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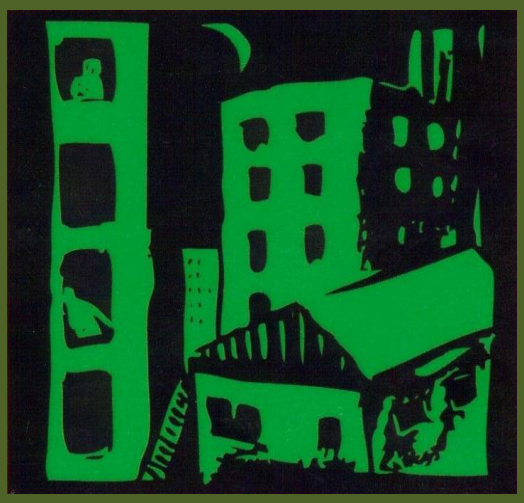

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Between separation of powers and justiciability: Rationalising the Constitutional Court's judgement in the Gauteng E-tolling litigation in South Africa

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1 INTRODUCTION

In handing down its judgments in the controversial Gauteng e-tolling appeal in *National Treasury v opposition to Urban Tolling Alliance*,[1] and the Marikana mineworkers' legal representation imbroglio in *Madigiwana*

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[1] 2012 (6) SA 223 (CC). For the High Court ruling that gave rise to this appeal, see *Opposition to Urban Tolling Alliance v SANRAL* 2012 ZAGPPHC 63 (HC).

and another v President of the Republic of South Africa and others (*Marikana 1*)[2], the Constitutional Court based its reasons for refusing to grant the interim relief sought in both cases on the doctrine of separation of powers. The Opposition to Urban Tolling Alliance (OUTA) had approached the Court in *SANRAL 1,*[3] to interdict the South African National Roads Agency Limited (SANRAL) and the Minister of Transport from going ahead with the e-tolling arrangements on six Gauteng roads pending the substantive review application in the case; whereas in *Marikana 1,* the "injured and arrested persons" among the Marikana mineworkers had gone to court to enforce their right to legal representation at State expense.[4] They, therefore, asked the Court for an order to compel the State and the Minister of Justice to pay the legal bills arising from their participation in the Commission of Inquiry (the Commission) established to uncover the truth behind the turbulence that engulfed the Marikana mine at Lonmin and the tragedy that befell the workers on 16 August 2012. In both cases, the applicants approached the High Court in Pretoria for interim interdicts. On each occasion, an appeal was lodged with the Constitutional Court against the High Court granting the interim order in *SANRAL 1* but refusing it in *Marikana 1*. The question common to both cases was whether the apex court could hear appeals of that nature and make the orders sought.

In pointing to the doctrine of separation of powers, the Court threw out the appeals citing the nature and subject matter of the disputes. Both cases involved executive decision making on matters involving budgetary issues and allocation of resources. Executive policy formulation was also in issue in *SANRAL 1*. Implicated in these circumstances are the principles of separation of powers and the rule of law whereby the courts apply self-restraint in order to avoid unduly trespassing unto the executive terrain. It is argued in this article that, although the Court was silent on the issue, the jurisprudential question of justiciability was implicated through those same reasons advanced by the Court for reaching the conclusion it did in both judgments. In other words, the reasons behind its reluctance to adjudicate on such matters with regard to the nature and subject matter of the dispute are tantamount to saying that the issues before the Court were non-justiciable. Since the Constitutional Court gave so much weight in its judgment in *SANRAL 1* to the doctrine of separation of powers, it is for this singular reason that the case has been identified here as the tip of the iceberg. This is so notwithstanding a wealth of recent case law on various aspects of the doctrine of separation of powers.[5] However, brief mention needs to be made of the *Marikana 1* judgment in order to give the perspectives of the case in the present context.

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[2] 2013 (11) BCLR 1251 (CC). For the high court ruling that gave rise to this appeal, see *Magidiwana and another v President of the Republic of South Africa and others (No 1)* 2014 (1) All SA 61 (GNP).

[3] *SANRAL 1* at paras 7-8.

[4] *Marikana 1*at paras 1-6.

[5] See *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture and Fisheries* 2013 (5) SA 571 (CC); *SAAPIL v Heath* 2001 (1) SA 883 (CC) at paras 897B-902A; *City of Cape Town v Premier, Western Cape* 2008 (6) SA 345 (C) (the *City of Cape Town*) at paras 167-217 *Mazibuko v Sisulu* 2013 (6) SA 249 (CC) (*Mazibuko 2*); and *Justice Alliance of SA v President, RSA* 2011 (5) SA 388 (CC) (*Justice Alliance*).

