CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 41/08
[2008] ZACC 19

HUGH GLENISTER	Applicant
versus	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF SAFETY AND SECURITY	Second Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	Fifth Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Sixth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Seventh Respondent
AFRICAN CHRISTIAN DEMOCRATIC PARTY	Eighth Respondent
DEMOCRATIC ALLIANCE	Ninth Respondent
INDEPENDENT DEMOCRATS	Tenth Respondent
UNITED DEMOCRATIC MOVEMENT	Eleventh Respondent
INKATHA FREEDOM PARTY	Twelfth Respondent
together with	
CENTRE FOR CONSTITUTIONAL RIGHTS	Amicus Curiae

Heard on : 20 August 2008

Decided on : 22 October 2008

JUDGMENT

LANGA CJ:

Introduction

[1] The Directorate of Special Operations (DSO), commonly known as the Scorpions, was established in terms of section 7(1) of the National Prosecuting Authority Act 32 of 1998 (NPA Act),[1] and came into existence in 2001. Its purpose is to deal with national priority crimes and to supplement the efforts of existing law enforcement agencies in tackling serious crime. It is located within the National Prosecuting Authority (NPA) and, as a specialist unit, is vested with powers of investigation, including the power to gather, keep and analyse information, and the power to institute criminal proceedings, where appropriate, relating to organised crime or other specified offences. In April 2008, Cabinet approved draft legislation[2] which,

[1] Section 7(1) of the NPA Act provides:

> "(a) There is hereby established in the Office of the National Director an Investigating Directorate, to be known as the Directorate of Special Operations, with the aim to—
> (i) investigate, and to carry out any functions incidental to investigations;
> (ii) gather, keep and analyse information; and
> (iii) where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings, relating to—
> (aa) offences or any criminal or unlawful activities committed in an organised fashion; or
> (bb) such other offences or categories of offences as determined by the President by proclamation in the Gazette."

[2] The National Prosecuting Authority Amendment Bill of 2008 (NPAA Bill) (B23-2008) and the General Law Amendment Bill of 2008, which has been renamed the South African Police Service Amendment Bill of 2008 (SAPSA Bill) (B30-2008).

among other things, proposed to relocate the DSO and amalgamate it with the South African Police Service (SAPS).

[2] The applicant has chosen to challenge Cabinet's decision to initiate this legislation in the courts. He approached the Pretoria High Court (High Court) as a matter of urgency on 18 March 2008 for a final order, alternatively for an interim order, interdicting and restraining the President, the Minister of Safety and Security and the Minister for Justice and Constitutional Development (first, second and third respondents respectively) from initiating legislation that seeks to disestablish the DSO. Subsequently, once Cabinet had in fact approved draft legislation to be introduced in Parliament, the applicant amended his notice of motion to seek an order interdicting the respondents "from persisting with the passage of legislation" that seeks to disestablish the DSO. In his judgment handed down on 27 May 2008, Van der Merwe J held that the High Court had no jurisdiction to hear the application in the circumstances and struck it from the roll. He held that the Constitutional Court might have jurisdiction to consider the matter.

[3] The applicant now applies to this Court on two bases. In Part A of his notice of motion he seeks leave to appeal, on an urgent basis, against the judgment and order of the High Court. Part B contains an application for direct access and seeks, on an urgent basis, an order: (1) declaring that the decision taken by Cabinet on or about 30 April 2008 to initiate legislation disestablishing the DSO (to which I will refer as the decision) is unconstitutional and invalid; and (2) directing the relevant ministers to

withdraw the National Prosecuting Authority Amendment Bill of 2008 (NPAA Bill) and the South African Police Service Amendment Bill of 2008 (SAPSA Bill) (collectively referred to as the Bills) from the National Assembly.

[4] By the time this Court heard argument in this matter, the Bills were before Parliament. Parliament's Portfolio Committees on Justice and Constitutional Development and on Safety and Security had called for comment on the Bills and had held public hearings regarding their content.

The parties

[5] The applicant approaches this Court by virtue of his own interest in the matter as a South African businessman who has a vested interest in the survival and growth of the economy which, he alleges, is threatened by crime and thus by legislation that results in the disbanding of an effective crime-fighting unit (such as the DSO). He also approaches this Court in the interest of a group or class of persons and in the public interest.[3]

[6] The first respondent is the President of the Republic of South Africa, cited in his official capacity, who abides the decision of the Court. The second respondent is the Minister of Safety and Security, also cited in his official capacity as the minister

[3] The applicant has obtained, by way of an online petition, a number of "signatures" in support of his opposition to the proposed legislation, which he has submitted to demonstrate he acts on behalf of a group of persons which opposes the disestablishment of the DSO. He has also submitted a number of public opinion polls to demonstrate support for the DSO and opposition to the proposed legislation. To support his claim that he acts in the public interest, the applicant refers to the "massive amount" of public interest in the matter, as evidenced by the public opinion polls and media reports.

