NOTES / AANTEKENINGE

THE "DEFERENCE" OF JUDICIAL AUTHORITY TO THE STATE*

1 Introduction

The adoption of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution"), provided an opportune moment for the courts, especially the Constitutional Court to ensure an appropriate balance in the development of the principles and values of the doctrine of separation of powers *vis-à-vis* those of judicial review (see Bilder "Why We Have Judicial Review" 2007 116 *Yale LJ* 215). The Constitution is framed in a manner that entrenches a system of checks and balances (this is deduced from the manner in which the various chapters of the Constitution are structured, dealing with the roles of the legislature, executive and the judiciary). This system gives the general public a legislative and executive authority that is accountable to them subject to judicial review by an independent judiciary (see O'Regan "Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution" 2005 1 *Potchefstroom Electronic LJ* 1-30). The system of checks and balances affirms the limited power of the legislative and executive authorities which is confined within the constraints of constitutional values and principles. (See Chaskalson P in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 par 58. He held that it seems central to the conception of the new constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may not exercise the power and perform a function beyond what is conferred by law upon them.)

The importance of checks and balances is similarly endorsed by Edwards as a system that has ushered in a new process of the regulation of state authority in the new dawn of democracy. This system envisages a move away from a culture of authority of the apartheid rule to one of justification of the new constitutional dispensation. He substantiates his argument by pointing out that the new process of regulating state authority has enabled the courts to educate other branches of government through principled and robust articulations of the foundational and constitutional values of the

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Constitution in a democratic society (see Edwards "Judicial Deference under the Human Rights Act" 2002 65(6) *Modern LR* 859 867).

Against this background, the purpose of this note is to provide a brief overview of the *Merafong Demarcation Forum v President of the Republic of South Africa* (2008 (10) BCLR 968, hereinafter "*Merafong*") judgment. The particular emphasis on this judgment is its potential to defer the judicial authority (which the author refer to as a "political doctrine") to the state. The objective is to analyse this doctrine and evaluate it against the development of substantive principles of judicial review. This purpose is motivated by Chaskalson CJ's argument in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* (2000 (3) BCLR 241). Chaskalson CJ in this case held that the Constitutional Court cannot allow itself to be diverted from its main function as the final and independent arbiter in the contest between the state and its citizens (*Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa supra* par 55). In *Merafong*, the court created an impression of having misconstrued this purpose and the objectives it has to fulfil.

This note is limited to the "political approach" which the court emphasised without much thought, and attempt to address the question of public involvement in legislative processes raised in this case. It also acknowledges that the court has affirmed its independence as the guardian of the Constitution in the regulation of state authority and advancement of the principles of judicial review (see, *eg*, *Azapo v President of the Republic of South Africa* 1996 (8) BCLR 1015; and *In re: KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995* 1996 (7) BCLR 903), but its lack of consistency in its adopted approach is a worrying factor and a cause for concern for the regulation of state authority.

2 *Merafong*: Background facts and reasoning of the court

The bone of contention in *Merafong* was the challenge to the validity of a constitutional amendment in terms of the Constitution Twelfth Amendment Act of 2005, as well as the Cross-Boundary Municipalities Laws and Repeal Related Matters Act (23 of 2005), which changed provincial boundaries – including the boundary between Gauteng and North West Provinces. One part of the Merafong Local Municipality (Merafong) was thus relocated from Gauteng to North West.

The essence of the claim was based on the legitimacy of the decision taken by the Gauteng Provincial Legislature to relocate Merafong to North West. The applicants argued and required the Constitutional Court to declare that:

- the Gauteng Provincial Legislature failed to comply with its constitutional obligation to facilitate public involvement in terms of section 118 of the Constitution, in its processes leading up to the approval of the Twelfth

Amendment Bill by the National Council of Provinces (NCOP); (This section requires the provincial legislature to: (1)(a) facilitate public involvement in the legislative and other processes of the legislature and its committees; (b) conduct its business in an open manner, and hold its sitting and those of committees in public, but reasonable measures may be taken to: (i) regulate public access, including access of the media, to the legislature and its committees; and (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to or the removal of any person; and (2) not to exclude the public including the media from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.)

