CASES / VONNISSE

THE INCONSISTENCY OF THE CONSTITUTIONAL COURT ON THE APPLICATION OF THE *HYUNDAI*-INSPIRED INTERPRETATION

Democratic Alliance v Speaker of the National Assembly (CCT86/15) [2016] ZACC 8*

1 Introduction

The *Hyundai*-inspired interpretation obliges the courts to interpret, where possible, legislation in conformity with the Constitution of the Republic of South Africa 1996 (hereinafter "the Constitution"). This process involves taking into account the objects and purports of an Act and interpreting its provisions in the manner that complies with the constitutional values (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) par 22 (hereinafter "*Hyundai Motor*")). Essentially, it ensures that courts give preference to an interpretation of legislation that is within the parameters of the provisions of the Constitution over the one that is not. However, courts do not apply the *Hyundai*-inspired interpretation if it cannot be ascribed to the provision of the legislation in question or if it is not reasonably possible for them to do so (*Hyundai Motor* par 23–24). Such situations include the *Hyundai*-inspired interpretation that unduly strains the text, (*Hyundai Motor* par 24; *National Director of Public Prosecutions v Mohamed NO* (CCT44/02) [2003] ZACC 4; 2003 (1) SACR 561; 2003 (5) BCLR 476; 2003 (4) SA 1 (CC) par 35) or that obliges the court to read-in too many qualifications (*Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* (CCT12/09) [2009] ZACC 31; 2010 (2) BCLR 99 (CC) par 105–106 (hereinafter "*Abahlali Basemjondolo*")). In these situations, the courts have to declare the legislative provision in question unconstitutional and resort to the remedy of reading- in or notional severance (*Hyundai Motor* par 26). The *Hyundai*-inspired interpretation is evidenced in quite a number of cases. However, this case note critically dissects the manner in which the Constitutional Court applied it in the case of *Democratic Alliance v Speaker*

* The author would like to thank Prof Schulze for his insightful comments on the first draft of this article.

of the National Assembly ((CCT86/15) [2016] ZACC 8) (hereinafter "*Democratic Alliance 1*").

It concludes that the manner in which the Constitutional Court applied it, in this case, is inconsistent with the manner in which the Constitutional Court applied it in the case of *Abahlali Basemjondolo* six years earlier. When interpreting the word "disturbance" which section 1 of the Powers Privileges and Immunities of Parliament and Provincial Legislatures Act (4 of 2004) (hereinafter "the Act") defined as *"*any act which interferes with or disrupts or which is likely to interfere with or disrupt the proceedings of Parliament or a House or Committee" and which the High Court had found to be too broad that it had the effect of finding a robust and controversial debate unconstitutional (*Democratic Alliance v Speaker of the National Assembly* (2792/2015) [2015] ZAWCHC 60 par 31 and 43 (hereinafter "*Democratic Alliance 2*")), the Constitutional Court unexpectedly read in too many qualifications to the word "disturbance" in conformity with the Constitution. The reason being, the Constitutional Court, six years earlier, found the approach of reading- in too many qualifications in conformity with the Constitution to be straining the text and to be contrary to the rule of law and the principle of separation of powers in the case of *Abahlali Basemjondolo*.

2 Facts of the case and the decision in the Western Cape High Court

This case concerned the Democratic Alliance's (DA's) application, which emanated from an incident that took place in the parliament on 12 February 2015. On that day, during the joint sitting of the Houses of Parliament and while the President was delivering the State of the Nation Address, a member of the Economic Freedom Fighters (EFF) rose and asked a question as to when the President was going to repay the money spent on certain upgrades to his private residence at Nkandla, in conformity with the report of the Public Protector (*Democratic Alliance 1* par 5).The Speaker of Parliament responded that such a question could not be asked during the State of the Nation Address (*Democratic Alliance 1* par 6). As a result, some members of the EFF continuously interjected the Speaker of the National Assembly despite her repeated request for them to take their seats. Consequently, the Speaker of Parliament invoked section 11 of the Act (which provides, "A person who creates or takes part in any disturbance in the precincts while Parliament or a House or Committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security forces") and ordered the security services to remove them. The EFF members were then removed from Parliament by the security services.

