THE SEPARATION OF POWERS AND THE NON-DELEGATION DOCTRINE

In re Constitutionality of the Mpumalanga Petitions Bills, 2000

2000 1 SA 447 (CC); 2001 11 BCLR 1126 (CC)

1 Introduction

The modern concept of separation of powers was first introduced by Charles Louis de Secondat, Baron de la Bréde et de Montesquieu (1689-1755), in his well-known work *L'Esprit des Loix* (1748). Since then this concept has developed into a doctrine made up of four basic principles, one of which is the principle of separation of functions (the other three being: the principle of *trias politica;* the principle of separation of personnel; and the principle of checks and balances – see Van der Vyver "Separation of Powers" 1995 *SAPL* 177).

The principle of separation of functions – which provides that each branch of state may only exercise those powers which have been entrusted to it – gives rise to many complex issues. One of these is the extent to which the legislative branch may validly delegate lawmaking powers to another body or person. This issue has been considered by the Constitutional Court on a number of occasions, most recently in the case *In re Constitutionality of the Mpumalanga Petitions Bill, 2000* (2002 1 SA 447 (CC); 2001 11 BCLR 1126 (CC)).

This judgment is particularly interesting because it deals not only with the type of legislative power which may be validly delegated to another body or person – which was the focus in the Constitutional Court's previous judgments on the issue (see *Executive Council of the Western Cape Legislature v President of the RSA* 1995 4 SA 877 (CC); 1995 10 BCLR 1289 (CC); and *Executive Council of the Western Cape v Minister for Provincial Affairs* 2000 1 SA 661 (CC); 1999 12 BCLR 1360 (CC)) – but also with the sorts of bodies or persons to whom legislative power may be validly delegated.

Besides dealing with the sorts of bodies or persons to whom legislative power may validly be delegated, the judgment also clarifies a number of issues relating to the referral of a bill to the Constitutional Court by the

president (or a provincial premier) in terms of section 79 (or s 121) of the Constitution.

2 The facts

Section 121(1) of the Constitution provides that if a premier has reservations about the constitutionality of a provincial bill that has been sent to him or her for assent and signature, the Premier must refer it back to the provincial legislature for reconsideration. If, after reconsideration, the bill fully accommodates the Premier's reservations he or she must assent to and sign the bill (s 121(2)). If, however, the bill does not fully accommodate the Premier's reservations, he or she may either assent to and sign the bill (s 121(2)(a)); or refer it to the Constitutional Court for a decision as to its constitutional validity (s 121(2)(b)).

Acting in terms of section 121(2)(b), the premier of Mpumalanga referred the Mpumalanga Petitions Bill, 2000 ("the Petitions Bill") to the Constitutional Court for a decision on its constitutional validity. As its title indicates, this bill provided for a petitions process which was intended to facilitate greater public participation in the functions of the Mpumalanga Legislature ("the legislature") and particularly in the legislature's responsibility for oversight of the executive.

In his referral the Premier asked the Constitutional Court to consider two issues. The first was whether the legislature was competent to pass the Petitions Bill ("the competency issue"). The second was whether the bill could validly confer upon the Speaker of the legislature the power to make regulations under the bill (in terms of clause 18) and to fix a date on which the bill would come into operation (in terms of clause 19) ("the delegation issue").

Before referring these two issues to the Constitutional Court, the premier had referred the delegation issue, but not the competency issue, to the provincial legislature for its reconsideration in terms of section 121(1). The provincial legislature, however, adopted the bill again without addressing any of the Premier's reservations concerning this issue.

3 The judgment

3 1 Introduction

In its judgment the Constitutional Court (per Langa DP; Chaskalson P, Ackermann, Kriegler, Madala, Mokgoro, O'Regan, Sachs, Yacoob JJ and Du Plessis and Skweyiya AJ concurring) dealt with each issue in turn.