- alternatively, the legislature failed to exercise its legislative powers rationally when it voted in support of the relevant parts of the Twelfth Amendment Bill in the NCOP (see *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 1 and 41).

The majority view established that the means adopted by the Gauteng Provincial Legislature to facilitate public involvement as required by section 118(1)(a) of the Constitution were reasonable. The means were directly linked to the objective sought to be achieved, that is of relocating Merafong to North West in order to eliminate cross-boundary municipalities. The failure of the Portfolio Committee to report back to the community did not amount to unreasonableness. It cannot result in a finding that Gauteng failed to take reasonable measures to facilitate public involvement, as required by sections 72(1)(a) and 118(1)(a) of the Constitution (par 56).

The court further held that in compliance with the doctrine of separation of powers, the judiciary should not substitute their opinions if it does not agree with the legislature regarding the manner in which it seeks to implement the rights in the Bill of Rights. As the court further contended, the obligation to facilitate public involvement does not necessarily mean that public opinion will always prevail over legislative decisions (*Merafong Demarcation Forum v President of the Republic of South Africa supra* par 63).

Despite the fact that the court established that there is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government (Van der Westhuizen J in *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 50), it still disagreed in reaching this decision in relation to the following issues:

- on the rationality standards to be applied in this matter;
- on the standards required to determine a constitutionally appropriate application of the requirement of the rationality test;
- whether the Gauteng Provincial Legislature's understood and appreciated its constitutional powers and obligations; and
- on a fundamental aspect regarding the geographical area and the community at the core of this application, namely whether it deals with the location of the whole of Merafong (the Merafong City Local

Municipality), or only with the part of Merafong that was located in Gauteng before the adoption of the Bill. (Van der Westhuizen J (par 8-9) and see also Sachs J (par 300) in *Merafong Demarcation Forum v President of the Republic of South Africa supra*, as Sachs J argued that: arms-length democracy was not participatory democracy and the consequent and predictable rupture in the relationship between the community and the legislature tore at the heart of what participatory democracy aimed to achieve.)

Of great concern in this judgment is the emphasis by both the majority and minority view that the Court *is not a site for a political struggle* (author's own emphasis). This view has a potential to (unjustifiably) delegate judicial authority to the legislature which is controlled by political appointees (*Merafong Demarcation Forum v President of the Republic of South Africa supra* par 60, 305, 306 and 308). This view leaves uncertainty on the quest for judicial review and it is, therefore, essential to identify the factors that form the crux of the argument in this note.

3 Constitutional interpretation at the crossroads

3 1 Vote them out of office (see Merafong): the development of the "political doctrine" in constitutional adjudication?

It is assumed that the principles of judicial review are essential for the maintenance and sustenance of the principles of separation of powers. The *Merafong* judgment is a serious cause of concern for the development of the interdependence of these principles in the new constitutional dispensation. Although the Constitutional Court was highly divided on this matter in relation to its reasoning in reaching its decision (Van der Westhuizen J (par 8-10), see also Sachs J (par 300) and Skweyiya J (par 305, 306 and 308) in *Merafong Demarcation Forum v President of the Republic of South Africa supra*), the view, which stressed that the court was not a site *for a political struggle*, raised questions on the development and affirmation of guiding principles of judicial review. These questions raised a number of concerns in relation to the following issues:

- what would qualify as a judicial question that would need to be resolved through judicial decision-making?
- whether hard political questions cannot be translated into judicial questions without offending the doctrine of separation of powers?
- whether the court, indirectly, is bringing to the fore or validates the argument that judges are not elected and cannot, therefore, invalidate laws passed by elected representatives in Parliament? (See Daniels "Counter-majoritarian Difficulty in South African Constitutional Law" 2006 Paper 1363 *The Berkeley Electronic Press* 1-37.)

