

SEPARATION OF POWERS, CHECKS AND BALANCES AND JUDICIAL EXERCISE OF SELF- RESTRAINT: AN ANALYSIS OF CASE LAW

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SUMMARY

The Constitution of the Republic of South Africa, 1996 creates a system in which there is a separation of the powers exercised by the different branches of the State. It also creates a system of checks and balances. The exercise of a power by one arm of state is checked by another to ensure that there is no abuse of state power. Organs of state ought to respect each other and the powers allocated to them by the Constitution. To this end, no organ of state should encroach upon the domain of the other organs. However, the courts wield enormous power because they are the ultimate guardians and custodians of the Constitution in South Africa. Courts have the power to declare any law or conduct unconstitutional. Where decisions have been taken by other arms of the State on matters falling within their exclusive domain and such decisions violate the Constitution, courts have a duty to intervene in order to make organs of state act within constitutional bounds. However, courts should not be overzealous and should not encroach upon the powers of the other arms of the State when exercising their judicial power and authority. Against this backdrop, this article analyses how the South African courts have cautioned themselves to exercise self-restraint in order not to usurp or encroach upon the powers of the other arms of the State while exercising their judicial authority and power.

1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (the Constitution) provides for the implementation of the doctrine of separation of powers. The doctrine is based on several generally held principles in terms of which the government is separated into three branches, namely the legislative, executive, and judicial branches, with the conception that each branch should perform unique and identifiable functions that are appropriate to that

branch, and that there should be a limitation of the personnel of each branch to that branch, so that no one person or group should be able to serve in more than one branch simultaneously.¹

Essentially, the constitutional framework is to the effect that the legislative authority of the Republic, in the national sphere of government, is vested in Parliament; in the provincial sphere of government, it is vested in the provincial legislature; and in the local sphere of government, it is vested in the municipal council.² The executive authority of the Republic, in the national sphere of government, is vested in the President;³ in the provincial sphere, the executive authority is vested in the premier of the province;⁴ and in the local sphere of government, it is vested in the municipal council.⁵ The judicial authority of the Republic is vested in the courts.⁶

The legislative arm of the State has the power to pass legislation. In terms of section 44 of the Constitution, only the legislative arm of the State is empowered to pass legislation. No organ of state except the legislative arm is given the power to pass legislation. At a national level, the National Assembly has the power to amend the Constitution, pass legislation and to assign any of its legislative powers, except the power to amend the Constitution, to any sphere of government.

The executive branch of the State is tasked with the duty to implement the law, while the judiciary interprets and applies the law.

Organs of state should run their own affairs and exercise powers given to them by the Constitution. Courts should not interfere with the functioning of the other branches of the State. Courts should be resorted to when organs of state have breached their constitutional obligations or boundaries. In instances where an organ of state has exercised a power given to it by the Constitution within constitutional bounds, it is undesirable for a court to get involved. Courts should not dictate how the other arms of the State exercise their constitutional powers.

There has been constant friction in the way and manner different branches understand the application of the separation-of-powers doctrine.⁷ Most times, when there are notable political disputes to be resolved, the court is usually approached by the aggrieved party whereas the issues are supposed to be resolved using political means. The aggrieved party would argue that through checks and balances the issue should be resolved by the court while the other party would argue that it was against the separation of powers doctrine. In most cases, the judiciary is put on the spot in an attempt to police the maintenance of the two doctrines.⁸ The good news is that these

¹ Bradley and Morrison "Historical Gloss and the Separation of Powers" 2012 *Harvard Law Review* 411–421.

² S 43 of the Constitution.

³ S 85 of the Constitution.

⁴ S 125 of the Constitution.

⁵ S 151(2) of the Constitution.

⁶ S 165 of the Constitution.

⁷ Bradley and Siegel "Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers" 2016 *Georgia Law Journal* 255–264.

⁸ Garry "The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers" 2005 *Alabama Law Review* 689–694.

days, the courts have been up to speed and taking the bull by the horns by adjudicating cases involving the doctrines.