In its application, the DA argued that properly interpreted, section 11 of the Act can only be applicable to non-members of parliament on the following grounds: (a) members of parliament may not be arrested for what they say in parliament; (b) parliament may not pass legislation infringing a member's privilege of free speech guaranteed by the Constitution; and (c) to allow the Executive to use force to arrest members of parliament in

parliament amounts to the violation of the independence of parliament or the principle of separation of powers (*Democratic Alliance 2* par 5). As a result, the DA sought the following declaratory order: declaring section 11 unconstitutional and reading- in the words, *"*except for members"; alternatively, declaring section 11 of the Act unconstitutional and deleting the words, *"*arrest" and *"*security services" in the second alternative, declaring section 11 of the Act unconstitutional and granting an order of notional severance to prevent its application to any exercise of parliamentary privilege of freedom of speech; in the third alternative, declaring that, as a matter of interpretation, section 11 of the Act is not applicable to the exercise of the parliamentary privilege *(Democratic Alliance 2* par 6).

In countering the DA's argument, the Speaker of Parliament argued that section 11 of the Act, properly construed, applies to a member of parliament who creates or takes part in the disturbance of parliament and is not unconstitutional (*Democratic Alliance 2* par 7). The Speaker of Parliament argued further that this section not only minimises disruptive conduct by members but also strengthens the proper functioning of parliament (*Democratic Alliance 2* par 7).

The legal question was therefore divided into the following two parts: the first part was whether the reference to "a person" in section 11 of the Act was "reasonably capable of including 'a member' of parliament; the second part was, if so, whether such meaning complies with section 58(1) of the Constitution and the doctrine of the separation of powers".

On the question whether section 11 of the Act includes members of parliament, the High Court applied the *Hyundai*-inspired interpretation and found that indeed this section, reasonably interpreted, included members of parliament (*Democratic Alliance 2* par 30). However, it found that this section did not comply with section 58(1) of the Constitution (*Democratic Alliance 2* par 42). It based this finding on quite a number of factors which encompass the following: (a) the definition of the word "disturbance" was so broad that robust debate and controversial speech could constitute an act which could be construed as interfering with or disrupting the parliamentary proceedings in violation of the right to freedom of speech and arrest; (*Democratic Alliance 2* par 31 and 43); (b) section 11 of the Act does not introduce new privileges or powers which may limit freedom of speech in terms of section 58(2) of the *Constitution* which provides that *"*other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation" (*Democratic Alliance 2* par 34) and that there are sections of the Act that dealt with members who were disobeying the Rules of Parliament; (c) the Rules and Orders of the National Assembly also cater for the situations where members of parliament are disobeying parliament (*Democratic Alliance 2* par 38); (d) unlike the right to freedom of speech and debate, the Rules and Orders of the National Assembly do not subject the right to freedom from arrest to the restrictions placed on such freedom by the Constitution, any other laws or the Rules (*Democratic Alliance 2* par 40); (e) section 11 of the Act did not benefit the House as a whole or its members in general, but the Speaker, Chairperson, or other designated Presiding Officers (*Democratic Alliance* 2 par 34); and (f) this

section was against the principle of representative democracy (*Democratic Alliance 2* par 36). Freedman describes this principle as follows:

> *"*representative democracy is a limited and indirect form of democracy. It is limited in that popular participation in government is infrequent and brief, being restricted to this act of voting every few years. It is indirect in that the public do not exercise power themselves; they merely select those who will rule on their behalf. This form of rule is democratic only insofar as representation establishes a reliable and effective link between the government and the governed. This is sometimes expressed in the notion of an electoral mandate" (Freedman *Understanding the Constitution* (2013) 24).

The High Court further argued that this section was against the right of the parliamentarians to express the mandate of their constituencies without fear (*Democratic Alliance 2* par 35).

Having found this section constitutionally invalid, it declared it inconsistent with the Constitution and invalid "to the extent that it permits a member to be arrested for conduct that is protected by sections 58(1)(b) and 71(1)(b) of the Constitution" (*Democratic Alliance 2* par 48). It then suspended this order for notional severance for a period of 12 months in order for Parliament to remedy the defect (*Democratic Alliance 2* par 48) and referred this order to the Constitutional Court for confirmation (*Democratic Alliance 2* par 48). In the Constitutional Court, the confirmation order was sought by the DA. The Speaker sought leave to appeal the order of the High Court.

