

NOTES / AANTEKENINGE

PRESIDENTIAL POWERS IN SOUTH AFRICA – MORE QUESTIONS THAN ANSWERS

“The king ought not to be under any man, but he ought to be under God and the law, since the law makes the king. Therefore let the king render to the law what the law has rendered to the king, namely dominion and power; for there is no king where will prevails and not the law.”

Bracton

“There, in words that have rung through the centuries, you have the fundamental antithesis between government under law and government by arbitrary will. These are, in fact, two opposite poles of political life. Government under law is the antitheses of unfettered power.”

DV Cowen *The Foundations of Freedom* (1961) 197.

1 Introduction

South Africa's 1996 Constitution (the Constitution) was not the result of a “revolution” such as the revolutions that lead to a new constitutional dispensation in North America (1775–1881), France (1789–1799) or Russia (1917). It emerged as a result of a historical political settlement, essentially peacefully negotiated, that laid the foundation for a democratic constitutional dispensation. It replaced parliamentary or legislative supremacy with constitutional supremacy. In this sense, the Constitution is “revolutionary”. The Constitution is a human rights-orientated constitution that seeks to serve a pluralistic society under an overarching set of entrenched legal norms (Venter “The Emergence of South African Constitutionalism: From Colonial Constraints to a Constitutional State” in Van der Schyff (ed) *Constitutionalism in the Netherlands and South Africa* (2008) 27–31).

In modern democracies, the highest executive office is virtually always occupied by the leader of the majority political party. South Africa is no exception. Section 85 of the Constitution provides that the executive authority of the Republic is vested in the President and that the President exercises it together with other members of the Cabinet. The South African President as head of government is a true executive president. The replacement of former President Jacob Zuma with President Cyril Ramaphosa in February 2018 focused renewed attention on presidential powers in South Africa. The South African President is elected by Parliament, and his or her term of office is linked to the duration of Parliament but he or she can, as transpired in February 2018, resign, or by a motion of no confidence be forced to resign. The resignation of President

Zuma in February 2018, and the circumstances that led up to it, generated a renewed interest not only in presidential powers but also in South African constitutional law in general.

It is a mistake to assume that the constitutional law of a country governed by a written organic instrument such as the Constitution – vintage 1996 – involves only the application of the legal rules of interpretation. It would also be a mistake to assume that the sole task of the judiciary is to lay the section of the Constitution that is invoked beside the constitutional power that is challenged, and decide whether the latter squares with the former. Such a picture of South African constitutional law would convey only a mechanical process akin to the judicial construction of a contract or a will. Such a picture, although appropriate in some cases, may be at variance with reality. South African constitutional law is more than the “mere exegesis of a fundamental text”, as Schwartz (*American Constitutional Law* (1955) 4) said of the constitutional law of the United States of America (US).

One who looks only at the language of the Constitution will obtain a partial and distorted picture of the working of the South African constitutional system. The Constitution only emphasises the essential framework of the South African governmental structure, and often barely this. Developments since the drafting of the Constitution have been significant and most of the questions raised since that period can no longer be solved by reference to the constitutional text alone. Our constitutional law is also derived from the decisions of the courts. Their interpretation has become in many ways even more important than the bare text itself. As time passes, the interpretations of the courts of the text of the Constitution become the prime concern of the constitutional lawyer. The Constitution today is at the same time a product of the progressive history of a mere two-and-a-half decades. Being a written document in general language does not mean that its meaning does not alter. Changes come in social and political life and the Constitution must embrace in its grasp all new conditions that fall within the scope of the powers conferred.

This note attempts to analyse the *essence of presidential powers* in South Africa (author’s own emphasis). These powers are in essence found in sections 83–85 of the Constitution, which relate to “The President”, “Powers and functions of President” and “Executive authority of the Republic” respectively. After being in operation for close to two-and-a-half decades, questions still remain as to the *precise* meaning of the Constitution’s reference to the President as “*head of state*”, “*head of the national executive*” and being vested with “*executive authority*” (author’s own emphasis). The existence of such questions, it is submitted, should be of some concern. Since the role of the President is critical in ensuring effective executive government, is it not imperative that, by this time, there should be a consensus as to the meaning of the terms “head of state”, “head of the national executive” and “executive authority”? The role of the President can be extremely politically demanding. Executive aggrandisement must be averted. Because our system of executive government is relatively unexplored given that the Constitution only dates from 1996, it needs to be developed in a truly *democratic* context with a keen sense of

constitutionalism (author's own emphasis). This implies that the executive must be "unable to employ the strong arm tactics that an autocratic executive is by its very nature able to do" (Devenish *A Commentary on the South African Constitution* (1998) 164).

The dilemma facing the South African President as head of state and head of the national executive and being vested with executive authority (sections 83, 84 and 85 of the Constitution) is similar to that faced by Abraham Lincoln on 4 July 1861 in his historic address to the United States Congress after the outbreak of the Civil War. Lincoln posed this question: "Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?" (Wheare *Modern Constitutions* (1966) 142).

