and the executive. Furthermore, it is up to the judiciary to determine the limits of their power by striking a balance between the doctrine of separation of powers and the constitutional accountability of the legislature and the executive. On the face of it, it therefore appears that the powers in government vested in the judiciary, inevitably makes the judiciary invariably more powerful than the other two organs of the State. There is, however, an inherent paradox about all this power as highlighted in *S v Mamabolo* where the court stated, "Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of states and, ultimately, as the watchdog over the Constitution and the Bill of Rights." It is submitted that while judicial review is a vital role performed by the courts, it does not give the judiciary greater power than any other branch of government.

- (ii) Whether or not the powers of review vested in the judiciary violates the doctrine of separation of powers

In *De Lille and Another v Speaker of the National Assembly*, the High Court held that all acts and decisions of Parliament are subject to the Constitution and therefore subject to review by the courts. The court emphasized that while section 57(1) of the Constitution permits Parliament to determine and control its internal arrangements, it may not do so in a manner inconsistent with the Constitution. The exercise of the power of judicial review by the courts should, therefore, not be viewed as an "intrusion" into the affairs of the other branches of the state. This is because, judicial review that is based on the objectives, obligations and values gleaned from the constitutional text does not intrude. However, in as much as courts have a wide discretion to formulate remedies in constitutional review matters, they should observe the limits of their power. This ensures legitimacy of the judicial process (*Doctors for Life International v*

Speaker of the National Assembly, 2006). They should not use their power of review to supervise the legislative and executive arms of government.

Findings

Courts exist to police the constitutional boundaries and where the constitutional boundaries are breached or transgressed, courts have a clear and express role. The courts are constitutionally mandated to uphold the provisions and values of the Constitution and to declare laws and conduct that are inconsistent with the Constitution invalid (section 2). The Constitution subscribes to the principle of cooperative government (chapter 3) and states that spheres of government should respect one another (section 41(1)(e)) and not assume any power or function except those conferred by the Constitution, (section 41(1)(f)) and the Constitution is the supreme law (section 2]. Therefore, the constitutional obligations to apply the Constitution impartially and without fear, favour or prejudice, (section 165(2)) impel the judiciary to intervene in the actions of other organs of state, should constitutional violations occur.

Separation of powers prohibits organs of branches of the state and their personnel from exercising functions within the executive domain of other organs of state. However, it is evident from the constitutional architecture that the three branches (acting as checks and balances) are not hermetically sealed from each other and exhibit a degree of overlap. In *Ex parte Chairperson of the Constitutional Assembly of the Republic of South Africa*, para 109, the court stated, “The 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 from usurping power from one another. In this sense it anticipates the necessity or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers ...” In this light, sight should therefore, not be lost of the fact that complete separation of powers is not possible – neither in theory nor in practice. Some overlapping is unavoidable.

Conclusion

The judiciary is constitutionally mandated to exercise its powers of judicial review. Organs of state are not immunized from judicial review simply by virtue of the doctrine of separation of powers (Moseneke, 2018). This is because constitutional obligations to apply the Constitution impartially and without fear, favour or prejudice, impel the judiciary to intervene in the actions of other organs of state, should constitutional violations occur. However, the judiciary must not unduly trespass the terrain of other branches of government. From the discussed case law, including *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*, it is evident that the courts have been consistent in proving their ability to carefully consider in detail the nature of their duty when it comes to interfering with the decisions or processes of other branches of government and how to reconcile their judicial review function with the separation of powers. It is concluded that while the principle of non-encroachment into the affairs of other organs of State is an important aspect of the doctrine of separation

of powers, it must nonetheless give way to the need to provide protection to the Constitution which is the supreme law of the land.

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