There has been much debate on the meaning of the separation of powers. Ultimately, a minimal consensus has emerged on its scope, and the principle has evolved in contemporary constitutional law owing to changing historical and political circumstances.⁹ Separation of powers is one of the essential principles that have brought about democracy and constitutionalism.¹⁰ It could be said that the sole purpose of the separation of powers is to protect liberty from tyranny.¹¹ In most constitutional systems that provide for constitutional review, the issue of the separation of powers soon emerges in constitutional jurisprudence; the different branches and institutions of government begin to exercise power and challenges are brought to test the extent of these powers in different contexts.¹²

The Constitution plays a very broad role in governance, a role that is essential to good governance. It is the Constitution that empowers all the institutions of government, providing an institutional framework through which power is to be exercised and controlled.¹³ The Constitution divides the powers between the executive, legislative and judicial arms of the State. The division of power is not watertight. In certain instances, the different arms of the State interact with each other.

The judiciary stands out from the three branches. The Constitution allocates enormous power to the judiciary, and the judiciary is in fact the guardian and custodian of the Constitution. The judiciary has broad powers of checks and balances on the other branches and has power to declare any act or action of the executive or legislature invalid and unconstitutional. However, despite the authority and responsibility with which the judiciary is vested, it still has to operate and exercise its power in accordance with the Constitution and the doctrine of separation of powers. Recently, in the case of *Economic Freedom Fighters v Speaker of the National Assembly*,¹⁴ the minority judgment found the majority judgment to be in violation of the separation of powers doctrine. Mogoeng CJ classified the majority judgment as “a textbook case of judicial overreach – a constitutionally impermissible intrusion by the judiciary into the exclusive domain of Parliament”.¹⁵ According to Mogoeng CJ, the majority judgment encroached upon the domain of Parliament by not observing the limits of the judiciary in the exercise of judicial powers. The intrusion by the judiciary into the exclusive domain of Parliament is constitutionally not permissible. The Constitution requires that each branch of the State should exercise the powers bestowed upon it and not usurp the powers bestowed upon another branch. In this

⁹ Whittington *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999) 20.

¹⁰ Manning “Separation of Powers as Ordinary Interpretation” 2011 *Harvard Law Review* 939–945.

¹¹ Mollers *The Three Branches: A Comparative Model of Separation of Powers* (2013) 16.

¹² Klug “Separation of Powers, Accountability and the Role of Independent Constitutional Institutions” 2016 *New York Law School Law Review* 153–159.

¹³ Robinson “Expanding Judiciaries: India and the Rise of the Good Governance Court” 2009 *Washington University Global Studies Law Review* 3–8.

¹⁴ 2018 (2) SA 571 (CC).

¹⁵ *Economic Freedom Fighters v Speaker of the National Assembly supra* par 223.

case, the judiciary went beyond exercising the checks and balances permitted by the Constitution; the judiciary was dictating to Parliament how it should exercise its (Parliament's) powers, although the Constitution allows Parliament to make its own rules to govern its processes. Mogoeng CJ's view was criticised by Froneman J who disagreed with the characterisation of the majority judgment as a "text book case of judicial overreach".

It is submitted that the judiciary cannot simply declare any constitutional act or action of the executive and Parliament invalid. Interestingly, the judiciary itself has realised that there might be a tendency for presiding judges to overreach while exercising their judicial review powers. In order to contain this, the judiciary is expected to respect other branches and exercise self-restraint while exercising its powers.