responsible for the SAPS. The third respondent is the Minister for Justice and Constitutional Development, cited in her official capacity as the minister responsible for the NPA, within which authority the DSO is currently located. The second and third respondents will be referred to collectively as the respondents as they are the two respondents who oppose the application. The fourth respondent is the National Director of Public Prosecutions (NDPP), in whose office the DSO is located by virtue of section 7(1)(a) of the NPA Act, while the fifth respondent is the Head of the Directorate of the DSO. Both the fourth and fifth respondents abide the decision of the Court. The fourth respondent lodged an affidavit in the High Court including certain factual information to assist the Court. The sixth and seventh respondents are also cited in their official capacities and are, respectively, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces. No relief is sought against the fourth, fifth, sixth and seventh respondents; they are cited by virtue of the interest they might have in the matter. They have taken no part in these proceedings.

[7] The eighth to twelfth respondents are all political parties who are cited as respondents in this matter by virtue of their admittance in the High Court as amici curiae. They are, respectively, the African Christian Democratic Party, the Democratic Alliance, the Independent Democrats, the United Democratic Movement and the Inkatha Freedom Party. Of these, only the eleventh respondent, the United Democratic Movement (UDM), appeared in this Court to support the application. The Centre for Constitutional Rights (CFCR) was admitted as amicus curiae in this Court.

The CFCR is a unit of the FW de Klerk Foundation, a charitable trust. The stated mission of the Centre is to uphold the Constitution and to assist in litigation in which constitutional issues arise.

Applications for condonation

[8] The second and third respondents filed their answering affidavit two days late and the UDM filed its written submissions two days late. The delays were minimal and plausible reasons were given for both. No material prejudice was caused to the other litigants or to the Court. I consider that condonation should be granted in both instances. The CFCR also applied for condonation in light of the fact that, at the time of its application to be admitted as amicus curiae, it had not obtained the consent of the fourth and fifth respondents. These two respondents have however not made any submissions to this Court and, as already indicated,[4] the applicant seeks no relief against them. Condonation should thus also be granted in this instance.

Directions of this Court

[9] In setting down the application for leave to appeal, the directions issued by the Chief Justice specify as the only issue to be decided:

> ". . . whether, in the light of the doctrine of the separation of powers, it is appropriate for this Court, in all the circumstances, to make any order setting aside the decision of the National Executive that is challenged in this case."

[4] Above [6].

The sole question for decision is therefore whether it is appropriate for this Court to intervene at this stage of the legislative process. This question goes to the relief sought both in Part A, the application for leave to appeal, and Part B, the application for direct access. If judicial intervention is inappropriate, both applications must fail.

Factual background

[10] The application relies upon the following background facts, which are either common cause or undisputed. Since its establishment in 2001, the DSO has undertaken a number of high-profile investigations, some of which have involved prominent members of the African National Congress (ANC). On 1 April 2005, the first respondent appointed Judge Sisi Khampepe to chair a commission of inquiry (Khampepe Commission) to investigate and report on certain aspects of the DSO. The issues to be considered by the Khampepe Commission included the rationale for the establishment of the DSO, its mandate, the question whether the DSO should be located within the NPA or the SAPS, and the systems for coordination and cooperation between the SAPS and the intelligence agencies on the one hand and the DSO on the other. The Khampepe Commission's report (Khampepe Report) was signed on 3 February 2006, presented to the first respondent on 22 May 2006, and published on 5 May 2008. It recommended that the DSO should continue to be located within the NPA and under the Minister for Justice and Constitutional Development,[5] albeit with certain adjustments. Other recommendations related to the

[5] The observations in the Khampepe Report included the following remarks: "I am also satisfied that there is nothing unconstitutional in having a structure such as the DSO located under the prosecutorial authority" and "it is inconceivable that the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities and location of the DSO." (See pages 39 and 103 of the Khampepe Report.)

President's power to transfer oversight and responsibility over the law enforcement component of the DSO to the Minister of Safety and Security[6] and the need to tackle the evidently unhealthy relationship between the DSO and the SAPS.[7]

[11] Although Judge Khampepe made a number of recommendations for change, she approved of the work of the DSO in general. She found that there was nothing unconstitutional in the DSO and the SAPS sharing a mandate, nor in the DSO's methodology, which combines the skills of prosecutors to direct investigations, analysts to interpret information, and investigators to collate information for successful prosecutions. She regarded the combination of these skills as an effective tool in addressing complex and organised crime.