The *Marikana 1* judgment starts with the proposition that a court can only entertain a matter, adjudicate over it and grant relief if there is a legal basis for doing so. In effect, there must be a constitutional source, a statutory authority, a subordinate legislative backing, or common law precedent to constitute the legal authority upon which the court can exercise its jurisdiction. A court does not make orders in *vacuo*. It does not engage in an academic exercise or indulge in hypothesising where its decision will have no practical effect.[6] There must be a concrete dispute, a controversy between the parties in court,[7] which means that, at least, the rightful plaintiff is in court and/or that the respondent against whom an order of court will be made is joined in the action. In the absence of the applicant/plaintiff having an interest in the matter as well as the absence of an appropriate defendant/respondent being in court, the court cannot ordinarily assume jurisdiction to determine the issue. The Constitutional Court had no doubt that the applicants in *Marikana 1* made a case for fair representation, that there ought to be equality of arms in the proceedings of the Commission, but were the State and/or the Minister constitutionally or legally responsible to provide them with legal aid? Could an order be made against them or any of them where they or none of them did not have the constitutional or statutory obligation to provide the workers with legal aid? Was Legal Aid South Africa Legal Aid), the national institution established by statute and charged with the responsibility of providing legal representation to the indigent in society, properly brought into the proceedings? [8]

Ironically, the applicants focused on the State and the Minister. They did not challenge Legal Aid'srefusal to grant them legal aid in their original review application nor did they challenge the provisions of the Legal Aid Act of 1969 as unconstitutional. Surely, the applicants picked the clue from the pronouncements of the Constitutional Court in the interim appeal so that in their amended notice of motion on the review application, they rightly sought an order setting aside as unconstitutional, the respective decisions taken by the President, the Minister and Legal Aid to refuse them legal aid for the proceedings of the Commission. They also sought an order compelling the respondents to provide them with legal aid. In other words, with this vital amendment, the legal attack at the subsequent review application in *Marikana 2*,[9] was properly directed at the public body clothed with the necessary legal framework to deal with legal representation on behalf of the State.

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[6] See *Radio Pretoria v Chairman, Independent Communications Authority of SA* 2005 (1) SA 47 (SCA); *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA); *National Colaition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (*National Coalition)*(at para 21 (noting that a case is not justiciable if it no longer presents an existing or live controversy which should exist if a court is to avoid giving advisory opinions on abstract propositions of law).

[7] The principles of "ripeness" whereby a court does not hear a case of which the dispute is yet to mature, and of "mootness" which means that there was nothing relevant in a matter that requires adjudication fit into this category. See *Legal Aid South Africa v Magidiwana (2)* 2014 (4) All SA 570 (SCA) (dismissed because the parties settled the matter).

[8] Section 3 Legal Aid Act 22 of 1969.

[9] See *Magidiwana and another v President of the Republic of South Africa (No 2)* 2014 (1) All SA 76 (GNP) (*Marikana 2*) at para 2.

2 THE FACTS AND JUDGEMENT IN *SANRAL 1*

The applicant, OUTA, had approached the courts to interdict SANRAL and the Minister of Transport from going ahead with the e-tolling arrangements on six Gauteng roads pending the substantive review application in the case.[10] It had sought an urgent *pendente lite* interdict prohibiting SANRAL from levying and collecting tolls on the roads pending the final determination of the Rule 53 review application for the setting aside of the decisions of SANRAL and the Minister of Transport, which gave rise to the declaration of the roads as toll roads in 2008. The applicant sought to impugn the decisions of SANRAL and the Minister of Transport on a number of grounds including: (a) procedural unfairness in failing to comply with the notice and comment procedure prescribed by section 27(4) of the South African National Road Agency Act 7 of 1998[11] and section 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); (b) the tolling of the Gauteng Freeway Improvement Project (GFIP) amounted to an unlawful deprivation of the right to property under section 25 of the Constitution; (c) the decision to impose e-tolling was unreasonable because of its excessive operational costs and the practical impossibility of its enforcement; (d) the failure of the Minister of Transport to consider the costs of toll collection; and (e) that the 2006 estimate of the toll collection was incorrect.[12] The applicant was successful on the interim order in the High Court. On appeal by the State, the Constitutional Court did not have to investigate any of these issues in the interim appeal as it pitched its judgment on its unwillingness to entertain appeals of this nature based on the doctrine of separation of powers and the unsuitability of the subject matter of the complaint for adjudication.