3 Constitutional court's decision

The Constitutional Court divided the legal question into the following parts: first, whether reference to "a person" in section 11 of the Act was "reasonably capable of including 'a member' of parliament; the second part was whether such meaning complies with section 58(1) of the Constitution and the doctrine of the separation of powers" (*Democratic Alliance 1* par 10). The third part was the extent to which this privilege may be limited. The fourth part centred on the reach of disturbance envisaged in section 11 of the Act, or on what constitutes "interference" and "disruption" in the definition of disturbance (*Democratic Alliance 1* par 10). It then proceeded to find section 11 of the Act unconstitutional on the basis of the following reasons that the High Court had also endorsed: the word "person" in section 11 of the Act included a member of parliament; section 11 of the Act infringed the privilege of freedom of speech of members of parliament and that only the rules and orders of parliament could limit parliamentary privilege. However, it differed with the High Court's reasoning that section 11 of the Act was also unconstitutional based on being too broad that it had the effect of violating the right of the parliamentarians to free speech. It dealt with each of these reasons as follows:

3 1 Does the word "person" in section 11 of the Act include a member of parliament?

Having set out the importance of free speech in parliament, the Constitutional Court tackled the question whether the word "person" in

section 11 of the Act included a member of parliament. Having gone through the purpose of section 11 and other provisions of the Act in which the word "person" was used, it agreed with the High Court that the word "person" in this section included members of parliament. This is evidenced by the following excerpt:

> "I read the purpose of section 11 to be to ensure that the business of Parliament is not hamstrung and brought to a standstill by a disturbance. Members are more likely – than non-members – to cause an unwelcome disturbance in Parliament. It makes sense for "person" in section 11 to include a member. Otherwise, the section would be denuded of much of its efficacy …" (*Democratic Alliance 1* par 28).

Its reasons for this finding were: (1) grammatically the word "person" includes a member and there is nothing that "militates against that meaning being ascribed to the word …" (*Democratic Alliance 1* par 29); (2) interpreting this section as excluding members of parliament contradicted with the *Hyundai*-inspired interpretation since excluding them would result in strained interpretation (*Democratic Alliance 1* par 33).

3 2 Does section 11 infringe the privilege of freedom of speech of members of parliament?

On the question whether section 11 of the Act infringes parliamentary privilege of free speech, the Constitutional Court argued that it did. It provided two reasons for this argument: (1) The possibility of the arrest of the members of parliament might instil fear in them contrary to their right to free speech. The Court held as follows:

> "section 11 provides that a member may be arrested for it. There is no reason for members not to believe that detention and prosecution may follow. This chilling effect alone constitutes an infringement of parliamentary free speech" (*Democratic Alliance 1* par 41).

(2) This section is contrary to section 58(1)(b) of the Constitution, which entitles members of parliament to immunities from criminal proceedings, arrest and imprisonment because section 58(1)(b) is absolute (*Democratic Alliance 1* par 42 and 56).

3 3 The extent to which this privilege may be limited

On the issue of the limitation of parliamentary privilege, the Constitutional Court categorically stated that it could only be limited by the rules and orders of parliament. (*Democratic Alliance 1* par 47, citing s 58(1)(a) of the Constitution). It further argued, therefore, that section 11 of the Act, which limited parliamentary privilege, was unconstitutional for the following reasons: (1) it did not constitute rules and orders of parliament that are adopted internally (*Democratic Alliance 1* par 47); (2) it constituted the legislative infringement of parliamentary privileges which brings in the participation of an external agency such as the Executive. The following words of the Constitutional Court are insightful in this regard:

> "Sections 57(1) and 70(1) of the Constitution dictate that the rule and order making power vests in the National Assembly and National Council of Provinces respectively. The process is thus wholly internal. Limiting parliamentary free speech by means of an Act of Parliament would bring in the participation of an external agency, the Executive. The Executive – a different arm of state – would thus be taking part in a process that sections 57(1) and 70(1) have made the exclusive domain of the Legislature …" (*Democratic Alliance 1* par 51).

3 4 What constitutes "interference" and "disruption" in the definition of "disturbance", or what is the reach of "disturbance" as envisaged in section 11?