[12] Cabinet appeared to approve the Khampepe Report. A Cabinet statement of 29 June 2006 reveals that Cabinet endorsed the National Security Council's decision to accept, in principle, the recommendations of the Khampepe Commission, including the retention of the DSO within the NPA. A further statement of 7 December 2006 stated that, at its meeting of the previous day, Cabinet had reviewed progress in implementing the recommendations of the Khampepe Commission, noted the tension

[6] See page 68 of the Khampepe Report, where the following is stated:

> "It is both untenable and anomalous that the Minister of Safety and Security who has the responsibility to address the overall policing/investigative needs and priorities of the Republic should not exercise any control over the investigative component of the DSO considering the wide and permissive mandate of the DSO relating to organised crime."

[7] See page 106 of the Khampepe Report, where the following is stated:

> "There has been no sound relationship between the DSO and SAPS in particular. The evidence of the NDPP confirms that the relationship between the DSO and the SAPS was an unhappy relationship. The head of the DSO ascribed the tension to be institutional jealousy and personality differences."

between the DSO and the SAPS, and decided that legal instruments must be put in place to ensure greater coordination and cooperation between the two agencies.

[13] However, the Minister of Safety and Security, Mr Charles Nqakula, speaking during the debate on the President's State of the Nation Address in the National Assembly on 12 February 2008, made the following statement:

> "We want to place on the table, therefore, a proposal for the creation of a better crime fighting unit, to deal with organised crime, where the best experiences of the Scorpions and the police's Organised Crime Unit will be merged. The best investigators from the two units will be put together, under the South African Police Service, as a reconstructed organised crime fighting unit. The Scorpions, in the circumstances, will be dissolved and the Organised Crime Unit of the police will be phased out and a new amalgamated unit will be created."

[14] A draft resolution proposing that the DSO be moved from the jurisdiction of the NPA to the SAPS was prepared at the ANC's national policy conference in June 2007. Six months later, in December 2007, the ANC adopted a resolution calling for a single police service and the dissolution of the DSO at its 52nd national conference held in Polokwane (Polokwane Resolution). The relevant part of the Polokwane Resolution, under the heading "Peace and Stability", reads as follows:

> "6 The constitutional imperative that there be a Single Police Service should be implemented.
>
> . . . .
>
> 8 The Directorate of Special Operations (Scorpions) be dissolved.
>
> 9 Members of the DSO performing policing functions must fall under the South African Police Services.

> 10 The relevant legislative changes be effected as a matter of urgency to give effect to the foregoing resolution."

[15] Following the conference in Polokwane, the acting NDPP, Advocate Mokotedi Mpshe, in a communiqué to staff, reported to members of the DSO that "a decision [had] been taken" about the investigative unit of the DSO. Amplification of this is to be found in the February-March edition of *Khasho*, the newsletter for NPA staff, where Advocate Mpshe wrote:

> "You should be aware by now that the government has officially announced that the DSO will be merged with the SAPS's Organised Crime Unit to form a new crime-fighting body."

Then, during a radio interview in February 2008, the Director-General of the Department of Justice and Constitutional Development stated that the DSO would be amalgamated with the SAPS.[8] The legislative programme of the Department of Safety and Security for 2008 also indicated that laws dealing with the DSO would be placed before Parliament during the year.

[16] Subsequent to a Cabinet meeting on 30 April 2008, the Government Communication and Information System issued a statement to the effect that Cabinet had approved the NPAA Bill and the General Law Amendment Bill (later renamed the SAPSA Bill)[9] and that the Bills would be tabled in Parliament. The stated aim of the

[8] The Director-General has since stated, in an affidavit filed at this Court, that this interview reflected his own personal views and not those of Cabinet.

[9] Above n 2.

Bills was to strengthen the country's capacity to fight organised crime and to give effect to the decision to relocate the DSO from the NPA to the SAPS. The Bills were published in the Government Gazette on 8 May 2008 and 9 May 2008 respectively.[10]

[17] One last set of facts should be recorded. In an affidavit deposed to by Advocate Mpshe on 16 May 2008, he states that between 1 April 2007 and the date of his affidavit, of the 530 employees working for the DSO, 56 (38 of whom were investigators) resigned from the DSO, 26 of them since the end of January 2008. Although there is disagreement as to the reasons for the resignations, the numbers are not in dispute.

Submissions of the parties in this Court

[18] As set out in paragraph 9 above, the only issue in this Court is whether, in the light of the doctrine of the separation of powers, it is appropriate for this Court to make any order setting aside the decision of the National Executive that is challenged in this case. The parties lodged written argument directed at this issue.

[19] The applicant submits that "it is a necessary component of the doctrine of separation of powers that the courts have a constitutional obligation to ensure that the executive acts within the boundaries of legality." The applicant relied on the following statement of Ngcobo J speaking for the majority of this Court in *Doctors for Life*:

[10] In Government Gazettes 31037 GN 562 and 31016 GN 523 respectively.