Indeed, the Constitutional Court held that it could not enter into adjudication in *SANRAL 1* because it was a policy issue involving: (a) a cabinet decision; (b) a decision of the Minister of Transport that users of the upgraded roads were the ones who must pay; and (c) the National Treasury's domestic budgetary responsibilities and its sovereign debt policies.[13] In other words, the Court would not enter into what belongs to the "heartland of executive-government function and domain", such as the duty to determine how public resources are to be drawn upon and re-ordered especially where fraud or corruption was not alleged. Moseneke DCJ held that the power and prerogative to formulate and implement policy "on how to finance public projects reside in the exclusive domain of the National Executive subject to budgetary appropriations by Parliament".[14] Moseneke DCJ held further, first:

> A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts a obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters

[10] *SANRAL 1* at paras 7-8..

[11] SANRAL Act 1998.

[12] *SANRAL 2* at paras 21.

[13] *SANRAL 1* at paras 34-35 (Moseneke DCJ).

[14] *SANRAL 1*at para 67.

> pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.[15]

Secondly:

> A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owed to other branches of Government, provided they act lawfully. Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review except perhaps where the review has no prospect of success whatsoever.[16]

That the court found the appellant's argument unattractive was summed up by Froneman J in his concurring judgment when he held:

> It is undisputed that in July 2007 the Cabinet approved the Gauteng Freeway Improvement Project and the concomitant basis for its funding, e-tolling, after extensive investigation and a report to it on the issue. It is national executive and treasury policy not to use fuel levy-type funding for these kinds of projects. None of this was, or could be, attacked on review in this Court. The playing field for the contestation of executive government policy is the political process, not the judicial one.[17]

Froneman J also held:

> The main thrust of the respondent's review application is the alleged unreasonableness of the decision to proclaim the toll roads. But unreasonableness compared to what? The premise of their unreasonableness argument is that funding by way of tolling is unreasonable because there are better funding alternatives available, particularly fuel levies. But that premise is fatally flawed. The South African National Roads Agency Limited has to make its decision within the framework of government policy. That policy excludes funding alternatives other than tolling. It is unchallenged on review.[18]

3 JURISPRUDENTIAL ISSUES ARISING FROM *SANRAL 1*

It has already been noted that the judgment of the Constitutional Court in *SANRAL 1* did not address the doctrine of separation of powers as a ground for review. Instead, it applied it as a form of restraint as to the order a court could make in its quest for constructing the appropriate relief in the circumstances. Thus, the principle of separation of powers would naturally relate to a particular constitutional function

[15] *SANRAL 1* at para 66. See also *International Trade Administration Commission v SCAW South Africa Ltd* 2012 (4) SA 618 (CC) (*Scaw*) at para 69.

[16] *SANRAL 1* at para 26.

[17] *SANRAL 1* at para 93.

[18] *SANRAL 1* at para 94 (Froneman J).

which must properly belong to the judiciary in accordance with the constitutional distribution of powers and upon which the court can exercise its judicial authority. Or, as in the present context, it is power vested in the legislative or the executive branch, in which case the court cannot interfere. In other words, the principle of separation of powers does not only operate as a check on the exercise of legislative and executive powers it also serves as a restraint on the exercise of judicial authority. Justiciability, on the other hand, relates to the nature of the issue, the subject matter of the controversy which the court is called upon to adjudicate. For a court to enter into adjudication, the issue must be a "dispute" which "can be resolved by the application of the law".[19] Otherwise, it might be caught by the doctrine of justiciability.

3.1 Separation of powers issue

Quite unlike the concepts of the supremacy of the Constitution and the rule of law which are enacted as parts of the founding provisions of section 1,[20] the term "separation of powers", a long-standing constitutional concept,[21] is nowhere mentioned in the Constitution, far less being defined. However, it is regarded as a necessary incident of a written constitution in which governmental powers and functions are distributed among the three organs of State: the legislature, the executive and the judiciary. It is generally recognised as the foundation upon which the democratic edifice is constructed.[22] Suffice it to say in the present context that "separation of powers" simply means, in the language of the United States Supreme Court in *Springer v Government of the Philippine Islands,*[23] that "unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive[24] or judicial power;[25]

[19] Section 34 of the Constitution of the Republic of South Africa, 1996 (Constitution). See also Mhango M "Is it time for a coherent political question doctrine in South Africa? Lessons from the United States" (2014) 7 *African Journal of Legal Studies* 457 at 478.