2 EXERCISING SELF-RESTRAINT IN DISCHARGING JUDICIAL POWERS: ANALYSIS OF CASE LAW

In exercising judicial power, the court must be sensitive and accord other branches due respect. Against this backdrop, salient cases where the court held that the judiciary should exercise self-restraint are considered. In the case of *President of the Republic of South Africa v South African Rugby Football Union*,¹⁶ the Constitutional Court found that it was not in the interests of justice for the High Court to ask the President to come and give oral evidence as this would amount to disrespecting the President. The Constitutional Court emphasised that the dignity and status of the President must be protected. The court reasoned that it is in the interests of the public that the dignity and status of the President of the Republic be preserved and protected in order for the executive to function effectively and efficiently, unimpeded at all times. Even at Cabinet meetings, where sensitive and important matters of policy are discussed by the President and Cabinet ministers, the dignity and status of the President should be protected. The court observed that insisting that the President appear in person in court to give oral evidence undermines the executive branch and the presidency. Therefore, the Constitutional Court cautioned that the judiciary should exercise appropriate restraint in such cases, being sensitive to the status of the head of state and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that the courts are not disrupted in the administration of justice.

This case established that the branches of the State ought to respect each other and the powers allocated to them by the Constitution. The fact that the arms of the State should respect each other does not mean that they must not discharge their constitutional responsibilities. Accordingly, the court disagreed with the High Court's calling of the President to present oral evidence.

Similarly, in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,¹⁷ the Constitutional Court refused to encroach upon the domain of the executive. In this case, the applicant was

¹⁶ 2000 (1) SA 1 (CC).

¹⁷ 2004 (4) SA 490 (CC).

dissatisfied with the allocation of fishing quotas it had received in the 2001 allocation process for the 2002 to 2005 fishing seasons and it sought to review that allocation. The review succeeded in the Cape High Court, but on appeal that judgment was overturned by the Supreme Court of Appeal (SCA). The case raised the question of the extent to which such a decision was susceptible to review under the new constitutional order. The court emphasised the need for one arm of the State to respect another arm of the State. Courts should not conduct themselves in a manner that suggests that they are wiser than the other branches of the State in matters falling within the exclusive competence of another branch. Where decisions have been taken by other branches of the State on matters falling within their exclusive domain, courts should not interfere unless it can be shown that such decisions violate the Constitution. In other words, courts should exercise a higher degree of care when dealing with matters involving the exercise of power by other branches of the State.

The judiciary should not step into the terrain of the executive branch of the State by ordering a minister to provide medical care despite the fact that it would go beyond the available resources of the State. In the case of *Soobramoney v Minister of Health, KwaZulu Natal*,¹⁸ the court refused to order the Minister of Health to provide dialysis treatment to a patient whose health condition was not requiring emergency health care. The appellant in this case was a 41-year-old diabetic suffering from ischemic heart disease, cerebro-vascular disease, and irreversible chronic renal failure. In order to prolong his life, he sought dialysis treatment from a state hospital in Durban. He was not admitted to the dialysis programme of the hospital because the hospital did not have enough resources to provide dialysis treatment for all patients suffering from chronic renal failure. According to the hospital's policy, patients suffering from acute renal failure that could be treated and remedied by renal dialysis were admitted automatically to the renal dialysis programme. Patients suffering from irreversible chronic renal failure were not admitted automatically. To qualify for automatic admission to the dialysis programme, a patient had to be eligible for a kidney transplant. A patient who was eligible for a transplant would be provided with dialysis treatment until an organ donor was found and a kidney transplant had been completed.

According to the guidelines designed by the hospital, patients were not eligible for kidney transplants unless free of significant vascular or cardiac disease. Since the appellant suffered from ischemic heart disease and cerebro-vascular disease, he was not eligible for a kidney transplant. The appellant then made an urgent application to the High Court for an order directing the hospital to provide him with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit of the hospital. The application was dismissed. The appellant appealed to the Constitutional Court, which dismissed the appeal.