In discussing the terms "head of state" and "head of the national executive", the terms as they feature in the Constitution are referred to; the terms as interpreted and applied in practice are analysed and lastly the myriad questions raised by the terms are highlighted. It will emerge that when it comes to analysing these terms, there appear to be *more questions than answers* (author's own emphasis). It is submitted that these unanswered questions are not consonant with good governance and can only result in constant litigation.

2 "Head of State" and "Head of the National Executive"

Section 83(a) of the Constitution declares that the President is the "head of state" and "head of the national executive". Section 84(1) of the Constitution declares that the President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of "head of state" and "head of the national executive". What do the terms "head of state" and "head of the national executive" mean precisely? What is the significance in distinguishing between the two terms?

Is the significance of the term "head of state" only to indicate that the head of state symbolises the unity of the state and of only ceremonial value? Are the terms integrated to such a degree that there is no distinction between the powers and functions of the office bearer who acts as head of state and head of the national executive? Does the term "head of state" imply that the office bearer may act in a purely discretionary manner and not on behalf of and on the advice of the "national executive"?

Academic constitutional lawyers may be comfortable in stating that the formal powers of the President are delineated in the Constitution as augmented by judicial pronouncements. A healthy scepticism does however pose the question whether the formal designated powers of the Constitution really do tell the whole story? If there is no consensus as to the *precise* meaning of "head of state" and "head of the national executive", what are the chances that *in practice* presidential power in South Africa becomes the product of personal and partisan political skills rather than reliance on legal texts? (author's own emphasis) What is the potential for the President's

organisational skills, emotional intelligence, cognitive style and even personal decorum to determine the interpretation of “head of state” and “head of the national executive”? Could the President’s role also as majority political party leader not in the future become highly relevant to the manner in which he or she interprets the powers set out in section 83(a) of the Constitution? Could partisan leadership not in future change the very conception of the President’s office? This is despite the fact that the Constitution does not specify a partisan role for the President, since it is in essence an anti-party document. Can the legal meaning of the text of section 83(a) of the Constitution not in practice be influenced by partisan presidential leadership? These highly important questions remain to be answered. If they are not, the danger exists, as has transpired in the US, that the precise difference between “head of state” and “head of the national executive” becomes murky and an ongoing moot point as to the meaning of “executive power”.

3 The United States of America

Clearly there are marked differences between the US presidential system and the South African presidential system. The US President is elected directly by the people; the US President and members of Cabinet are not members of the legislature; the term of office of the US President is not coupled to the term of the legislature and the US President is not dependent on the majority support in the legislature. Yet, it is important to take cognisance of how the term “executive power shall be vested in the President” (article II (i) of the US Constitution) has been interpreted in the US. The presidential system of executive government in the US is undoubtedly the most well-known example of executive government and, as in South Africa, operates within the confines of a constitutional structure. Similarly to South Africa, presidential executive actions in the US must take into account values contained in the US Bill of Fundamental Rights (Amendments to the US Constitution) and if they do not do so, the judiciary can strike down such unlawful executive acts (Barrie and Van Staden “From Marbury to Tronox: Constitutional Review in South Africa” 2017 *TSAR* 619). By comparing the interpretation of the US President’s executive powers and those of the South African President, possible guidelines to be followed emerge, as do pitfalls to be averted.

In the US Constitution, article II (i) declares “The executive power shall be vested in the President of the United States of America”, but different opinions continue to proliferate as to the meaning of that “executive power”. Examples are Rossum and Tarr (*American Constitutional Law* (2014) 177–186) and Tushnet, Graber and Levinson (eds) (*The Oxford Handbook of the US Constitution* (2015) 177–191). These two works of recent vintage and authored by eminent constitutional academics are prime examples of the different possible interpretations of “executive power shall be vested in the President”. The question is posed whether the evolutionary transformation of presidential power in the US has served the country well or is dangerous?

Further questions challenge the idea that the US presidency serves as a general representative of the nation. Does the USA presidency not maximise outcomes for his or her core partisan constituencies? Can the US President replace congressional parochialism with presidential particularism? Is partisan leadership not transforming the executive President? Can the veto power not be abused? Is executive presidency nothing more than a network of informal powers? Is executive power not derived from the President's own judgement of political necessity? Can the President sway the implementation of public policy so as to move outcomes toward his or her own preferences? Can the President come with presidential action that is not explicit in the text of the Constitution by means of executive orders, proclamations, directives and budget choices? Is the President nothing more than a titular head for a set of an elite people of influence rather than a distinctive agent able to act on his or her own? What precisely are the discretionary powers of the US President? Can any limits be placed on the President's determinations as to any terrorist threat, the amount of military force to be used in response or the nature of the response? Are presidential prerogatives constitutionally acceptable? Is executive privilege controlled by legal standards or does it become presidential prerogative if the legislature and judiciary say so? Because the President is commander-in-chief, may he or she commit the country to war in the face of a threat? Or does the war-powers regime consist of the President *vis-à-vis* Congress? Is the President in practice the sole organ of foreign affairs and the sole judge of the boundary between foreign and domestic affairs? Can the modern executive presidency be squared with the Constitution? Do the President's initiatives not define Congress's legislative agenda? Does the veto power not ensure that the President's views are taken into account in congressional deliberations as Congress seeks to avoid the threat of a veto? Disputes over executive privilege and presidential immunity raise the question as to the limits of implied powers. If the US Constitution gives the President the power to appoint executive-branch officials, does he or she have the power to remove them?