- whether the doctrine of separation of powers is used as a yardstick that prevents the judiciary from directly examining the substantive nature of the alleged unfair government conduct? and
- whether the judiciary would, in some instances, succumb to the moral or public views of the general public, including the other two branches of government, (legislature and executive)? (See Sachs J in *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) par 92, as he held that "the court would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others".)

These questions impact on the ability of the court in translating hard political questions into substantive judicial questions. The court cannot simply shun away from decision-making on hard and controversial questions. It is essential for the court, as the ultimate interpreter of the Constitution to enforce substantive and constitutionally mandated legislative procedure and invalidate laws which are not passed in accordance with the democratic principles of the new dawn of democracy. The process would be of great significance for the determination of the impact it would have on the nature and content of the right alleged to have been compromised.

The view expressed in *Merafong* created the potential for the court to abdicate its constitutional and judicial authority by relying on the pretext of adhering to the doctrine of separation of powers and claimed that it was unable to intrude into the domain of the legislature. The majority view in this case laid the foundation for the (unjustifiable) delegation of judicial authority to the legislature. Van der Westhuizen J emphasised that:

> "discourteous conduct does not equal unconstitutional conduct which has to result in the invalidity of the legislation. Politicians, who are perceived to disrespect their voters or fail to fulfil promises without explanation, should be held accountable. A democratic system provides possibilities for this, one of which is regular elections". (Van der Westhuizen J in *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 60.)

Skweyiya J further affirmed the majority view and argued that the new dawn of democracy provides mechanisms, as he refers to them as "powerful methods", for voters to hold politicians accountable through regular free and free elections when they engage in bad or dishonest politics (*Merafong Demarcation Forum v President of the Republic of South Africa supra* par 309). He strengthened their argument and held that:

> "this court [which is the Constitutional Court] *is not and cannot be a site for political struggle.* It can do nothing to resolve differences within that process. We are a site for the vindication of rights and the enforcement of the Constitution. All that this court can do in relation to a constitutional amendment is to determine whether the constitutional requirements for the amendment have been met", (*Merafong Demarcation Forum v President of the Republic of South Africa supra* par 306) (author's own emphasis).

Although they cautioned that discourteous officials should not be absolved of their ultimate responsibility merely because the Constitutional Court could not invalidate the legislation, they stressed that the court should not be seen as a "*panacea*" (*Merafong Demarcation Forum v President of the Republic of*

South Africa supra par 307), of being an answer to all the socio-political and cultural challenges or problems (see the definition www.dictionary.com (accessed 2012-01-12)). Skweyiya J substantiated their contention by making reference to section 19 of the Constitution (this section provides that: (1) Every citizen is free to make political choices …; (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution; (3) Every adult citizen has the right: (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret) and deeply rooted the relegation of judicial authority to the legislature as he emphasised that:

> "if voters perceive that their democratically elected politicians have disrespected them or believe that the politicians have failed to fulfil promises made by the same politicians without adequate explanation, then the politicians should be held accountable by the voters. Courts deal with bad law; voters must deal with bad politics. The *doctrine of separation of powers, to which our constitutional democracy subscribes, does not allow this court, or any other court*, to interfere in the lawful exercise of powers by the legislature", ((*Merafong Demarcation Forum v President of the Republic of South Africa supra* par 308) (author's own emphasis).

The (unjustifiable) delegation of judicial authority to political appointees compromised and undermined the principles of judicial deference which are determined by a justified government action in relation to the substantive nature of the challenged measure. Of grave concern in this judgment is that it dealt and focused more on the procedural aspects in relation to the manner in which the Gauteng Provincial Legislature facilitated public involvement rather than the interdependence of the process with the substantive nature of the right itself. The majority view itself acknowledged that the main relief sought by the applicants was a declaration of invalidity for the failure of the Gauteng Provincial Legislature to facilitate public involvement (*Merafong Demarcation Forum v President of the Republic of South Africa supra* par 308; and Van der Westhuizen J in *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 90). The interdependence of the procedural *vis-à-vis* the substantive aspects in analysing the manner in which the Provincial Legislature facilitated the right to public involvement could have provided a deeper insight on the impact of the challenged measure, (Twelfth Amendment) on the right not to be transferred to the North West Province.