The Constitutional Court did not want to step into the terrain of the executive branch of the State by ordering the minister to provide medical care that would go beyond the available resources of the State. The Constitutional Court said that a court will be slow to interfere with rational

¹⁸ 1998 (1) SA 765 (CC).

decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.¹⁹

In the case of *Mazibuko NO v Sisulu NNO*,²⁰ the High Court warned against the politicisation of the judiciary. In this case, the applicant, as leader of the opposition and on behalf of eight opposition parties, brought an urgent application that first respondent be directed to ensure that a tabled motion of no confidence in the President be scheduled for debate and a vote before the National Assembly on or before the last day of its annual sitting. The applicant alleged that “procedural machinations” frustrated the scheduling of the debate and argued that, notwithstanding the National Assembly Rules not providing for breaking the resulting deadlock, the first respondent had a residual power to order scheduling of the debate. The court said that the judiciary has no mandate to run the country or govern the country. The overall responsibility of the court is to police the constitutional boundaries and where there is any transgression, the court has the power to act without fear or favour against any branch that has transgressed. The court thus strongly cautions against politicising the judiciary by drawing it into every political dispute when there is another appropriate forum to resolve such political impasse relating to policy disputes. The courts should not be seen to be telling Parliament when and how to arrange its precise order of business matters, provided that Parliament operates within a constitutionally compatible framework.

In the case of *United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party intervening; Institute for Democracy in South Africa as Amici Curiae)*,²¹ the court considered the effect of an order of the High Court suspending the operation of a piece of legislation in view of the doctrine of the separation of powers.

The applicant had brought an application in the High Court to suspend the operation of certain “floor-crossing” legislation, pending an application to the Constitutional Court to declare the legislation to be unconstitutional. The High Court granted the application. The Constitutional Court subsequently heard the parties on the desirability of it hearing the matter as a court of first instance and whether it could make an order prior to hearing the main application, which would stabilise the situation pending the hearing of the main application. The court observed that since the legislative authority of the national sphere of government is vested in Parliament in terms of section 43 of the Constitution, the suspension of the coming into operation of a piece of legislation has the effect of defeating the will of the elected legislature and hampering its ability to exercise the legislative authority conferred upon it by the Constitution.

The Constitutional Court was reluctant to interfere with the functioning of the legislative arm of the State. According to the court, suspending the coming into operation of a piece of legislation violates Parliament’s exercise of legislative authority. The court respected the fact that law-making falls within the exclusive terrain of Parliament.

¹⁹ *Soobramoney v Minister of Health, KwaZulu Natal supra* par 29.

²⁰ 2013 (4) SA 243 (WCC).

²¹ 2003 (1) SA 488 (CC).

The courts are the ultimate guardians of the Constitution. Courts have the power to declare any law or conduct unconstitutional.²² Courts have the power to review conduct of the other arms of the State to the extent that the conduct is inconsistent with the Constitution. However, in exercising their judicial review powers, courts should know their own limits or boundaries. In the case of *Mazibuko NO v Sisulu NNO*,²³ the court observed that courts should be careful not to exceed their constitutional bounds. The court stated that in terms of the system of separation of powers, the judiciary is forbidden from intervening in matters that fall within the domain of Parliament, except where the intervention is mandated by the Constitution. Therefore, the courts should caution themselves and exercise self-restraint by staying in their lane when exercising their review power and should stick strictly to what the Constitution permits them to do. The Constitution is supreme and binds all arms of government, including the courts.

The doctrine of separation of powers underlies the principle of judicial independence, being the idea that only the judicial branch of government should discharge judicial functions and that it should do so free of interference from the other two branches. Independence also expresses the idea that the judiciary should decide disputes impartially and without bias.²⁴ The judicial arm of the State should not step into the terrain of the other branches of the State unless it is constitutionally allowed to do so.

When adjudicating, courts should be careful not to venture into policy formulation, which is the role of the executive, or law-making, which is performed by the legislative arm. The case of *Government of the Republic of South Africa v Grootboom*²⁵ presents a temptation that may lead a court to encroach upon the domain of the other branches of the State in the area of justiciable socio-economic rights. In this matter, the respondents left their place of residence, which was congested and in a devastating state. They occupied privately owned land that was earmarked for development. The owner of the land applied for and was granted an eviction order against the respondents. When the eviction was carried out, the respondents were left stranded and without accommodation.