[20] Section 1(c) of the Constitution.

[21] See Laslett P (ed) *Locke Two treatises of government* (Cambridge: Cambridge University Press 1988) chap XII; Cohler A M, Miller B C & Stone H S (eds) *Montesquieu The spirit of the laws* (Cambridge: Cambridge University Press 1989) chap 6; Bradley A & Ewing K *Constitutional and administrative law* (London: Sweet & Maxwell 1999). For a modern approach to the separation of powers doctrine in the British Constitution, see Okpaluba C "Judicial review of legislation in an unfamiliar constitutional environment: the United Kingdom experiment" (2006) 2 *SAPR/PL* 263.

[22] For a discussion of separation of powers in South Africa, see the *SAAPIL* case (2001); and *De Lange v Smuts NO and others* 1998 (3) SA 785 (CC)(*De Lange*); Mhango (2014) at 457-494.

[23] See *Springer v Government of the Philippine Islands* 277 US 189 (1928) at para 201 (*Springer*); *Meyers v US* 272 US 52 (1926)(*Meyers*); *Shoemaker v US* 147 US 282 (1893)(*Shoemaker*) at paras 185-6.

[24] *Springer* involved a situation where the legislature purported to usurp the powers of the executive to make certain appointments. See also *Governor of Kaduna State and others v Kagoma* 1982 (3) NCLR 1032 (HC); *House of Assembly, Bendel State v Attorney General, Bendel State* 1984 (5) NCLR 161 (SCN).

[25] See *Police v Khoyratty* 2004 (5) LRC 611 (Mau, SC); *Ngoc Tri Chau v DPP (Cth)* 132 ALR 430 (1995); *S v Dlamini; S v Dladla; S v Joubert; S v Schetekat* 1999 (7) BCLR 771 (CC); *S v Vries* 1996 (12) BCLR 1666 (Nm); *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC); *DPP, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC).

the executive cannot exercise either legislative[26] or judicial power;[27] the judiciary cannot exercise either executive[28] or legislative power".[29]

The basic democratic principle involved in the context of *SANRAL 1* is the doctrine of separation of powers which impels the judiciary from meddling in executive[30] or legislative matters unless the intrusion was constitutionally mandated.[31] It was held that the "harm and inconvenience to motorists" upon which the High Court relied as a ground for intervention, resulted from the decision of the national executive in the process of ordering of public resources, "over which the executive government disposes and for which it, and it alone, has the public responsibility. Thus, the duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive government function and domain".[32] Furthermore, the Court had to take into consideration the interests of the government and the extent to which the requested interdict would intrude on the executive terrain, particularly if it interfered with the allocation of public resources - a policy issue at the core of the executive domain. Such interference could only be warranted where the Court apprehends the presence of *mala fides*, fraud or corruption, otherwise, it must "examine carefully whether its order will trespass upon the terrain of another arm of government in a manner inconsistent with the doctrine of separation of powers".[33] By preventing SANRAL from performing its statutory duties, the High Court had meddled in fiscal affairs without considering the operation of the doctrine of separation of powers. The

[26] The United States Supreme Court has long held that the principle of separation of powers excludes any extensive delegation of legislative power to the executive agencies. See *Schechter Poultry Corporation v US* 205 US 495 (1935). See *Justice Alliance* at paras 62-69.

[27] See *Attorney General v Breckler* 163 ALR 576 (1999)(HCA); *J Astaphan & Co (1970) Ltd v Comptroller of Customs* 1999 (2) LRC 569 (Dominica); *De Lange*.

[28] The Supreme Court of Nigeria held in *Bronik Motors Ltd v Wema Bank Ltd* 1983 (1) SCNLR 296 (Bronik Motors) at para 356 that the vesting of judicial power in the courts precludes them from being conferred with non-judicial functions.

[29] See *Bronik Motors* at para 3.1.1.