> "Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, Courts have developed a 'settled practice' or general rule of jurisdiction that governs judicial intervention in the legislative process.
>
> The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, Courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid. However, there are exceptions to this judicially developed rule or 'settled practice'. Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object."[11] (Footnotes omitted.)

[20] The applicant contends, on the basis of the above dictum and foreign case-law, that there are exceptional cases in which an aggrieved litigant cannot be expected to wait for Parliament to enact a statute before he or she challenges it in court. The important question, according to the applicant, is "whether effective redress could be given after the legislation [has been] enacted. If the answer to that question is 'no', then the courts are obliged to intervene at an earlier stage." The applicant contends that in the present matter the DSO will have been destroyed long before the enactment of the legislation. In making this assertion, he points to the evidence of Advocate

[11] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at paras 68-9; 2006 (12) BCLR 1399 (CC) at 1425A-D.

Mpshe indicating that many of the employees within the DSO have already resigned, or plan to resign, as a result of the decision. Even if an application challenging the resulting legislation were to be successful, the applicant submits, it would not be possible to reconstruct the institution. The damage would have been done – with the consequential harm to the ability to fight crime – and would be irreversible. It is for these reasons that the applicant submits that the Court should intervene at this stage of the legislative process.

[21] The UDM argues that the decision to initiate legislation was in breach of the constitutional principle of legality,[12] thus falling to be set aside. Because the decision emanated directly from a resolution of the governing party structures, it amounts to Cabinet having abdicated its constitutional responsibility, substituting accountability to the governing party for its accountability to Parliament. The UDM draws this inference by traversing the chronology of events, commencing with the purported acceptance of the Khampepe Report to the resolutions of the ANC conferences, and culminating with a change of heart by the executive and its decision to dissolve the DSO. The UDM acknowledges that Cabinet will ordinarily give weight to the policy of the ruling party but contends that what is not permissible is for Cabinet to follow this policy blindly, as it alleges happened in this case.

[12] For a discussion of the constitutional principle of legality see *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 17-20; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 148; and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 56-9.

[22] The UDM also contends that the doctrine of separation of powers is not a barrier to the Court's consideration of the decision of the executive in this case. It submits that our courts are competent to review decisions of the other arms of the state. It argues that since the separation of powers doctrine is dynamic, it should be adapted to the prevailing conditions (in which there is a danger of "one-party domination") and accommodate institutional developments that have crucially shifted the balance of power between the branches of government. The relative marginalisation of the legislature, argues the UDM, has a disastrous impact on the ability of opposition parties to make their voices heard in policy formulation. The Court should act as a counterweight if the ruling party overreaches itself and, it contends, if the Court does not act, it is unlikely anyone else will.

[23] Counsel for the CFCR in general makes common cause with the applicant and the UDM regarding their central submissions. He also argues that the separation of powers doctrine does not preclude the Court from interdicting the continued passage of the Bills on the basis that the executive's actions constitute independent, foundational and egregious violations of the Constitution and the rule of law. However, the focus of his argument is that the decision by Cabinet is structurally inconsistent with the Constitution and a threat to the independence of the NPA which is guaranteed by section 179(4) of the Constitution.[13] He argues that the DSO is an integral part of the NPA; it is central to the NPA's ability to properly function as it has

[13] This section provides:

> "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

been given powers not only by the NPA Act, but also by constitutional provisions. The DSO is the institution which carries out the NPA's "incidental" functions as envisaged by section 179(2) of the Constitution.[14] He submitted that the effect of the decision will be to place the DSO within the SAPS, which is not independent. Moreover, if the NPA does not have the DSO to do its "incidental" work, it too cannot function independently and this will render government in breach of its international obligations, which require the establishment and maintenance of independent specialised agencies to fight corruption.[15]

[24] The CFCR supports judicial intervention at this early stage because it contends that the obligation to protect the public from crime is at the core of a constitutional democracy and that intervening at a later stage would be too late to prevent harm.

[25] The second and third respondents argue against judicial intervention at this stage. In their analysis of the separation of powers doctrine, they highlight the duty of

[14] Section 179(2) of the Constitution provides:

> "The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions *incidental* to instituting criminal proceedings." (Emphasis added.)

[15] The CFCR cites the United Nations Convention Against Corruption and the African Union Convention on Preventing and Combating Corruption as relevant.

Article 36 of the United Nations Convention Against Corruption of 2003 (which South Africa ratified on 22 November 2004) provides as follows:

> "Each State Party shall . . . ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental legal system of the State Party, to be able to carry out their functions effectively and without undue influence."

Article 5 of the African Union Convention on Preventing and Combating Corruption of 2003 (which South Africa ratified on 7 December 2005) provides as follows:

> "State Parties undertake to:
> . . . .
> (3) Establish, maintain and strengthen independent national anti-corruption authorities or agencies."