In this regard, a distinction must be drawn between the procedural *vis-à-vis* the substantive conception of the approach that should provide guidance on the development of the principles of judicial review. It must be noted that the procedural, which I would refer as the "formal conception" of judicial authority, is limited in its application because it does not go far enough to address the significance of judicial review. This is far all too evident in Van der Westhuizen's argument as he had earlier noted in the judgment that a court cannot interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately (Van der Westhuizen J in *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 63). He further endorsed his argument for the majority by pointing out that:

> "it is not for this court [which is the Constitutional Court] to decide in which province people must live or to second-guess the option chosen by the Gauteng Provincial Legislature to achieve its policy goals and thus to make a finding on how socially, economically or politically meritorious the Twelfth Amendment is" (Van der Westhuizen J in *Merafong Demarcation Forum v President of the Republic of South Africa supra* par 114).

Apparently, the *Merafong* judgment has reinforced the deference approach that has been slowly developing as evidenced by the jurisprudence of the Constitutional Court. The relegation of judicial authority which Whittington refers to as, "the road not taken" in answering hard constitutional cases (Whittington "The Road not Taken: *Dred Scott* Judicial Authority and Political Questions" 2001 63(2) *The Journal of Politics* 365-391) is gaining momentum in South Africa. The court has since established the "road not taken doctrine" in *Ferreira v Levin* (1996 (1) BCLR 1 (CC)), when Chaskalson P held that:

> "whether or not there should be regulation and redistribution is *essentially a political question which falls within the domain of the legislature and not the court*. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution. It should not, however, require the legislature to show that they are necessary if the Constitution does not specifically require that this be done", (author's own emphasis).

The approach was endorsed in *Soobramoney v Minister of Health (Kwazulu-Natal)* (1997 (12) BCLR 1696) as Chaskalson P (as he then was) held that "a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters" (*Soobramoney v Minister of Health (Kwazulu-Natal) supra* par 29). The doctrine was further consolidated in *UDM v President of the Republic of South Africa* (2002 (11) BCLR 1179), when the court held that the "issue before the court was a *political question that was not of concern to the court* as it did not deal with the merits or de-merits of the challenged provision" (*UDM v President of the Republic of South Africa supra* par 11) (author's own emphasis).

This argument raises a question whether it would be appropriate for the court to challenge the developed measure and determine the effect it would have on the constitutionally protected right and on the people it meant to benefit.

3 2 Judicial authority red-carded (extracted from Harms DP in National Director of Public Prosecutions v Zuma ((573/08) [2009] ZASCA par 13) to the legislature

The "doctrine" is a great cause of concern, because it is the court that is empowered to declare invalid any legislation or conduct which is inconsistent with the values and principles of the Constitution. It is the court that has to examine and review government conduct and evaluate it against the ethos and principles as envisaged in the Constitution. The court had correctly

pointed out and rejected the "political doctrine" approach in *Minister of Health v Treatment Action Campaign* (2002 (10) BCLR 1075) as it held that even though "all arms of government should respect the doctrine of separation of powers does not mean that courts cannot make orders that impact on policy". Besides, the "primary duty of the courts is to the Constitution and the law, which they must apply without fear or favour" as envisaged in section 165 of the Constitution (*Minister of Health v Treatment Action Campaign supra*, see par 98 and 99). The court substantiated its contention and held that:

> "where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself" (*Minister of Health v Treatment Action Campaign supra*, see par 99).

This argument was earlier endorsed by McLaughlin J in *RJR MacDonald v Canada* ([1995] 3 SCR 199 quoted in Edwards 2002 65(6) *Modern LR* 859 867) as he held that:

> "care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the [Constitution] places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. *The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded*" (*RJR MacDonald v Canada supra* par 54) (author's own emphasis).