May the US President, in order to fulfill his or her military, diplomatic and national security responsibilities, withhold sensitive information from congressional and public scrutiny? The relevance of this question was raised in *United States v Nixon* (94 SCt 3020) in which the United States Supreme Court unanimously rejected the President's claim of executive privilege and voted to compel him to release the Watergate tapes. It held that the fact that the President was a defendant did not render non-justiciable the question of privilege for confidential communications. The court rejected the President's claim that invoking privilege was vested absolutely in his executive powers. The Supreme Court also established that the President is amenable to judicial oversight. The extent of this judicial oversight, however, remains less than clear. Former US Supreme Court Chief Justice Rehnquist sees *United States v Nixon* (*supra*) as the most celebrated case to have come before the Supreme Court since he came on to that court (Rehnquist *The Supreme Court* (2002) 184). What is the position of the presidential exercise of prerogative powers? Do prerogatives not expand the President's executive power? Did the Supreme Court in *Youngstown Sheet and Tube Company v*

Sawyer (343 US 579), when it invalidated President Truman's order during the Korean War that the nation's steel mills be seized to prevent a strike, indicate a wholesale rejection of an absolute prerogative of the president? The Constitution of the US dates from 1787. Despite being in operation for two-and-a-half centuries, the debate over the precise content of the President's *executive powers* continues, as is illustrated by the questions above.

The South African Constitution's reference in sections 83(a) and 84(1) to the President as "head of state" and "head of the national executive" and the provision that "[t]he President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive" could conceivably raise the *very same* questions that have been raised on the executive power of the President of the US (author's own emphasis). Questions that immediately come to mind are: Can the South African President's powers not be more effectively constrained? Has the history of the South African presidency not become a history of aggrandisement? Is presidential power in South Africa not expanding outside the constitutional framework?

4 "Head of State"

As *head of state*, the President may appoint a *commission of inquiry* (s 84(2)(f)) (author's own emphasis). Such a commission is not automatically vested with powers under the Commissions Act 8 of 1947 (*President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) par 131 (*SARFU III*)). The President must decide to vest such powers in a commission and is only competent to do so if the commission is investigating a matter of public concern. The President is *not* bound to accept a commission's findings, nor to follow its recommendations (author's own emphasis). A commission of inquiry is in effect an adjunct to the policy formation responsibility of the President. It is a mechanism whereby information and advice can be obtained. The appointment of a commission of inquiry does *not* constitute administrative action within the meaning of section 33 of the Constitution (author's own emphasis). The only constraints on the President when exercising powers under section 84(2)(f) is that he or she is required to exercise the powers personally; the exercise must be recorded in writing and signed; the exercise of the powers may not infringe the Bill of Rights; the principle of legality must be complied with, and, by implication, the President must act in good faith and not misconstrue his or her powers (*SARFU III* par 146). These constraints are applicable to all the President's powers under section 84(2).

Section 84(2)(j) allows the President as *head of state* to *pardon* or *repeive* offenders (author's own emphasis). As to the question whether the pardon power does not violate the separation of powers between the executive and the judiciary, the Constitutional Court held in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* (1996 (4) SA 744 (CC) par 114–117 (*First Certification* decision)) that it has never been part of the general functions of a court to pardon or *repeive* offenders after justice has

run its course. As to the judicial reviewability of the President's power to pardon, it was held in the *First Certification* decision (par 116) that should the pardon be such as to undermine any provision in the Constitution, such exercise of power would be *reviewable* (author's own emphasis). This was confirmed in *President of the Republic of South Africa v Hugo* (1997 (6) BCLR 708 par 11 (*Hugo*)), in which the Constitutional Court held that, whether the President was acting as head of state or as head of the executive, he or she was acting as *an executive organ of state* (author's own emphasis). In *Hugo*, the Constitutional Court was called upon to review the exercise of the pardon power under the Interim Constitution to remit the sentences of a whole group of prisoners. What is confusing about *Hugo* is that the Constitutional Court explicitly stated that a distinction may have to be made where a court is asked to review the exercise of the pardon power in *individual* cases, as opposed to a *general* pardon employed by the President in *Hugo* to remit the sentences of a whole *group* of prisoners (*Hugo* par 29) (author's own emphasis).