Having discussed the permissible means of limiting freedom of speech, one of the critical questions that the court had to answer was what constituted interference or disturbance that warranted the removal of parliamentarians who interfered with or disrupted parliamentary proceedings. In answering this question, the Constitutional Court differed with the High Court's reasoning that section 11 of the Act was unconstitutional on the basis that it was too broad that it had the effect of violating the right of the parliamentarians to free speech. The reason is that it applied the Hyundai-inspired interpretation when interpreting the word "disturbance" and categorically stated that "It cannot be all conduct that annoys and tests the patience of the presiding officer and some in Parliament that amounts to interference or disruption" (*Democratic Alliance 1* par 44). The reason being, according to the court, "Robustness, heatedness and standing one's ground in here in the nature of parliamentary debate" (*Democratic Alliance 1* par 45). It further argued that an action which warranted the removal and arrest of the members was the one that rendered parliament incapable of conducting its business with no possibility of the resumption of its business within a reasonable time (*Democratic Alliance 1* par 45).

On the reach of disturbance, it argued that section 11 of the Act did not apply in a situation where a member proceeded with his or her contribution after he or she had been ordered by the Speaker to desist from further debate. The court reasoned as follows:

> "[I]n the heat of a debate one must expect that – from time to time – a member's contributions will not come to a screeching, mechanical halt once the presiding officer has ruled that the member desist from further debate on a subject. Is that the sort of conduct to which section 11 is meant to apply? If it is, then section 11 would also be constitutionally invalid for impermissible overbreadth" (*Democratic Alliance 1* par 44–45).

Having found section 11 of the Act unconstitutional on the basis of the aforementioned reasons, it refused, just as the High Court did, to deal with the question whether this section was constitutionally invalid on the ground that it violated the principle of separation of powers. It then declared it, unlike the High Court, which declared it invalid "to the extent that it permits a member to be arrested for conduct that is protected by section 58(1)(b) of the Constitution", invalid on the basis that it applied to members (*Democratic Alliance 1* par 59). It then cured the constitutional defect by reading- in the words, "other than a member" after the word "person" to ensure this section does not apply to members of parliament (*Democratic Alliance 1* par 60).

4 Critique of the decision of the Constitutional Court

Both the High Court and the Constitutional Court are commended for their reasoning for finding section 11 of the Act unconstitutional on the basis that it limits parliamentary privileges and immunities guaranteed by the Constitution. They are also commended for the manner in which they applied the *Hyundai* -inspired interpretation when they found that the word "person" in this section included a member of parliament. However, the same cannot be said about the manner in which the Constitutional Court went about applying the *Hyundai*-inspired interpretation when interpreting the word, "disturbance" in this section which the High Court had already found to be too broad. The reason is that when doing so, it read-in too many qualifications to the definition of the word "disturbance":

1) "It cannot be all conduct that annoys and tests the patience of the presiding officer and some in Parliament that amounts to interference or disruption" (*Democratic Alliance 1* par 44).
2) "[T]o warrant removal from the Chamber, interference, or disruption must go beyond what is the natural consequence of robust debate..." (*Democratic Alliance 1* par 44).
3) "[I]nterference and disruption that may be sufficient for the removal of a member must be of a nature that hamstrings and incapacitates Parliament from conducting its business" (*Democratic Alliance 1* par 45).
4) "Even so, there must be no anticipation of resumption of business within a reasonable time..." (*Democratic Alliance 1* par 45).
5) Failure of the members of parliament to desist immediately from debate during the heat of the debate once instructed to do so by the Speaker does not constitute interferences that warrant their arrest and removal from parliament (*Democratic Alliance 1* par 44–45).
6) "[i]nterference or disruption that does not meet this threshold is not hit by section 11" (*Democratic Alliance 1* par 45).

While these qualifications rescue section 11 of the Act from being declared unconstitutional for being overbroad and contrary to the rule of law, (in the case of *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*, (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 par 54, the Constitutional Court stressed the need for legislative guidance on how public power has to be exercised; and this argument was also indirectly affirmed by Judge Savage in the minority judgment in *Primedia Broadcasting, A Division of Primedia (Pty) Ltd v Speaker of the National Assembly* (2749/2015) [2015] ZAWCHC 72 par 61; *Janse van Rensburg v Minister of Trade and Industry* (CCT13/99) [2000] ZACC 18; 2001 (1) SA 29; 2000 (11) BCLR 1235 (CC) par 25), the author argues that they epitomise an inconsistency on the part of the Constitutional Court on the application of the *Hyundai* interpretation. The reason is that six years earlier, the same Constitutional Court found in the case of *Abahlali Basemjondolo* that reading- in too many qualifications in conformity with the Constitution strained the text and was contrary to the rule of law and separation of powers.