[30] *Offit Enterprises (Pty) Ltd v Coega Development Corporation* 2010 (4) SA 242 (SCA) at para 48 held that where the intention to expropriate had not materialised, an intervention by a court to compel the expropriating authority to make a decision would be tantamount to trespassing the boundaries constituted by the separation of powers into the terrain of the executive. See also *Pikoli v President, Republic of South Africa* 2010 (1) SA 400 (GNP) at 409A-H, Du Plessis J holding that making the order would not be in breach of the separation of powers doctrine.

[31] Davis J had held in *Mazibuko v Sisulu* 2013 (4) SA 243 (WCC) (*Mazibuko 1*) at 256E-H and 259I that, while the judiciary is entitled to direct parliament to operate within its constitutional boundaries, it may not trespass unto the legislative terrain by dictating to parliament as to how to arrange its order of business, that is, how to organise its internal affairs. But see *Mazibuko v Sisulu and Another* 2013 (6) 249 (CC) where the majority held that the Rules of the Assembly were defective, and (Jafta J minority opinion) at para 83 (noting that political issues must be resolved at a political level; that our court should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution); and Mhango M "Separation of powers in Ghana: the evolution of the political question doctrine" (2014) 17 *Potchefstroom Electronic Law Journal* 2703 at 2704.

[32] *SANRAL 1* at para 67.

[33] *SANRAL 1* at para 71.

Court had also ignored the substantial financial harm the interdict would cause the government. In effect, the High Court's

> [D]eafening silence on the overarching consideration of separation of powers, taken together with other factors that go to where the balance of convenience rests, entitles this court to intervene. It should have held that the prejudice that will confront motorists in Gauteng if the interim interdict is not granted does not exceed the prejudice that the national executive government, National Treasury and SANRAL will have to endure, should the temporary restraining order be granted.[34]

The courts are wary of the use of judicial remedial powers as an instrument to frustrate the executive authority of the President.[35] For instance, the Court reiterated what it had said earlier in *National Coalition*[36] and in its subsequent judgment in the highly politically charged floor-crossing litigation case of *UDM v President of RSA (1).*[37] The Court was considering what a just and equitable remedy would be in a case where the interim orders made by the trial court intruded into the field reserved by the Constitution for the legislature. This meant that local government councillors were not able to take advantage of an amendment to the legislation held to be valid by the trial court and unless the Court reversed those orders, the effect of the Court proceedings would have frustrated the will of Parliament and rendered nugatory the provisions of item 7 of Schedule 6A of the Constitution. The Constitutional Court therefore made an order which would lift the apparent suspension imposed by the trial court orders by restoring the 15-day window period to enable those councillors interested in floor-crossing to do so within the period specified in the judgment. Indeed, in the third of the three judgments delivered by the Court concerning the same parties - *President of RSA v UDM*[38] - in considering the issue of interim relief, the Court stated:

> Having regard to the importance of the legislature in a democracy and the deference to which it is entitled from the other branches of government, it would not be in the interests of justice for a court to interfere with its will unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation. Where the legislation amends and has thus achieved the special support required by the Constitution, courts should be all-the-more astute not to thwart the will of the legislature save in extreme cases.

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[34] *SANRAL 1* at para 72.

[35] In similar vein, the court frowns on any conduct of the executive which is designed to frustrate the judiciary in performing its function. See *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at paras 52-54, holding that the State had a duty not to frustrate the courts in their enforcement of constitutional rights.

[36] See *National Coalition* at para 61 where it cautioned that deference to the legislature and restraint were called for in order to avoid the Court engaging in lawmaking.

[37] See *UDM v President of RSA (1)* 2002 (11) BCLR 1179 (CC) at para 116.

[38] See *Republic of South Africa and Others v UDM* 2002 (11) BCLR 1164 (CC) at para 31.

3.1.1 *Analogy with the remedies of Severance and Reading In*

The problem of determining the "appropriate relief" to be granted or the "just and equitable"[39] order the court should make that would not interfere with the principles of separation of powers is not restricted to the consideration of granting interim relief. It also relates to structural interdicts as well as the interpretative relief of reading in or severance among other judicial review remedies in the armoury of the courts. The courts always emphasise that they cannot in the guise of constitutional interpretation or in the exercise of their judicial review power take over the law-making function. Take the courts' resistance in this regard whenever they are persuaded to read down statutes that ordinarily contravene the provisions of the Constitution in such a manner as to save them from unconstitutionality. For instance, in *Kauesa v Minister of Home Affairs,*[40] the Namibian Supreme Court refused to read down provisions of an over-inclusive police regulations so that the phrase "comment in public upon the administration of the force" should be "amputated" to preserve the protectable core by inserting after the word "force" the following: "in a manner calculated to prejudice discipline within the force". The Court construed this as an invitation to legislate which was within the constitutional domain of Parliament.[41] However, this is contrary to the attitude of the Constitutional Court in subsequent cases where it has actually read in words in under-inclusive statutes so as to render them constitutional.[42] But even in these instances the Court was mindful of the principle of separation of powers in its exercise of its constitutional mandate under section 172(1)*(b)* which empowers it to make any order that is "just and equitable" where a law or conduct was found to be inconsistent with the Constitution.[43]