Section 239 of the Constitution provides that the exercise of a power or the performance of a function in terms of the Constitution amounts to conduct of *an organ of state* (author's own emphasis). Does this mean that were the President to abuse his or her pardoning powers by acting in bad faith, the court can intervene and correct such action and declare it to be unconstitutional? Could a decision to grant a pardon in consideration of a bribe be set aside by a court? Could a court intervene if the President were to pardon political allies who were convicted of criminal behavior? Should the drafters of the Constitution, as suggested by Currie and De Waal (*The New Constitutional and Administrative Law* (2001) 245), not have considered including a more appropriate check on the power to pardon? Such a check could, for example, be confirmation by Parliament or another independent institution. With no such requirement in place, it can only be hoped that the courts construe the power to pardon extremely restrictively to prevent it from being abused. In this regard it is significant what the Constitutional Court held in *Hugo* (par 15) that "the fact that the arbitrary exercise of the power to pardon may be a rarity is not ground for denying constitutional review".

5 "Executive Authority"

Section 85(1) declares that the executive authority of the Republic is vested in the President. Section 85(2) declares that the President exercises the executive authority *together with the other members of the Cabinet* (author's own emphasis). Section 85(2) states that the President exercises the executive authority by (i) implementing national legislation (except where the Constitution or an Act of Parliament provides otherwise); (ii) developing and implementing "national policy;" (iii) coordinating the functions of state departments and administrations; (iv) preparing and initiating legislation and (v) performing any other executive function provided for in the Constitution or in national legislation.

What is "*national policy*" (author's own emphasis)? Must national policy always be consistent with the Constitution? Must such policy be *rationaly* related to its purpose (author's own emphasis)? May the President's

decisions taken together with members of the Cabinet be *unreasonable*? (Rabie and Van Zyl Smit "The Nature and Effect of Legislative and Quasi-legislative Administrative Acts" 1989 *SAPL* 74 93) (author's own emphasis).

When discussing "executive authority", sections 238, 239 and 101(2) must also be addressed. In so doing, it emerges that there is no clarity and much room for conjecture. Section 238 provides that an executive organ of state in any sphere of government may exercise any power or perform any function for any other executive organ of state on an *agency* or *delegation* basis (author's own emphasis). In terms of section 239, both the Cabinet and an individual minister qualify as an "organ of state" insofar as they exercise a power or perform a function in terms of the Constitution or in terms of legislation. May the Cabinet therefore *delegate* its constitutional powers as *Cabinet* to *individual* Ministers allowing them to make decisions together with the President (author's own emphasis)?

In respect of powers in terms of section 85(2) (alluded to above), section 101(2) states that a written decision by the President requires a *countersignature* "by another Cabinet member if that decision concerns a function assigned to that other Cabinet member" (author's own emphasis). What does this mean precisely? In practice it could be interpreted that the countersignature indicates the approval of that Minister for an executive decision made by the President. Does the absence of the countersignature mean that the relevant Minister did not concur with the conduct of the President? Does a failure to obtain a countersignature result in the *invalidity* of the President's executive act (author's own emphasis)?

6 Appointments

The President makes appointments as head of state and as head of the national executive. It is not always clear in *which capacity* these appointments are made (author's own emphasis). The Constitution should preferably indicate whether an appointment is made by the President acting as head of the national executive or as head of state. Where *nothing* is said, may it be assumed that the President makes the appointment as *head of state* – unless the context indicates otherwise (author's own emphasis)? Where there is an element of *discretion* involved, is it logical to assume that the President makes an appointment as head of the national executive (that is, together with the Cabinet) (author's own emphasis)? It is the view of Currie and De Waal (*The New Constitutional and Administrative Law* 241) that the logical answer is that the President must act together with the Cabinet in such a case.

When attempting to ascertain precisely which appointments are made as head of state and which as head of the national executive, one enters into a maze of prescripts and practices. The random examples below suffice to illustrate the powers of the President when it comes to appointments.

The President as *head of state* appoints diplomatic and consular representatives (s 84(2)(i)); the Deputy-President, Ministers and Deputy-Ministers (s 91(2) and 93); a member of Cabinet as leader of the government business in the National Assembly (s 91(4)); two practising

advocates and two practising attorneys nominated by their professions to serve on the Judicial Service Commission (JSC) (s 178(1)(e) and (f)); the Public Protector, Auditor-General, the Human Rights Commission, the Commission for Gender Equality and the Electoral Commission – on recommendation of the National Assembly (s 193); the Public Service Commission (s 196(7) – five members must be recommended by a proportionally composed committee of the National Assembly and nine members nominated by premiers of the provinces after being recommended by a proportionally composed committee of the nine provincial legislatures); the judges of the Constitutional Court after consulting the leaders of the parties in the National Assembly (s 174(3) and (4) read with s 85(2)); the Chief Justice and Deputy Chief Justice after consulting the JSC (s 174(3)); the other Constitutional Court judges after consulting the Chief Justice and from a list of names submitted by the JSC (s 174(4)); the President and Deputy-President of the Supreme Court of Appeal – together with the other members of the Cabinet after consulting the JSC (s 174(3)); all other judges on the advice of the JSC.