Cabinet to account to the legislature for policies, decisions and actions, and the concomitant powers of Parliament to ensure the accountability of the executive. They submit that the Constitution has created checks and balances to maintain the delicate balance in the power wielded by the executive, legislature and judiciary. They argue further that intervention with the executive's initiation of legislation would upset this balance – it is neither necessary nor warranted.

[26] In advancing this argument, the respondents do not take issue with the submission that pre-enactment relief should be granted where an exceptional case has been made out, the basis for this exception being that the courts are duty-bound to enforce compliance with the Constitution and the rule of law. However, because Bills, such as those in this case, may be amended, adopted or rejected by Parliament, they cannot create, detract from or extinguish rights; they only do so once they become law. Therefore, exceptional cases must be established on proof of immediate and irreversible harm caused by the conduct in question. Relief would be appropriate in those circumstances, the respondents submit, because the constitutional power of the Court to deal effectively with the legislation once enacted would otherwise be rendered nugatory.

[27] The respondents contend that these circumstances are not present in this case. They argue that the statistics relating to the number of resignations of DSO employees, upon which the applicant relies, are not sufficient proof of the employees having left as a result of the decision; one should not speculate about the reasons why

employees might have left the institution. Moreover, alternative remedies are open to the applicant in the event that the enactments ultimately prove to be unconstitutional. The respondents argue that the existence of alternative remedies is a major and relevant factor in the exercise of a court's discretion to interfere. Currently, however, the deliberative process of Parliament is under way, the political party respondents are fully participating in it, no decision has been taken regarding the final form of the enactment, and the DSO continues to carry out its mandate as contemplated in the NPA Act. They contend that in light of these circumstances it is not appropriate for this Court to make the order sought by the applicant.

The legal issues

[28] The directions specify only one issue for determination and that is whether, in the light of the doctrine of separation of powers implicit in our Constitution, and considering all the circumstances of this case, it is appropriate for this Court to set aside the decision of the National Executive or to interdict the respondents from pursuing the passage of the Bills through Parliament. In considering this question, it will be useful to commence with a discussion of the principle of separation of powers under our constitutional order.

The principle of separation of powers

[29] It is by now axiomatic that the doctrine of separation of powers is part of our constitutional design. Its inception in our constitutional jurisprudence can be traced back to Constitutional Principle VI, which is one of the principles which governed the drafting of our Constitution. It proclaimed 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."[16]

[30] There is no express mention of the separation of powers doctrine in the text of the 1996 Constitution. In the First Certification judgment, *In re: Certification of the Constitution of the Republic of South Africa, 1996,* this Court held that the text of the new Constitution did comply with Constitutional Principle VI. The Court stated:

> "There is, however, 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 that is absolute."[17]

It continued—

> "[t]he principle of separation of powers, on the one hand, recognises 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 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."[18]

[31] In a subsequent case, *De Lange v Smuts NO and Others*, Ackermann J repeated that there is no universal model of separation of powers. He continued with the following remarks:

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[16] See Schedule 4 to the Interim Constitution Act 200 of 1993 and *Ex Parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) in Annexure 2.

[17] Id at para 108.

[18] Id at para 109.

> "I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."[19]

[32] The starting point in an understanding of the model of separation of powers upon which our Constitution is based, must be the text of our Constitution.[20] Section 85 of the Constitution vests the executive authority in the President acting with the Cabinet. In terms of section 85(2)(d), the Cabinet has the constitutional authority to prepare and initiate legislation. Section 73(2) gives a Cabinet member the authority to introduce a Bill in the National Assembly. Thus the ministers had the constitutional authority to initiate the legislation in issue here. One of the issues the Cabinet will consider is whether the proposed legislation that it approves and initiates conforms to the Constitution.

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[19] [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 60. See also *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 24, where this Court held that "[t]he practical application of the doctrine of separation of powers is influenced by the history, conventions and circumstances of the different countries in which it is applied."

[20] See *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para 17 and *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 34, where the following comments of Professor Tribe in *American Constitutional Law* Volume One 3ed (Foundation Press, New York 2000) are referred to with approval:

> "What counts is not any abstract theory of separation of powers, but the actual separation of powers 'operationally defined by the Constitution'. Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favor of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure." (Footnotes omitted.)

[33] 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.[21] 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.

[34] In *Doctors for Life*, the Court made these points:

> "The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.
>
> But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'. Courts are required by the Constitution

[21] See above n 11 at para 70 of the SA Law Report and 1427A-B of the BCLR.

> 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled'. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."[22] (Footnotes omitted.)

[35] 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, prevent 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. Against this background, I turn now to the question that needs to be considered.