The respondents applied to the High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The High Court held that section 28(1)(c) of the Constitution obliged the State to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children, that this obligation existed independently of and in addition to the obligation to take reasonable legislative and other measures in terms of section 26 of the Constitution and that the State was bound to provide this rudimentary shelter irrespective of the availability of resources.

The appellant appealed the decision of the High Court to the Constitutional Court. The legislative and reasonable measures imposed on the State by section 26(2) of the Constitution are measures to be taken by

²² S 172 of the Constitution.

²³ 2013 (6) SA 249 (CC).

²⁴ Currie and De Waal *The Bill of Rights Handbook* (2013) 34.

²⁵ 2001 (1) SA 46 (CC).

the executive and the legislature. When the court is called upon to determine whether the executive and/or legislature have complied with their constitutional obligations, it (the court) should not require the legislature or executive to do more than is reasonable. In other words, if the measures taken by the State are reasonable under the prevailing circumstances, the court should not interfere with the decisions taken by the State.

In order to exercise self-restraint and not exceed its boundaries, a court should know what functions should be performed by which organ of state. One arm of the State should not dictate to the others what they should do, but the court may order compliance with constitutional obligations in the event of breach. In the *Grootboom* case,²⁶ the court was alive to the responsibility that rested on the executive to ensure compliance with the obligations imposed by section 26 of the Constitution. The court recognised the responsibility that is bestowed on the national sphere of government to decide on allocation of the national housing budget. The court cannot interfere with the exercise of the power by the executive to decide on the allocation of budget unless the exercise is unreasonable and violates the Constitution or the Bill of Rights.

In the case of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,²⁷ the Constitutional Court dealt with a situation where the High Court had encroached upon the domain of the executive. The court cautioned that courts must know their boundaries as the ultimate guardians of the Constitution.

In this case, the Minister of Trade and Industry, acting on a recommendation made by the predecessor of ITAC, imposed anti-dumping duties on steel cable and similar products manufactured by Bridon International Ltd UK. Such duties would, under the Anti-Dumping Regulations of 2003, endure for a period of five years unless a sunset review investigation was initiated prior to the expiry of the five-year period that would have allowed ITAC to extend it for a maximum of 18 months, for a review of the duties and the making of recommendations to the Minister.

In February 2007, just before the expiry of the five-year period, SCAW, a South African manufacturer of competing products, asked ITAC for a sunset review that would maintain the anti-dumping duties in question. Contrary to SCAW's expectations, ITAC recommended the termination of the anti-dumping duties pertaining to Bridon in October 2008.

Three days later, SCAW made a High Court application for an interim interdict pending the final determination of a review application restraining ITAC from forwarding its recommendations to the Minister and restraining the Minister of Finance from implementing ITAC's recommendation. The High Court granted both interdicts. The matter ultimately came to the Constitutional Court on appeal. The Constitutional Court said that in a constitutional democracy, all public power is subject to constitutional control and that each arm of the State must act within the boundaries set out by the Constitution. However, if there is a trespassing by one arm of the State into

²⁶ *Government of the Republic of South Africa v Grootboom supra*.

²⁷ 2012 (4) SA 618 (CC).

the terrain of another, the courts, being the ultimate guardians of the Constitution, have the right to intervene in order to prevent the violation of the Constitution; they also have the constitutional duty to do so. However, when exercising their oversight power, the courts must observe the limits of their own power.

In the *National Treasury* case,²⁸ the respondents approached the North Gauteng High Court on an urgent basis for an interim interdict restraining South African National Roads Agency (SANRAL) from levying and collecting tolls on the Gauteng roads pending the final determination of their application to review and set aside the decisions of (a) SANRAL and the Transport Minister to declare the Gauteng roads as toll roads; and (b) the Director-General to grant certain environmental approvals related to the Gauteng Freeway Improvement Project (GFIP). The GFIP was approved by Cabinet for SANRAL to upgrade roads in the economic hub of the Gauteng Province. The High Court granted the interdict.