Severance involves the excision of over-inclusive provisions in circumstances where the impugned legislation is not wholly unconstitutional but only partly so and there would be no need to strike down the entire statute.[44] On the other hand, reading in contemplates an insertion of words which ought to have been embodied in the enactment in the first instance.[45] The logic of the co-existence of these two remedies is that if the court can delete from a statute that part which renders it invalid without

[39] The two expressions were discussed in detail in Okpaluba C "Extraordinary remedies for breach of fundamental rights: recent developments" (2002) 17 *SA Public Law* 98 at 102 & 124, respectively.

[40] *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (Nm SC) at 987E-F.

[41] See *Coetzee v Government of the RSA* 1995 (4) SA 631 (CC) at para 31; *Case and another v Minister of Safety and Security* 1996 (3) SA 617 (CC) at para 76; *Mistry v Interim Medical and Dental Council of SA* 1998 (4) SA 1127 (CC) at para 32; *S v Lawrence; S v Negal; S v Solberg* 1997 (10) BCLR 1348 (CC) at para 80.

[42] See *National Coalition* at para 67 and 74*; S v Manamela* 2000 (5) BCLR 491 (CC).

[43] Article 25(3) of the Namibian Constitution 1990 which deals with remedies for infringement of fundamental rights speaks of "such orders as shall be necessary and appropriate".

[44] See Okpaluba C "Judicial attitude towards the unconstitutionality of legislation: a Commonwealth perspective (part II)" (2000) 15 *SAPR/PL* 439.

[45] See Okpaluba C "Of 'forging new tools' and 'shaping innovative remedies': unconstitutionality of legislation infringing fundamental rights arising from legislative omissions in the new South Africa" (2001) 3 *Stellenbosch Law Review* 469.

transgressing into the legislative province or interfering with the scheme of the legislation, then, it should be possible also to introduce into the legislation those words the absence of which would render the law invalid. Both techniques involve alteration of legislation.[46] Through both remedies editorial amendments are made by the courts to legislation. The rationale for the availability of reading in as a remedy for a fundamental right breach was laid down in *Schachter v Canada*[47] and Ackermann J in the *National Coalition* case.[48]

The emphasis which the court places on the remedies of reading in and severance is, as always, whether the remedy is less intrusive, and the same consideration pervades in respect of structural interdicts. It however remains debatable, at any rate jurisprudentially, whether the remedy of reading in words perceived by the court to have been omitted from the impugned legislation, which omission would render the legislation unconstitutional, does not in itself amount to judicial interference with the law-making powers of the legislature. Recognising the "suspicion" that the actual act of re-writing or editing legislation may constitute a possible encroachment by the judiciary on the terrain of the legislature and, therefore, a violation of the separation of powers, Madlanga J counselled that "courts must resort to it sparingly".[49] Agreeing with Madlanga J, Mogoeng CJ pointed out in a subsequent case:

> Severability is appropriate only in circumstances where the removed portion of the legislation or section does not so amputate the affected provision as to paralyse it. What remains must still be capable of effectively advancing the legislative vision. It must allow for the implementation of the purpose of the provision or legislation in question. That part of the legislation … that is to remain after severance must not owe its life to the excised provision. It must be so self-standing as to be capable of meaningful and effective application even in the absence of the excised offending part.[50]

However, the courts tend to find it not too intrusive because Parliament always has the opportunity of amending the statute.[51]

In *Premier, Limpopo v Speaker of the Limpopo Provincial Legislature,*[52] the Court declared the North West Act unconstitutional in its entirety as it had in a previous

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[46] See the decisions of the Supreme Court of Canada in *Tetreault-Gadoury v Canada* 1991 (2) SCR 22 (the *Tetreault-Gadoury* and *Miron v Trudel* 1995 (124) DLR 4th 693 (SCC) (*Miron* both of which are discussed below. See also *R v Hess* 1990 (2) SCR 906 (SCC).