3 2 *The competency issue*

Insofar as the competency issue was concerned, the court refused to consider the premier's reservation on the grounds that it lacked the necessary jurisdiction to do so (par 11). In arriving at this conclusion, the court made the following points:

First, that in *Ex parte President of the RSA In re: Constitutionality of the Liquor Bill* (2000 1 SA 732 (CC), 2000 1 BCLR 1 (CC) par 19) it had found that the president could refer a bill to the Constitutional Court in terms of section 79 of the Constitution only after parliament had first had an opportunity to reconsider the bill in the light of the President's reservations (par 8).

Second, that this finding also applied in the case at hand given that section 121 and section 79 of the Constitution were virtually identical, the only significant difference being that while section 79 referred to the president and parliamentary bills, section 121 referred to the Premier and provincial bills (par 7).

Third, that there are strong constitutional and functional reasons why the court may not consider a reservation which has not previously been referred to the legislature by the Premier. In this respect the Court explained that section 121 envisages:

> "[A] consideration by this Court of a Bill that has gone through a number of steps, which include communication by the Premier of his or her reservations to the legislature and its reconsideration of the Bill in the light of these reservations. The Court's function to adjudicate upon a bill commences only after the political process has been exhausted and it is limited to a consideration of the premier's reservations together with the responses of the parties represented in the legislature. The role of the legislature would be undermined if the Premier's reservations could be entertained by the Court without having been referred to the legislature for its consideration" (par 9).

Having made these points, the court then turned to address a related question which had been left open in the *Liquor Bill* case. The question was whether, following a presidential referral, it would be appropriate for the Constitutional Court to consider provisions which were patently unconstitutional but in respect of which the President had raised no reservations. In answering this question the court explained that if it could not consider an issue because the referral was procedurally defective then by implication it could not consider an issue which had not been referred to it at all. "No room exists", the Court therefore concluded, "in referral proceedings under s 79 or 121 of the Constitution, for consideration by the Court of issues that have not been raised in compliance with the Constitution by the President or the Premier" (par 13).

3 3 The delegation issue

Insofar as the delegation issue was concerned, the court first considered the Premier's reservations in respect of clause 18 and thereafter in respect of clause 19.

3 3 1 Clause 18

Clause 18 provided that "the Speaker must make regulations required for carrying out the provisions of the Act". The Premier argued, *inter alia*, that this clause was unconstitutional because it infringed the Constitution and the doctrine of separation of powers in two respects, namely that (i) the power to make regulations is one which may only be delegated to a Premier or a member of the executive council and not to a member of the legislature; and (ii) the regulations which the Speaker was required to make would constitute "rules and orders" concerning the legislature's business which, in terms of section 116 of the Constitution, could be made only by the legislature itself (par 17).

The court dismissed both of these arguments. In arriving at its conclusion the court began by explaining that while the power to make regulations is usually delegated to a member of the executive, the Constitution does not expressly require this (par 18). The power to make regulations may therefore be delegated to another body or person provided the delegation is "appropriate". In order to determine whether a delegation is appropriate, the court explained further, a variety of factors must be taken into account. Amongst these are "the nature and ambit of the delegation, the identity of the person or institution to whom the power is delegated, and the subject matter of the delegated power" (par 19).

Having identified the relevant factors, the court then turned to consider whether the delegation provided for in clause 18 was appropriate. In coming to the conclusion that it was indeed appropriate, the Court made two further points:

(i) first, that where an act is to be implemented by a provincial legislature and not a provincial executive, it is wholly appropriate for the legislature itself to regulate the functions set out in the bill and to delegate such powers to the Speaker; and
(ii) that where a part of an act relates to the legislature's role in overseeing the provincial executive, it would be wholly inappropriate for the act to delegate regulatory power with respect to this function to the provincial executive (par 20).

3 3 2 Clause 19

Clause 19 provided that the "Petitions Act ... comes into operation on a date to be determined by the Speaker by proclamation in the Provincial Gazette". The Premier argued that this clause was unconstitutional because it infringed the doctrine of separation of powers in that, by convention, the power to fix the date of the coming into operation of an act is one performed by a member of the executive only, usually the president or a provincial premier (par 21).