This case partly concerned the constitutionality of section 16 of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act (6 of 2007) (hereinafter "the Slums Act"). This section obliged the owner or person in charge of land or a building, occupied by unlawful occupiers, to institute proceedings for the eviction of such an unlawful occupier within a

period determined by the member of the Executive Council. It also obliged the municipality to institute proceedings for the eviction of such unlawful occupiers should the owner or person in charge of land or a building fail to do so. In finding this section unconstitutional for being at odds with section 26 of the Constitution, DCJ Moseneke in his judgment for the majority of the court rejected the following minority judgment's qualifications, which were aimed at interpreting section 16 of the Slums Act in a manner that complies with the Constitution:

> "1 the notice is issued in the process of slum elimination;
> 2 it can only be issued in respect of property that perpetuates slum conditions and is a slum;
> 3 the MEC must identify the property or properties to which the notice relates;
> 4 it must be necessary to evict the unlawful occupiers from the property or properties concerned to achieve the objects of the Act;
> 5 the owner is obliged to evict only if she has not consented to the occupation and only if, on the evidence available, the eviction is just and equitable; and
> 6 a municipality is obliged to evict consequent upon the notice only if it can establish that it is just and equitable and that it is in the public interest that the unlawful occupiers concerned be evicted" (*Abahlali Basemjondolo* par 80).

In rejecting these qualifications, DCJ Moseneke argued that they strained the text and were contrary to the rule of law and principle of separation of powers. The following excerpts from his judgment are instructive:

> "To read in one qualification to achieve constitutional conformity is very different from reading in six. Indeed, reading in so many qualifications inevitably strains the text" (*Abahlali Basemjondolo* par 105).
>
> "The rule of law is a founding value of our constitutional democracy. Its content has been expanded in a long line of cases. It requires that the law must, on its face, be clear and ascertainable …" *(Abahlali Basemjondolo* par 105).
>
> "[I]n any event, separation of power considerations require that courts should not embark on an interpretative exercise which would in effect re-write the text under consideration. Such an exercise amounts to usurping the legislative function through interpretation" *(Abahlali Basemjondolo* par 106).

Therefore, in the spirit of consistency, the Constitutional Court should not have read- in too many qualifications to the word "disturbance" in conformity with the Constitution. In doing so, it applies a judicial interpretation that strains section 11 of the Act and that is contrary to the rule of law and the principle of separation of powers.

5 Conclusion

The author agrees with the Constitutional Court that section 11 of the Act is unconstitutional because it infringes parliamentary privileges. However, with respect, the author does not agree with the Constitutional Court on the manner in which it applied the *Hyundai*-inspired interpretation when interpreting the word "disturbance". The reason is that the court read-in too many qualifications to the definition of the word "disturbance" which is an approach that is inconsistent with the findings in the case of "*Abahlali*

Basemjondolo". It strains section 11 of the Act and is contrary to the rule of law and separation of powers.

In as much as South African courts embrace the *Hyundai*-inspired interpretation, this interpretation encompasses an obligation to strike a balance on the tension between the rule of law which obliges the legislature to enact laws that are clear and unambiguous and the *Hyundai*-inspired interpretation (In the *Hyundai Motor* case par 24, the Constitutional Court stated that "[s]ince the rule of Law obliges the legislatures to enact legislation that is clear and precise, so much so that those to whom it applies understand what is expected of them, the courts will have to strike a balance 'as to how this tension is to be resolved when considering the constitutionality of legislation'"; Freedman *Understanding the Constitution* (2013) 30, echoes this argument when he states that "the principle of legality … adds to the principle of authority by imposing procedural requirement … in particular, this version provides that the law must be … clear, open and relatively stable"; De Vos and Freedman *South African Constitutional Law in Context* (2014) 339). It is also the duty of the legislature to provide guidance and to enact laws that are clear and that justify the removal and arrest of the members of parliament. It is not the task of the courts. (In the case of *National Credit Regulator v Opperman* (CCT 34/12) [2012] ZACC 29; 2013 (2) BCLR 170 (CC); 2013 (2) SA 1 (CC) par 84, the Constitutional Court argued this as follows: "It is preferable for the legislature to address the problematic content of the provision comprehensively, because it is part of an important piece of legislation with laudable objectives, rather than for a court to venture into patch-work legislating..."). Therefore, instead of reading-in too many qualifications to the word "disturbance", the Constitutional Court should have upheld the reasoning of the High Court that section 11 of the Act was too broad that the definition of the word "disturbance" had the effect of finding a robust and controversial debate unconstitutional.

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