As *head of the national executive*, the President appoints the National Director of Public Prosecutions (NDPP) (s 179(1)(a)); the National Commissioner of the South African Police Service (s 207(1)); the heads of the intelligence services (other than the intelligence division of the defence force or police service) (s 209(2); an inspector for the civilian monitoring of the activities of the intelligence services – approved by a resolution adopted by the National Assembly with at least a two-thirds majority (s 210(b)); the Fiscal and Financial Commission (s 221(1)); the military command of the defence force (s 202(1)) – command of the defence force is exercised in accordance with the directions of the Cabinet member responsible for defence under authority of the President (s 202(2)).

The President's power to appoint includes the power to dismiss. This was held in *Masethla v President of the RSA* (2008 (1) BCLR 1 (CC) par 77 (*Masethla*), which concerned the decision of the President to dismiss the head of the National Intelligence Agency (NIA). The basis of the challenge was that the President did not afford Masethla an opportunity to be heard prior to the dismissal and thus infringed section 33 (just administrative action) of the Bill of Rights. The Constitutional Court held (par 77) that the dismissal constituted executive action rather than administrative action in this *special category* of appointments of members of the NIA (author's own emphasis). According to the Constitutional Court (par 77), *it would not be appropriate to constrain the exercise of executive power* in the context of dismissing the head of the NIA by enforcing the requirements of *procedural fairness* as demanded by the Constitution (author's own emphasis). The Constitutional Court quoted from *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* (1999 (2) SA 91 (CC) par 41) where it *cautioned* that procedural fairness should *not* be made a requirement for the exercise of *every* decision by the executive (author's own emphasis). The Constitutional Court in *Masethla* (par 77) held that in determining what constitutes procedural fairness in a given case, a court should be slow to

impose obligations upon government that would inhibit its ability to make and implement policy effectively.

A relevant question raised by *Masethla* is what are “special category appointments” of the President that constitute *executive* action rather than *administrative* action (author’s own emphasis)? Does procedural fairness referred to in section 33 (just administrative action) of the Constitution have *caveats*? If so, *Masethla* poses a dangerous precedent. The Constitutional Court (par 77) stated:

“In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which inhibit its ability to make and implement policy effectively... As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to Act efficiently and promptly.”

This is disconcerting since it flies against the principle that *all decisions* by the President are in principle reviewable (author’s own emphasis) – either on the basis that the decision contravenes the Bill of Rights or flowing from the fact that the Constitution is supreme and adherence to the Constitution is the essence of respecting the rule of law (De Vos and Freedman (eds) *South African Constitutional Law in Context* (2014) 185).

Masethla must be read with *President of the Republic of South Africa v M&G Media Ltd* (2012 (2) BCLR 181 (CC) par 1), in which the actions of the President were found to infringe a constitutional right given effect to in legislation. In this case, the Constitutional Court held that the President could not refuse to hand over to the *Mail & Guardian* newspaper a report commissioned by the President as that would contravene the provisions of the Promotion of Access to Information Act 2 of 2000, which gave effect to section 32 of the Constitution (access to information).

Although, as stated above, the President under section 91(2) has the sole power to appoint and dismiss the Deputy President and Cabinet ministers, his or her powers, as stated by De Vos and Freedman (*South African Constitutional Law in Context* 179), may in practical terms be limited by political party constraints. When the President appoints or dismisses a Cabinet member, he or she needs support from his or her political party to retain the party’s confidence and will thus informally consult the leadership of the governing party. This is a practical political party reality.

In retrospect, it is clear that in *practice* the distinction between head of state and head of the national executive may be difficult to maintain and becomes murky. The following elementary examples bear this out. If the President makes a speech, it goes without saying that he or she does not need to consult the Cabinet. Does the situation change where the speech has major political implications? Is there a difference between the President visiting a foreign country on a state visit that has no political considerations and a visit that has significant political consequences? Does the latter visit require that he must take his decision together with the Cabinet? The fact that no ready answers are forthcoming to these questions illustrates how ill-defined the President’s head-of-state and head-of-the-national-executive powers are.

7 The text books

A brief overview is now given of how the President's powers are assessed by randomly selected South African authors on South African constitutional law. The various approaches are not expounded on extensively as this has been adequately and eruditely done by the respective authors.

Currie and De Waal (*The New Constitutional and Administrative Law* 237) see the distinction made in section 83(a) of the Constitution between "head of state" and "head of the national executive" when referring to "The President" as being of "legal significance" (author's own emphasis). As head of state, they declare, the President does *not* need to consult with any other person (author's own emphasis). Their authority for this is *SARFU III* (par 38). As head of the national executive, they declare, the President exercises executive authority *together with* other members of the Cabinet as set out in section 85(2) of the Constitution. They emphasise the decision of the Constitutional Court in *Hugo* (par 8) that the President has no powers derived from the Royal prerogative other than those enumerated in the Constitution. The former uncodified prerogative powers of the President as derived from the British system, they submit, have been extinguished and have been codified in section 84(2) of the Constitution. They further emphasise (Currie and De Waal *The New Constitutional and Administrative Law* 239) that the President may not abdicate any of his head-of-state powers since that would be an unlawful delegation of power or "passing the buck" as held in *SARFU III* (par 39).