The appellant appealed to the Constitutional Court. The Constitutional Court found that the High Court stepped into the domain of the executive. The High Court had granted the interdict without checking what implications the interim order would have on the separation-of-powers doctrine.²⁹ The effect of the interim order granted by the High Court in the matter was that the court had interfered with the functioning of the executive arm of the State. The executive arm of state was functioning in terms of legislation that was never challenged as being invalid. Despite the fact that the legislation in terms of which the executive exercised a power was never challenged, the court had granted an order interdicting the executive from exercising its powers. This type of an intrusion into the domain of the executive by the courts is not constitutionally permissible. The High Court had failed to respect the functioning of the executive and to observe its own constitutional bounds. The court interdict against the executive in this matter, as granted by the High Court, caused government to spend more because the order prevented government from collecting revenue.³⁰ When dealing with a matter that involves the exercise of authority by an organ of state, a court must have regard to the doctrine of separation of powers. The court should determine whether the power was exercised by the relevant authority and, if so, whether the relevant authority did not exceed its constitutional boundaries in the exercise of such power. If the court finds that the power was exercised by the relevant authority and that such power was exercised in a reasonable manner, the court should not interfere.

The order of the High Court was accordingly set aside and held to offend the separation of powers. A proper application of the doctrine of separation of powers is hindered when one branch of the State encroaches upon the exclusive domain of another. In certain instances, the courts are unable to limit their own power and they end up in the domain of the executive or legislature.

²⁸ *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC).

²⁹ *National Treasury v Opposition to Urban Tolling Alliance* *supra* par 27.

³⁰ *National Treasury v Opposition to Urban Tolling Alliance* *supra* par 47.

In *National Director of Public Prosecutions v Freedom Under Law*,³¹ the High Court had reviewed and set aside four decisions taken by or on behalf of the first three appellants in favour of the fourth appellant and directed the first three appellants to reinstate criminal prosecutions and disciplinary proceedings against him. The Supreme Court of Appeal held that the High Court encroached upon the exclusive domain of the executive. In this matter, the High Court had usurped the powers of the executive. It is not constitutionally justifiable for the court to make decisions on behalf of the National Director of Prosecutions and the South African Police Services. The High Court failed to observe its constitutional boundaries and encroached upon the exclusive domain of the executive arm of the State. The Supreme Court of Appeal disagreed with the High Court; it found that the High Court went too far – the High Court had exercised powers that belong to another branch of the State.

In the case of *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae)*,³² the Minister had made and published Regulations Relating to a Transparent Pricing System for Medicines and Scheduled Substances in terms of the Medicines and Related Substances Act 101 of 1965 in the *Government Gazette* in April 2004. The first respondent (New Clicks), second respondent (the Pharmaceutical Society of South Africa) and others launched separate applications in the High Court for orders declaring the regulations unconstitutional and invalid on various grounds. The challenges included an attack on the functioning of the Pricing Committee established in terms of the Medicines Act, the procedures used by the Pricing Committee and the substance of the regulations promulgated by the Minister on the Pricing Committee's recommendation. The Pricing Committee chose to abide the decision of the High Court. The two applications were consolidated and heard by a full bench of three judges. In a majority judgment, the High Court dismissed the consolidated applications, the minority holding that the regulations should be set aside on various grounds. On appeal, the Supreme Court of Appeal declared the regulations to be invalid and of no force and effect.

When the matter came to the Constitutional Court, the court warned that legislative administrative action is a special category of administrative action. It involves the making of laws and the taking of policy decisions. The court said that, under the Constitution, these are decisions that are within the domain of the executive, to whom Parliament has delegated its law-making power. The exercise of this power is also subject to constitutional control. The importance of the special role of the executive in exercising this power is acknowledged in constitutional democracy and as such, the courts should exercise restraint not to usurp it.

The Constitutional Court urged courts not to usurp powers belonging to other branches of the State. Although the courts have a duty to check that powers are exercised within constitutional bounds, they must not exercise

³¹ 2014 (2) SACR 107 (SCA).