[36] As pointed out above,[23] the sole question in this case is whether it can ever be appropriate for this Court to intervene when draft legislation is being considered by Parliament, to set aside the decision of the executive to initiate the legislative process. This question can be divided into the following three sub-questions:

(i) can courts ever intervene at this stage of the legislative process;

(ii) if the answer to (i) is "yes", what are the circumstances that would warrant intervention; and

[22] Id at paras 37-8 of the SA Law Report and at 1417C-1418A of the BCLR.

[23] Above [9].

(iii) are these circumstances present in this case?

Are there ever circumstances in which a court may intervene to decide whether a decision by the executive to initiate legislation is unlawful?

[37] The applicant seeks to impugn the conduct of the executive in preparing legislation before the legislation has been enacted by Parliament. Clearly, if the legislation had been enacted, the applicant's remedy would have been to challenge its constitutionality. However, the applicant has not waited for this to happen. Instead, he complains of a very specific form of executive conduct – the initiation of legislation – which is a part of the legislative process.[24] As the Bills concerned are now before Parliament, the judiciary is being asked to consider a matter that is presently within the sphere of responsibility of Parliament. It is Parliament that is vested with the primary oversight function of the executive. The Court is thus being asked to intervene before Parliament has concluded its work. In considering whether the Court can and should intervene at this stage, the starting point should be the respective roles of this Court and of Parliament as provided for by the Constitution.

[38] Judges (and thus the courts) in our constitutional order have the duty to uphold and protect the Constitution.[25] Section 38 of the Constitution provides that people

[24] Section 85(2) of the Constitution provides:

> "The President exercises the executive authority, together with the other members of the Cabinet, by—
> . . . .
> (d) preparing and initiating legislation".

[25] Item 6(1) of Schedule 2 to the Constitution requires that each judge or acting judge must swear or affirm the following:

may approach competent courts for appropriate relief in relation to the actual or threatened infringement of rights.[26] This Court has held that relief will not be appropriate unless it is effective.[27] Courts therefore are guardians of the Constitution. It is this role which we must bear in mind in addressing the question of whether this Court may intervene before Parliament has concluded its work.

[39] However, the Constitution is replete with provisions that make it plain that ordinarily a court will not interfere with the functioning of Parliament. For example, section 167(4)(b) restricts the ability of all courts to pronounce on the constitutionality of parliamentary or provincial Bills by providing that only the Constitutional Court may—

> "decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121".

> "I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. (In the case of an oath: So help me God.)"

[26] Section 38 of the Constitution reads as follows:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
>
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[27] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

[40] In *Doctors for Life*, this Court held that section 167(4)(b) must be understood to mean that, where a challenge to a Bill is levelled in order to render it invalid, the only circumstances in which this Court may entertain the challenge are those provided for in sections 79 or 121.[28] Sections 79 and 121 permit the President or a Premier, as the case may be, prior to signing a Bill into law, to refer it to this Court and not to any other court and, even then, only if he or she has reservations as to whether the Bill is constitutional or not. These provisions preserve the autonomy of both Parliament and the provincial legislatures to pursue their law-making responsibilities without undue interference by courts. In this case, the applicant has not sought to attack the validity of the Bill. Indeed, counsel for the applicant specifically stated that the Court need not look at particular provisions of the Bills, but merely at their general design, to determine whether the Court's jurisdiction should be exercised. What he urges us to consider is the impact of a decision of the executive, not the constitutionality of a Bill.

[41] There may however be exceptions to the principle that a court may not intervene in the legislative process. In *Doctors for Life*, this Court acknowledged that there is no express constitutional provision that precludes this Court from intervening in parliamentary proceedings before Parliament has concluded its deliberations on a Bill.[29] Ngcobo J noted that the question of whether the Court had this power raised two important, and potentially conflicting, constitutional principles:

[28] Above n 11 at para 52 of the SA Law Report and at 1421E-H of the BCLR.

[29] Id at para 67 of the SA Law Report and at 1424H-J of the BCLR.

> "On the one hand, it raises the question of the competence of this Court to interfere with the autonomy of Parliament to regulate its internal proceedings and, on the other, it raises the question of the duty of this Court to enforce the Constitution, in particular, to ensure that the law-making process conforms to the Constitution."[30]

However, the Court reached no firm conclusion on this question.[31] In my view, as will become clear from what follows, I do not find it necessary to decide the question in this case either. I am prepared to accept, for the purposes of argument, that a court may intervene in parliamentary proceedings. The question that arises next is the circumstances in which it may do so.

What are the circumstances that would permit judicial intervention?

[42] In considering this question, we should bear in mind the following two principles: On the one hand, the Constitution requires the courts to ensure that all branches of government act within the law;[32] on the other, it requires courts to refrain from interfering with the autonomy of the legislature and the executive in the legislative process.