De Vos and Freedman (*South African Constitutional Law in Context* 177), similarly to Currie and De Waal (*The New Constitutional and Administrative Law* 237), see the difference between "head of state" and "head of the national executive" pertaining to the President in section 83 of the Constitution as being of "legal significance" (De Vos and Freedman (eds) *South African Constitutional Law in Context* 177). The former term, as they see it, refers to the President acting *alone*, while the latter term refers to the President acting *in consultation with* the Cabinet (De Vos and Freedman (eds) *South African Constitutional Law in Context* 177) (author's own emphasis).

Rautenbach (*Rautenbach-Malherbe Constitutional Law* (2012) 142) sees reference to the President as "head of the national executive" as meaning in this role powers are exercised "together with other members of the cabinet". Rautenbach sees this as *joint action* of the head of government and the members of the Cabinet "as it exists in the Westminster system" (*Rautenbach-Malherbe* 143). As Rautenbach (*Rautenbach-Malherbe* 143) sees it, the expression "together with other members of the cabinet" indicates that the powers and functions of the President as head of the national executive are "*normally*" taken at cabinet meetings (author's own emphasis). "Normally", he explains, can also mean that in order to reach a joint decision, the President "could also consult with the other members of the cabinet in other ways than at formal cabinet meetings." (*Rautenbach Rautenbach-Malherbe* 143). The degree of consent needed from the other members of the Cabinet, he says, *depends* on the decision-making

procedures followed in the Cabinet (author's own emphasis). He adds, however, that *no legal directives* exist for these decision-making procedures (author's own emphasis). Rautenbach (*Rautenbach-Malherbe* 144) states that the President's adherence to the views of all (or some of) the other members of the Cabinet will depend on the President's political position within the framework of his or her individual accountability to Parliament. As the President is the only member of the Cabinet directly elected by Parliament, Rautenbach (*Rautenbach-Malherbe* 144) surmises, he or she cannot ignore the views of the members of the Cabinet who represent particular interest groups in the party that elected the President. This means that the President must take cognisance of *political constraints*, interest groups and factions of the party he or she represents – in practice, the majority party (author's own emphasis). Rautenbach (*Rautenbach-Malherbe* 161) points out that informal or statutory bodies have been provided for in the Constitution to advise the President in exercising his or her executive authority. These are the JSC (s 178(5)); the Financial and Fiscal Commission (s 220(1)); the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (s 185(2)) and the Commission for Gender Equality (s 187(2)).

Devenish (*A Commentary on the South African Constitution* 150) sees the powers of the President as involving a "synthesis of the dignity associated with the highest ceremonial office in the land together with the substantial political powers and influence that must of necessity be possessed by a chief executive officer of government". This, it appears, is a practical synopsis of section 84's reference to the President's powers. As seen by Devenish (*A Commentary* 150), the President's powers as head of both state and the executive by nature are significant – but not untrammelled. Devenish (*A Commentary* 151) submits that it is clear from section 84(1) that, to fulfil his or her joint functions (head of state and head of the national executive), the President must have *implied* powers (author's own emphasis). These implied powers, he states (*Devenish A Commentary* 151), will depend on statutory interpretation and administrative law. The implied powers, he states, must be reasonable and necessary for the assigned power to be effectively exercised. In keeping with Rautenbach (*Rautenbach-Malherbe* 35) and Currie and De Waal (*The New Constitutional and Administrative Law* 236), Devenish (*A Commentary* 151) declares that the President has no express or implied prerogative powers by dint of the mere fact that the office is described as head of state or head of the national executive (Barrie "Judicial Review of the Royal Prerogative" 1994 *SALJ* 788). (The previous State President under the Republic of South African Constitution Act 110 of 1983 inherited all prerogative powers enjoyed by his or her predecessor under the 1961 Constitution, and in terms of section 7(4) of the Republic of South Africa Constitution Act 32 of 1961, the State President was stated as having "such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative".)

Devenish (*A Commentary* 152) summarises section 84 as granting the President three categories of powers: (i) personal statutory competency; (ii) consultative powers, that is, done *in consultation with*, and (iii) powers

exercised *after consultation with other functionaries* (author's own emphasis). Devenish (*A Commentary* 157) sees the term "in consultation with" with reference to the President's executive powers as a *strong* form of consultation that will depend on the prevailing political circumstances and the political style of the President (author's own emphasis). The term "after consultation with" he sees as a *weak* form of consultation that means serious consideration must be given to the person or body concerned but their views do *not* legally bind the President (author's own emphasis). Rautenbach (*Rautenbach-Malherbe* 145) similarly sees the term "after consultations with" as meaning that the President is *not* bound to follow the advice or recommendation (author's own emphasis). Do Devenish and Rautenbach thus *imply* that the President if acting "*in consultation with*" is *bound* to act as advised or according to the recommendations received (author's own emphasis)?