³² 2006 (2) SA 311 (CC).

powers that belong to other arms of government. Courts must respect the powers bestowed upon the other arms of the State by the Constitution.

3 IMPLEMENTING CHECKS AND BALANCES

In *Mazibuko's* case,³³ the appellant made an application for an order that the speaker of the National Assembly be directed to ensure that a tabled motion of no confidence in the President be scheduled for debate and a vote before the National Assembly on or before the last day of its 2012 annual sitting. The Constitutional Court upheld the High Court's finding that, on a proper reading of the rules, the Speaker acting alone had no residual power to schedule a motion of no confidence in the President for a debate and a vote in the Assembly, and therefore dismissed the appeal. The Constitutional Court observed that the significance of a motion of no confidence is to ensure that the President and the national executive are accountable to the Assembly, made up of elected representatives. Therefore, a motion of no confidence plays an important role in giving effect to the checks and balances element of the separation-of-powers doctrine. The essence of the doctrine of separation of powers is to limit the power of a single individual or institution and to make the branches of government accountable to one another.³⁴ The principle of checks and balances allows the other arms of the State to see if one arm is abusing its power or exercising powers it does not have. In this sense, the arms of the State become accountable to one another, and abuse of power is avoided.

In terms of the Constitution, only the National Assembly can remove the President from office. The executive authority of a province is vested in the premier of that province.³⁵ The executive authority of a municipality is vested in its municipal council.³⁶ The doctrine of separation of powers requires that when functions have to be performed by the executive arm of the State, the other arms should respect this allocation and not interfere with it.

In the case of *President of the Republic of South Africa v United Democratic Movement*,³⁷ the first appellant had signed four Acts of Parliament into law. The effect of two of the Acts is to suspend, during certain specified periods, the anti-defection provisions contained in item 23A(1) of Schedule 2 of the Constitution relating to the National Assembly and provincial legislatures. The first of these "window periods" of suspension was to commence on the coming into force of the legislation. Provision is also made for consequential changes to a provincial legislature's delegates to the National Council of Provinces. The purpose of the other two Acts is to allow defection, during the same periods, from political parties in the local government sphere of government. The respondent brought an urgent application in the Cape High Court for the suspension of the Acts on the

³³ *Mazibuko NO v Sisulu NNO* 2013 (6) SA 249 (CC).

³⁴ *Mazibuko NO v Sisulu NNO supra* par 21.

³⁵ S 125(1) of the Constitution.

³⁶ S 151(2) of the Constitution.

³⁷ *President of the Republic of South Africa v United Democratic Movement (African Christian Democratic Party intervening; Institute for Democracy in South Africa as Amici Curiae)* 2003 (1) SA 472 (CC).

ground that these Acts were unconstitutional. The order was granted by the High Court. The order of the High Court in this regard had the effect of interfering with law-making. On appeal, the Constitutional Court observed that in a situation where legislation amends the Constitution and has thus achieved the special support required by the Constitution for such amendments, courts should be all the more alert not to thwart the will of the legislature, save in extreme cases.

4 ARMS OF THE STATE ARE INTERRELATED

Unless it is necessary and constitutionally permissible to do so, a court should not interfere with the functioning of the legislative arm of the State provided the legislature acts within the bounds of the Constitution.³⁸

Although given different functions by the Constitution, the arms of the State are interrelated. There are instances where they need each other in order to function. For instance, before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution.³⁹ Members of a provincial legislature are required to swear or affirm faithfulness to the Republic and obedience to the Constitution before they begin their functions in the legislature.⁴⁰ The oath or affirmation must be administered by the Chief Justice or another judge designated by the Chief Justice.⁴¹ In other words, in order for the legislative arm of the State to start operating after an election, the judicial arm has first to administer an oath or affirmation to the members of the National Assembly or provincial legislature. The functions of the legislature must be respected by the other arms of the State. The other branches or arms of the State should be careful not to intrude into the domain of the legislative arm of the State.