[43] In *Doctors for Life*, this Court considered jurisprudence from other jurisdictions concerning the question of when it would be appropriate for a court to intervene in the legislative process before it is complete.[33] The Court noted that the ordinary rule

[30] Id.

[31] Id at para 71 of the SA Law Report and at 1427C-D of the BCLR.

[32] See *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*)* [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) at para 25.

[33] Above n 11 at para 68 of the SA Law Report and at 1425A-B of the BCLR and at fn 52 of that case.

under the jurisprudence, notably of the Privy Council, is that courts will ordinarily not intervene until the process is complete. However, in *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and Another*, the Privy Council held that a court in Hong Kong may intervene if there is "no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object".[34]

[44] In my view, having regard to the doctrine of separation of powers under our constitutional order, this test would be the appropriate test to apply. Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process.[35] The applicant must show that the resultant harm will be material and irreversible.[36] Such an approach takes account of the proper role of the courts in our constitutional order: While duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and legislature. This is a formidable burden facing the applicant.

[34] [1970] 2 WLR 1264 at 1277G–H; [1970] AC 1136 (PC) at 1157E–F. See also the decision of the Privy Council in *Methodist Church in the Caribbean and the Americas (Bahamas District) and Others v Symonette and Others; Poitier and Others v Methodist Church of the Bahamas and Others* (2000) 59 West Indian Report 1 at 14g-h.

[35] See *Rediffusion (Hong Kong) Ltd* above n 34.

[36] Id.

[45] We were referred to the decision in *Trinidad and Tobago Civil Rights Association v The Attorney-General of Trinidad and Tobago*,[37] in which the High Court did intervene to prevent the enactment of a Bill. The impugned Bill proposed to abolish the jurisdiction of the court to consider public interest applications for judicial review. The High Court in that case held that the legislation would have impaired the rights of the public to challenge legislation, causing immediate prejudice and affecting the powers of the judiciary. The circumstances were thus, according to the High Court, sufficiently exceptional to warrant interference by the courts.

[46] On appeal, however, the Court of Appeal of Trinidad and Tobago agreed with the views expressed in the Privy Council decisions that courts should as far as possible avoid interfering with pre-enactment legislative process.[38] The test it formulated is whether it has been shown that, if a Bill is enacted, an applicant will not be able to access relief because the Bill's object would have been achieved.[39] It held that if the Bill in question were enacted, the courts would have the power to declare it void if it offended the constitution. The High Court had erred in holding this was an exceptional case because it had not been shown that irreversible consequences, damage or prejudice would result.[40]

[37] *Trinidad and Tobago Civil Rights Association; Rajh Basdeo v The Attorney-General of Trinidad and Tobago* [2005] TTHC 66, HCA No. S 1070 of 2005, delivered on 7 November 2005.

[38] *The Attorney-General of Trinidad and Tobago v The Trinidad and Tobago Civil Rights Association; Rajh Basdeo* Civ App No 149 of 2005, delivered on 18 July 2007, unreported, at para 18.

[39] Id at para 20.

[40] Id at para 21.

[47] Cases that would warrant intervention on this approach will be extremely rare. As acknowledged in an Australian case, *Cormack v Cope*, it is not the introduction of a Bill that affects rights; it is the making of a law that does that.[41] Thus, before the law has been enacted, it would be extremely unusual to be able to demonstrate harm. In my view, it is not necessary in this case to attempt to identify with precision what would constitute "exceptional circumstances" or to formulate in advance in what circumstances they may arise. The question whether exceptional circumstances exist depends on the facts of each case and is a matter to be considered on a case-by-case basis. In this particular case, for the reasons given below, it is not appropriate for the judiciary to intervene.

Do the circumstances of this case warrant judicial intervention?

[48] All three parties arguing for judicial intervention in this case sought to demonstrate that the executive's decision to introduce the Bills constituted a gross violation of the Constitution. The arguments were presented with a great deal of passion, no doubt because of the important and emotive debates in the country about the unacceptable levels of crime, its prevention and the measures that are being, or should be, employed to combat it.

[49] The reasons advanced, however, require close examination. We are dealing with the constitutionally mandated power of the executive to initiate legislation and the power of the legislature to enact it. While I do not find it necessary to

[41] Menzies J in *Cormack and Another v Cope and Others; The State of Queensland and Another v Whitlam and Others* (1974) 131 CLR 432 at 465.

circumscribe with precision the exact circumstances that would warrant judicial interference of this nature, I am of the view that the reasons advanced to justify intervention by the Court must, at the very least, demonstrate material and irreversible harm that could not be remedied once the legislation has been enacted. With this in mind, I turn now to consider the arguments made by the applicant, the UDM and the CFCR.