The court dismissed this argument as well. In arriving at its conclusion, the court began by explaining that the power to determine when an act should come into operation is a legislative one (par 22). This power, the court went on to explain, may, nevertheless, be conferred upon another body or person. This occurs when it is necessary to delay the coming into operation of an act so that the necessary steps may be taken in order to make the act effective before it comes into force (par 23).

While the power to determine when an act should come into operation, the court explained further, is usually conferred upon the head of the executive who is responsible for its implementation, the Constitution does not require this. The choice of person is accordingly left to the legislature. The legislature's discretion in this respect is, however, constrained by the fact that it must designate an appropriate person to exercise this power. When determining who is an appropriate person the following considerations must be taken into account:

(i) The functions of the person designated must be related to the matters that have to be resolved before the law is brought into force.

(ii) The person designated must be accountable to the legislature in some constitutionally recognized way.

(iii) The person designated must be in a position to determine when the act could effectively be brought into force (par 23).

Taking these considerations into account, the court then went on to find that the Speaker was an appropriate person to exercise this power given that the Speaker was: (i) accountable to the legislature; (ii) well placed to determine when the act could be brought into force; and (iii) intimately involved in the important steps which had to be taken before the act could be brought into force (par 24).

4 Comment

A legislature's authority to delegate its law-making powers to another body or person was first considered by the Constitutional Court in *Executive*

Council of the Western Cape Legislature v President of the RSA (*supra*). In this case the Constitutional Court held that while parliament does have the authority to delegate law-making power, and in particular subordinate law-making power, to another body or person, parliament's authority in this respect is limited by the doctrine of separation of powers – the argument being that law-making, as the proper domain of the legislature, should not be delegated excessively to another body or person (see Chaskalson and Klaaren "National Government" in Chaskalson *et al* (eds) *Constitutional Law of South Africa* (revision service 5, 1999) 3-4).

The first of the delegation limits referred to in the *Executive Council of the Western Cape Legislature* case (*supra*) was identified in the same judgment, namely that parliament may not ordinarily delegate plenary law-making powers to the president, and in particular parliament may not delegate the power to amend the enabling statute itself.

In arriving at this conclusion a majority of the court found that delegating plenary law-making powers to the executive infringed the interim Constitution's manner and form provisions which prescribed the way in which an Act of Parliament was to be passed. For example, in his judgment, Chaskalson P (as he then was) explained that parliament's power to make laws was "subject to" the provisions of the interim Constitution and had to be exercised "in accordance with" the interim Constitution. To delegate plenary law-making powers to the executive, he consequently found, subverted the "manner and form" provisions. The manner and form provisions, he explained further, were not simply directory. Instead, they prescribed how laws were to be made and changed and were part of a scheme guaranteeing the participation of both houses of parliament in the legislative process as well as establishing deadlock breaking mechanisms (par 62).

Other members of the court, however, found that delegating plenary law-making powers to the executive infringed the doctrine of separation of powers because it fundamentally altered the balance of power in favour of the executive. For example, in his judgment, Mohammed DP (as he then was) explained that parliament's competence to delegate its law-making powers cannot be determined in the abstract. It depends on "the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegate and practical necessities generally" (par 136). Applying these principles to the facts of the case, he went on to find that parliament had gone too far and effectively abdicated its legislative powers, leaving the president free to change the entire structure and policy of the empowering act (par 141).

In its two subsequent judgments on the same issue, the Constitutional Court has identified further delegation limitations. In both of these cases the approach adopted by Mohammed DP also appears to have found some favour.

Thus, in *Executive Council of the Western Cape v Minister for Provincial Affairs* (*supra*) the court held that parliament may not delegate a power to a member of the cabinet which the Constitution specifically requires parliament to perform itself. Although the court's decision was ultimately based on wording of the specific constitutional provision in question (s 159(1)), the court also drew attention to particular considerations based on the factors Mohammed DP mentioned in the first *Western Cape Legislature* case (par 126).

And, in *In re Constitutionality of the Mpumalanga Petitions Bill, 2000* (*supra*) the court held, *inter alia*, that while a provincial legislature may delegate subordinate law-making power to any person or body who is "appropriate", it may not delegate subordinate law-making powers regulating the legislature's oversight role to a member of the provincial executive. In arriving at this decision, the court expressly relied on the factors mentioned by Mohammed DP in the first *Western Cape Legislature* case (par 19).