The National Assembly has the power to make rules regulating the conduct of its business. The National Assembly may determine and control its internal arrangements, proceedings and procedures.⁴² In terms of section 165 of the Constitution, the judicial authority of the Republic is vested in the courts.⁴³ Judges are appointed by the President as head of the executive.⁴⁴ In terms of section 174(3), the President has to consult with the Judicial Service Commission and the leaders of parties represented in the National Assembly before he appoints the Chief Justice and Deputy Chief Justice. Before he appoints the President and the Deputy President of the Supreme Court of Appeal, the President as head of the executive has to consult with the Judicial Service Commission. All the other judges of the various courts are appointed by the President as head of the national executive. Section 177 of the Constitution deals with the removal of judges. The Judicial Service Commission is made up of, among others, the Chief Justice, cabinet

³⁸ Gerangelos *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (2009) 39.

³⁹ S 48 of the Constitution.

⁴⁰ S 107 of the Constitution.

⁴¹ Schedule 2 of the Constitution.

⁴² S 57 of the Constitution.

⁴³ S 165 of the Constitution.

⁴⁴ S 174 of the Constitution.

member responsible for the administration of justice, six persons designated by the National Assembly from among its members and four persons designated by the President as head of the national executive.⁴⁵

The executive and legislative arms of the State play a crucial role in the appointment of judges. In other words, the Constitution dictates that the executive and legislative arms of the State should play a role in setting up the judicial arm of the State. Similarly, the Constitution dictates that the judiciary should play a role in setting up the legislative and executive arms of the State. The Constitution does this by requiring the President to swear an oath or affirm faithfulness to the Republic and obedience to the Constitution. Members of the National Assembly are also required to swear an oath or affirmation. The oath or affirmation is administered by the Chief Justice, or another judge designated by the Chief Justice.

The Constitution vests the executive authority of the Republic in the President.⁴⁶ The President exercises this authority with the other members of the Cabinet.⁴⁷ In order for a person to occupy the position of the President, such a person must first be a member of the National Assembly. This is so because the Constitution requires that the election of the President should be from among members of the National Assembly. Another arm of the State, the judiciary, also plays a role in the election of the President. The Constitution provides that the election of the President must be presided over by the Chief Justice, or another judge designated by the Chief Justice.

Both the legislative and judicial arms of the State play an important role in the election of the President. First, the President must be a member of the National Assembly, secondly, members of the National Assembly must elect a President from among the members of the National Assembly, and thirdly, the Chief Justice (judiciary) must preside over the election of the President.

The executive authority is, among other things, responsible for preparing and initiating legislation. The function of legislating is predominantly the function of the legislative arm of the State. In terms of section 84 of the Constitution, the President is also responsible for assenting to and signing Bills into law. In other words, unless a Bill is assented to and signed by the President, it will not become a law. Members of the executive are accountable to Parliament both collectively and individually for the exercise of their powers and performance of their functions.⁴⁸

5 CONCLUSION

Courts are the major actors in the challenges faced by the doctrine of separation of powers. As custodian of the Constitution, the judiciary has a duty to ensure that the arms of the State exercise their powers within constitutional bounds, but in exercising their checks-and-balances role, the courts also intrude into the terrain of the other branches of the State. In order

⁴⁵ S 178 of the Constitution.

⁴⁶ S 85(1) of the Constitution.

⁴⁷ S 85(2) of the Constitution.

⁴⁸ S 92(2) of the Constitution.

to avoid intrusion or usurpation of other powers, the judiciary must observe their own limits and avoid usurping power that is constitutionally allocated to another arm of the State.

When approached to adjudicate on a matter involving the exercise of power by another arm of state, courts should first determine whether such powers were exercised within constitutional bounds. If the power was exercised within constitutional bounds, courts should refrain from interfering with the functioning of the other branches of the State.

In exercising their power to observe constitutional compliance, courts should resist a temptation to dictate how other branches of the State should run their affairs. Courts should limit themselves to ordering constitutional compliance and leave the arm of state concerned to exercise its constitutional powers.