[50] The main argument by the applicant is that judicial intervention is appropriate at this stage because of the negative effect the draft legislation is exerting on the daily operations of the DSO. In particular, the applicant's counsel points to the information provided by the acting NDPP in his affidavit that many DSO employees have left their employment. Counsel argues that this must be occurring because of the plan to disestablish the DSO, which would allegedly have a material and irreversible effect on the DSO, undermine the state's capacity to render basic security and cause harm to the constitutional order itself. He argues that there would be no remedy in the future because by then it would be too late.

[51] This argument must fail. First, it is not clear at this stage what Parliament will decide to do. The applicant's case regarding material and substantive harm is premised on the assumption that the legislation will be enacted without material change. However, Parliament may choose to make significant and substantial amendments to the draft legislation or it may choose not to enact the legislation at all.

Until the content of the legislation has been determined by Parliament, the effect of the legislation cannot be determined.

[52] Second, it is not clear that the members of the DSO are leaving because of the decision to initiate legislation to disestablish the DSO. The respondents state that there could well be other reasons for this depletion in numbers. The causal relationship, therefore, between the executive decision to introduce the legislation and the fact that many members have left has not been clearly established. Nevertheless, even were it to be established that some of them, indeed perhaps all of them, had left because of the decision to introduce the legislation, it cannot be said that this will necessarily constitute irreversible harm sufficient to warrant intervention by this Court at this stage. Institutions often experience times of change and uncertainty. Often too, they experience high levels of staff turnover. The level of staff turnover described by the acting NDPP in this case, while high, cannot be said to be so high as to constitute material and irreversible harm sufficient to warrant intervention. In reaching this conclusion, it is important to bear in mind that this is a particularly high threshold to meet.

[53] The applicant further argues that the President and Cabinet seek to disestablish the DSO and place its members in a dysfunctional unit (the SAPS) because a number of members of the ANC are (or have been) subject to the unwelcome attentions of the DSO. Again if this argument has any foundation, something which need not be decided in this case, appropriate relief can be sought in due course.

[54] The UDM argues that, because the decision to initiate the legislation arose as a result of the Polokwane Resolution, Cabinet acted under dictation in making the decision to initiate the legislation to disestablish the DSO. It suggests further that the executive followed the dictates of the ruling party rather than its responsibilities in terms of the Constitution. In my view, there is nothing wrong, in our multi-party democracy,[42] with Cabinet seeking to give effect to the policy of the ruling party. Quite clearly, in so doing, Cabinet must observe its constitutional obligations and may not breach the Constitution. However, if in this case, once the legislation is enacted, it is established that the legislation does breach the Constitution, relief will be available and the legislation may be declared invalid. In my view, this argument does not establish that material and irreversible harm will result if the Court does not intervene at this stage. The argument cannot succeed.

[55] The UDM also argues that, having regard to what it refers to as "the relative marginalisation of the legislature" and the dangers of one-party domination, the Court should act because no-one else will. I cannot agree. The role of this Court is established in the Constitution. It may not assume powers that are not conferred upon it. Moreover, the considerations raised by the UDM do not establish that irreversible and material harm will eventuate should the Court not intervene at this stage.

[42] See section 1 of the Constitution, which provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> . . . .
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness."

[56] The CFCR argues that the draft legislation poses a significant threat to the independence of the NPA and will cause harm to the structure of our Constitution, such that intervention is necessary. The first difficulty with this argument is that it assumes that the content of the draft legislation will remain unchanged during its passage through Parliament. The Court cannot make this assumption. I must proceed on the basis that Parliament will observe its constitutional duties rigorously. If it is correct that the draft legislation does threaten structural harm to the Constitution or the institution of the NPA, something which I expressly refrain from deciding, then Parliament will be under a duty to prevent that harm. It would be institutionally inappropriate for this Court to intervene in the process of law-making on the assumption that Parliament would not observe its constitutional obligations. Again, should the legislation as enacted be unconstitutional for the reasons proffered by the CFCR, appropriate relief can be obtained thereafter. This argument must thus also fail.

Conclusion

[57] In conclusion, then, I find that the applicant has not established that it is appropriate for the Court to intervene in the affairs of Parliament in this case. He has not shown that material and irreversible harm will result if the Court does not intervene. In the circumstances, both the application for leave to appeal (in Part A) and the application for direct access (in Part B) must be refused as it is not in the interests of justice for the applications to be granted.

Costs

[58] The applicant has raised important constitutional issues and there is great public interest in the matter. It accordingly seems to me that this is a matter in which this Court should make no order as to costs.

Order

[59] It is ordered that:

(a) The applications for condonation are granted.

(b) The applications for leave to appeal and for direct access are dismissed.

(c) There is no order as to costs in this Court.

Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Van der Westhuizen J and Yacoob J concur in the judgment of Langa CJ.

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