In the light of these judgments, it is submitted that the limits imposed on a legislature's power to delegate its law-making authority to another person or body may be divided into the following categories:

(i) First, that a legislature may not delegate a power that it does not possess.

(ii) Second, that a legislature may not delegate a power that the Constitution specifically requires the legislature to perform.

(iii) Third, that a legislature may not delegate a power that would fundamentally alter the balance of power which exists between the legislature and the other branches of state.

While the first two categories appear to be relatively uncontroversial, the third category may give rise to serious problems of judicial competence. This is because in terms of the balance of powers test, the line between a permitted and a prohibited delegation is one of degree. In each case the court will be required to determine whether the delegation of law-making powers has gone "too far". The problem, however, is that there appears to be no principled means in terms of which a court may readily determine how far "too far" is. In these circumstances, there is a strong possibility that the courts will produce ad hoc, highly discretionary rulings which give little

guidance to the legislature or to other courts (see Sunstein *Designing Democracy: What Constitutions Do* (2001) 145-146).

For these reasons, it is submitted that, except in extreme cases, it is unlikely that the courts will frequently or willingly strike down statutory provisions on the grounds that they infringe the non-delegation doctrine. This has certainly been the experience in the United States, for example, where the Supreme Court has struck down statutory provisions on the grounds that they infringe the non-delegation doctrine on only very few occasions. See *Clinton v City of New York* (524 US 417 (1998) (Congress may not delegate plenary law-making powers to the President)); *Metropolitan Washington Airports Authority v Citizens for the Abatement of Aircraft Noise Inc* (501 US 252 (1991) (Congress may not delegate executive power to a board of review comprising members of Congress)); *Bowsher v Synar* (478 US 714 (1986) (Congress may not delegate executive power to an officer answerable to it)); *INS v Chadha* (462 US 919 (1983) (Congress may not delegate law-making powers to only one of its Houses thus violating the Constitution's "manner and form" provisions)); *ALA Schecter Poultry Corp. v United States* (295 US 495 (1935) (Congress may not delegate subordinate law-making power to a private person)); and *Panama Refining Co v Ryan* (293 US 388 (1935) (Congress may not delegate unrestricted subordinate law making power to the President)).

The importance of the Mpumalanga Petitions Act 6 of 2000 ("the Petitions Act") should also not be overlooked. As indicated above, this Act provides for a petitions process which is intended to facilitate greater public participation in the functions of the legislature.

At the heart of the petitions process is a petitions committee consisting of members of the legislature appointed in terms of the legislature's standing rules (s 3). The responsibilities of this committee are: (a) to facilitate and encourage public participation in the process of government, particularly by previously disadvantaged persons and communities; (b) to receive petitions; (c) to enhance democracy by being accountable and transparent; and (d) to respect petitioners (s 2(1)(a)-(d)).

Insofar as the committee's obligation to receive petitions is concerned, section 8(1) provides that the committee must attempt to settle the subject matter of the petition to the petitioner's satisfaction, in so far as this is possible (s 8(1)(a)). It is also obliged to inform the petitioner of any other appropriate remedies that may be available to him or her (s 8(1)(b)). The committee may, in addition, recommend to the Speaker that the petition be referred to the following persons or bodies: the legislature; a standing committee of the legislature; a member of the executive council; a municipal council; the House of Traditional Leaders; or an institution mentioned in Chapter 9 of the Constitution (s 8(2)). Finally, section 8(5) provides that the

committee may also, if the petitioner so requests, seek to resolve the petitioner's concerns by mediation or negotiation.

In order to fulfill its functions the committee is empowered to hold hearings and hear evidence (s 9). It also has the power to summon or subpoena a person to appear as a witness or to produce any documents requested, if such evidence is relevant to the subject-matter of the petition (s 10(1)). The Act further defines a number of offences relating to the obstruction of the committee's evidentiary proceedings (s 11), with conviction on any of these leading to a fine or imprisonment for up to twelve months, or both (s 12).

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