Raher gives effect to this contention by arguing that "when procedural disputes reach the courts, litigants usually do not ask for direct intervention; instead, they allege that a specific statute has been passed in violation of a certain procedure, and pray for invalidation of the statute. If the procedure in question is mandated by the constitution [as envisaged in section 118], the deference of judicial authority is not a persuasive justification for not enforcing a constitutionally prescribed procedure" (Raher "Judicial Review of Legislative Procedure: Determining Who Determines the Rules of Proceedings" presented at the Annual Meeting of the Midwest Political Science Association 67th Annual National Conference, The Palmer House Hilton, Chicago, 02 April 2009 7) [as evident in *Merafong*] (author's own emphasis). This contention was similarly expressed by Mojapelo DJP in *Hlophe v The Constitutional Court* (2009 (2) All SA 72 (W)) as follows:

> "when courts are approached by litigants who complain of violation of their rights and there is a clear indication that such violation has taken place the courts should not lightly defer their jurisdiction to another tribunal not having such authority. Courts have an obligation in the exercise of their judicial

> authority to develop binding judicial precedents to guide future conducts in similar circumstances" (*Hlophe v The Constitutional Court supra* par 104).

Effectively, the "political doctrine" undermines the widest possible powers that the court has in developing and forging appropriate remedies for the protection of constitutional rights and the enforcement of constitutional duties. (See s 172 of the Constitution which provides that: (1) When deciding a constitutional matter within its power, a court – (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its consistency, and (b) may make any order that is just and equitable, including – (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period ad on an conditions, to allow the competent authority to correct the defect.) It limits the essence of judicial review which is essential for the independence of the courts. It is also worth noting that it is not denied that "it is the legislature that is in the frontline and a great teacher that establishes public norms that need to become assimilated into our daily living" (see Sachs J in *Minister of Home Affairs v Fourie supra* par 138). Nor is it disputed that there is no total separation of powers as the court in the *Certification* judgment held that "there is no scheme that can reflect a complete separation of powers as it is always one of partial separation" (*Certification of the Constitution of Republic of South Africa* 1996 (10) BCLR 1253 (CC) par 109).

The primary concern is the dispute relating to this role that requires the court to exercise its judicial authority and determine the extent to which democratic values have been compromised or not. It is the court that has to review and analyse the impact of the alleged conduct, legislation or policy on the applicants in order to establish its rational connection with the purpose sought to be achieved (see *Harksen v Lane* 1997 (11) BCLR 1489 par 51-55).

It is quite striking that the affirmation of judicial review could be red-carded to the development of "political doctrines" that undermines the founding values of the Constitution (see s 1 of the Constitution). The relegation of judicial review to "political appointees" relaxes the rules of constitutional interpretation and does not adequately address the court's role in the maintenance of democratic values. It was incumbent upon the court to be decisive in the *Merafong* matter and not let its adjudicative authority "hang in the balance" by relegating it to "political appointees" and fail to reconstruct the state and South African society.

4 Conclusion

In this note, the concern relates to the court's apparent deviation from its own previous record and abdicated its authority to political appointees. While the maintenance of separation of powers is a delicate matter, the court should always ensure that its duty towards people in South Africa is not easily eroded by consideration of legislative deference. It is incumbent upon

the court to ensure that law is not isolated from politics, since the two are interdependent, intertwined and interrelated.

Basically, the court voluntarily abdicated its judicial function in total disregard of its independence and the distribution of state authority between itself and the legislature. As has been emphasised above, Langa contends that it is the court that bears the ultimate responsibility for justifying its decisions – not only by reference to authority, but also by reference to the ideas and values entrenched in the Constitution (see Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch LR* 351 353). The Constitution makes an important distinction between the constitutional roles of the different branches of government. This distinction ensures the independence of these various branches, which is of particular importance for the functioning and the development of a healthy democracy. Of utmost importance is the centrality of the judiciary as a "safety valve" for the maintenance of power balances to ensure the efficiency and institutional integrity of each branch.

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