According to Devenish (*A Commentary* 158), it is clear from chapter 5 of the Constitution (s 83–102) that, seen from a historical perspective, the President can do very little on his or her own. That the President will in the normal course of duty and responsibility be *dependent* in effect on the agreement of Cabinet colleagues from day to day. The question arises: can the degree of this *dependency* be influenced by the *personality* of the President (author's own emphasis)? How does the personality of the President influence the interpretation of exercising executive authority "together with" or "in consultation with" designated functionaries? Erstwhile President PW Botha's political style was clearly more dictatorial and imperial than President Mandela's style, which was more consensual (Pottinger *The Imperial Presidency* (1988); Thatcher *The Downing Street Years* (1993) 25).

8 Limits

As set out above, the President acting as *head of state* or as *head of the national executive* has wide powers. What are the *precise limits* on these wide powers (author's own emphasis)? The limits can be categorised briefly as political constraints, *formal* and *substantive* limits explicitly placed on his or her exercise of power, and the requirement that the President must act in accordance with the Bill of Rights and the overall principle of legality (author's own emphasis). Regarding the latter, the Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* (1998 (12) BCLR 1458 (CC) par 58) stated:

"It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."

Formal limits are constitutional limits as set out above. For example, the President has no discretion in appointing ordinary judges but must act on the recommendation of the JSC (s 174(6) of the Constitution); or when appointing the Public Protector or the Auditor-General, he or she acts on the recommendation of the National Assembly (s 193(4)); or when appointing the Chief Justice or Deputy-Chief Justice, the President must consult with

the JSC and the leaders of the opposition parties in the National Assembly (s 174(3)) (author's own emphasis). *Substantive* limits are set when the courts review the President's exercise of powers by virtue of the Constitution being supreme (*Hugo* par 10); in the doctrine of *legality*, which forms part of the rule of law; in the prohibition of any infringement of the Bill of Rights (*Hugo* par 15); and in the requirement to act in good faith and not to misconstrue powers (*SARFU III* par 148) (author's own emphasis).

In *Albutt v Centre for the Study of Violence and Reconciliation* (2010 (5) BCLR 391 (CC) par 71), the Constitutional Court affirmed the principle that there must be a *rational connection* between the decision of the President and the legitimate purpose pursued (author's own emphasis). In *Albutt* (par 74), it was held that a decision by the President to exclude consultation with the victims of politically motivated offences in a special pardoning dispensation procedure for perpetrators who did not participate in the Truth and Reconciliation Commission process, was not *rational* and therefore not a constitutional exercise of the pardoning power provided for in section 84(2)(j) of the Constitution (author's own emphasis).

The principle that, when the President exercises power, he or she is constrained by the principle of legality in the sense that he or she must act rationally and in good faith is emphasised in *Hugo* (par 29), *SARFU III* (par 148) and *Minister of Justice and Constitutional Development v Chonco* (2010 (2) BCLR 140 (CC) par 30). The principle of *rationality* was elaborated upon by the Constitutional Court in *Democratic Alliance v President of South Africa* (2012 (12) BCLR 1297 (CC) par 189) (author's own emphasis). This case concerned the President's appointment of the National Director of Public Prosecutions (NDPP). The Constitutional Court found (par 89) that the President had ignored adverse findings as to the honesty of his appointee made by another body and had thus not followed a *rational* process (author's own emphasis). In *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* (2000 (3) BCLR 241 (CC) par 90), it was held by the Constitutional Court that the requirement that the President must act *rationally* when exercising his or her power is a *minimum threshold* requirement applicable to the exercise of all public power by members of the executive and other functionaries – *not* only a requirement for the President (author's own emphasis).

Du Plessis and Scott ("The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence" 2013 *SALJ* 597 608–609) point out that Constitutional Court judgments relating to the rationality review vary. In some instances, they say, the Constitutional Court will apply the text stringently but in others it takes a far more differential approach. They complain that with variability comes uncertainty and a lack of guidance. This, they submit, causes problems for potential litigants who need to decide whether to challenge decisions or conduct that has affected them.

Despite the principle that the exercise of power by the President is always reviewable (De Vos and Freedman (eds) *South African Constitutional Law in Context* 185), cognisance must be taken of the Constitutional Court's decision in *Minister of Home Affairs v Liebenberg* (2002 (1) SA 33 (CC)) and

SARFU III. In the former decision (*Liebenberg* par 15), it was held that when approaching a court to declare conduct of the President unconstitutional, it is necessary to indicate precisely which conduct falls foul of the Constitution. In the latter decision, it held (*SARFU III* par 240) that a court would not ordinarily require the President to give oral evidence as that would be going to the heart of the separation of powers doctrine and was thus of considerably constitutional significance. Secondly, it held (*SARFU III* par 242) that when calling the President as a witness, the status, dignity and efficiency of the office of the President must be upheld, but that this must not impede the administration of justice. How is upholding the status of the office of the President to be reconciled with not impeding the administration of justice? There is as yet no clarity on this issue. Is it not in the public interest that this whole matter be thoroughly explored?

9 Conclusion

The Constitution creates a sovereign democratic state founded on the values of human dignity, equality, non-racialism, and non-sexism. It is supreme and advances the rule of law, universal adult suffrage and a multiparty system of democracy with regular free and fair elections. Parliamentary sovereignty has been replaced by constitutional sovereignty. The Constitution contains a detailed Bill of Rights. The courts are the guardian of the Constitution. This should not, however, result in a cavalierly complacent attitude towards the working of the Constitution. The Constitution must not, due to the manner of its birth and exhortatory wording alone, be venerated. What is constantly necessary is a critical appraisal of the working of the Constitution and a critical appraisal of the vagaries that can emanate from interpreting the Constitution.

This note has looked at the presidential powers as mandated and specifically enumerated in the Constitution. As seen above, various questions immediately come to mind: where does effective *executive power* lie (author's own emphasis)? Is it possible that the term "head of the national executive" can in practice lead to *unrestrained power* (author's own emphasis)? What are the possibilities that the President as "head of the national executive" can *dominate* his Cabinet completely because the Ministers hold their offices entirely at his or her pleasure (author's own emphasis)? Does the fact that the President alone is vested with the power to appoint crucial officers not enable him or her to *control* such individuals and the departments under their control (author's own emphasis)? Can the fact that the President *appoints* Ministers and assigns their functions, and may *dismiss* them, not lead to a situation where the Ministers can be described as nothing more than "a group ... who surrounded the Czar or the Sultan or who execute the bidding of a Roman emperor like Constantine or Justinian" (author's own emphasis) (Bryce *The American Commonwealth* (1917) 94)?

When it comes to the appointment of judicial officers (s 174), a complicated procedure involving terms such as "after consulting" (s 174(3)) and "on the advice of" (s 174(6)) come into play. As seen above, the Constitution does *not* define the nature of these *consultations* (author's own

emphasis). *Must* the President follow the *advice* of those consulted (author's own emphasis)? Or do these consultations entail nothing more than an exchange of views that must be taken seriously (De Vos and Freedman (eds) *South African Constitutional Law in Context* 230–237)? As seen by Devenish (*A Commentary* 231) regarding appointments to the judiciary, the terms “after consulting with [the JSC]” and “on the advice of [the JSC]” do not mean that the President is bound by the recommendations of the JSC. It merely means that the President is obliged to consult the JSC *in good faith* (author's own emphasis). (For criticism of the JSC, see Wesson and Du Plessis “Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary” 2008 *SAJHR* 187.) Is there not the possibility, remote as it might be, that the President may be *hesitant* to appoint members of the judiciary (s 174(6)) whose views on matters of policy are known to be radically different from his or her own (author's own emphasis)? As seen above, the JSC plays a vital role when advising the President on the appointment of the judiciary. The JSC, however, does *not* have clear *criteria* to be used for the selection of judges for appointment and, as stated by De Vos and Freedman (*South African Constitutional Law in Context* 232), in practice it has developed a set of vague criteria (author's own emphasis). The Constitution itself does not expressly set out any criteria in this regard. Should such criteria not be set out in the Constitution? (It must be mentioned here that the selection of judges by the JSC is subject to judicial review as set out in *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA)).

Must a more clearly defined distinction in general not be drawn in the Constitution between the President's head-of-state and head-of-the-executive powers respectively? Although the Constitution provides some light on this issue, it is still too vague. Certainty is urgently needed as to what it means when the President acts “*in consultation with*” and “*after consultation with*” (author's own emphasis). Does the *absence* of a minister's *countersignature* lead to the invalidity of a presidential decision (author's own emphasis)? When does presidential executive action constitute purely “executive action” and not “*administrative action*” (author's own emphasis)? Is *procedural fairness* a requirement for presidential executive decisions (author's own emphasis)? What role does *rationality* play in presidential decisions (author's own emphasis)? Is a presidential *pardon* reviewable by the courts (author's own emphasis)? Is there a difference between the President exercising his or her *discretion* with regard to a *pardon* that only affects one person and one where the President exercises a general discretion affecting a large number of people (author's own emphasis)? Does the *reviewability* of presidential powers depend on the *nature of the power* exercised in the context in which it is exercised (author's own emphasis)? Where the court tests the actions of the President for *rationality*, may the court *substitute* its own opinion as to what is appropriate for the decision of the President (author's own emphasis)? Does the President have *implied powers* (author's own emphasis)? Are implied powers necessary for the President to put into effect his or her enumerated powers?

Unless these questions can be addressed with some semblance of consensus, they remain hanging in the air. These unanswered questions

can only lead to persistent constitutional litigation. Despite accepting that the South African Constitution remains a work-in-progress, and that constitutions are constantly subject to revision to achieve the society they desire, too many questions regarding the precise powers of the South African President remain.

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