[47] *Schachter v Canada* 1992 (93) DLR 4th 1 (SCC) at paras 12h-13b.

[48] *National Coalition* at paras 67-69.

[49] *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) (*Gaertner*) at para 82. See also Bishop M "Remedies" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* (Juta & Company 2008) at 9-104-9-105.

[50] *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC) (*Helen Suzman* at para 109.

[51] *Gaertner* at para 84; *Johncom Media Investments Ltd v M and others* 2009 (4) SA 7 (CC) at para 40; *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC) at para 89.

[52] *Premier, Limpopo v Speaker of the Limpopo Provincial Legislature* 2012 (4) SA 58 (CC) (*Limpopo (2)*.

judgement[53] declared the other provincial Acts purporting to authorise the provincial legislatures to manage their financial affairs. It rejected an application for severance because the argument for granting such relief in this case ran into several difficulties. The Court was of the view that "the textual surgery" it was asked to undertake was so fraught with complications that severance was "impracticable".[54] Apart from the vagueness of the request and sheer breadth of what the Court was asked to sever, it was also important to bear in mind that the granting of severance, as in the case of any other form of relief, should not infringe upon the doctrine of separation of powers, or lead to usurpation of the power of the legislature to legislate.[55] Khampepe J held in *The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*[56] that similar considerations apply in relation to reading in.[57] The reading in must remedy the defect; it must interfere as little as possible with the legislation and must still give effect to the purpose of the legislation.[58] Holding that neither severance nor reading in was appropriate in the circumstances of the case, the Court opted for a declaration that sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 were unconstitutional[59] and that the declaration should be suspended for 18 months to allow Parliament to deal with the matter.[60]

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[53] *Premier, Limpopo v Speaker of the Limpopo Provincial Legislature (1)* 2011 (6) SA 396 (CC).

[54] *Limpopo (2)* at para 23 (Khampepe J). See the extensive re-writing that took place in *C and Others v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 at paras 92-94 in the guise of reading in.

[55] *Limpopo (2)* at para 27. See also *Malachi v Cape Dance Academy International (Pty) Ltd* 2010 (6) SA 1 (CC) at para 47; *First National Bank of SA Ltd v Land and Agricultural Bank of SA* 2000 (3) SA 626 (CC) at para 15; *Case and another v Minister of Safety and Security* 1996 (3) SA 617 (CC) at para 73. In considering whether the order made in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 240 (CC) was unconstitutional, the Court discussed the purposes of the constitutional remedies of reading in, reading down, severance and notional severance and held that they always took place within the context of separation of powers. In declining to confirm the High Court's order of invalidity in relation to the appointment criteria of the head of the Directorate for Priority Crime Investigation, the Constitutional Court reasoned: "Separation of powers requires that the Judiciary refrain from being unnecessarily prescriptive to both the Executive and Parliament …. The constitutionally compliant policy choices they make must be respected even if there are, in the opinion of the Judiciary, better options available". *Helen Suzman* at para 75.

[56] 2014 (2) SA 168 (CC) (*Teddy Bear Clinic*).

[57] *National Coalition* at paras 67-68.

[58] *Teddy Bear Clinic* at para 106.

[59] Although neither severance nor reading in was in issue in *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC), it is noteworthy that s 50(2)(a) of the same Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was declared unconstitutional and inconsistent with s 28(2) of the Constitution to the extent that it unjustifiably limited the right of child sex offenders to have their best interests considered of paramount importance. See also *C and others v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC) at para 27.

[60] See *SA Liquor Traders Association v Gauteng Liquor Board* 2009 (1) SA 565 (CC) at para 40 where the Court held that since the legislative purpose was not clear, it was impossible to determine what tailored order of invalidity, whether severance or reading in, would best serve the purpose of the legislation; hence a declaration of invalidity was the best order to make in the circumstances. Thus, in *Minister of Local Government, Environmental Affairs and Development Planning, WC v The Habitat Council* 2014 (4) SA 437 (CC) at para 25, where the Constitutional Court did not confirm the extensive reading ordered by the trial court with the consent of both the Minister and the other parties before it 2013 (6) SA 113 (WCC).

3.1.2 *Structural Interdicts*

Structural interdicts gained prominence in constitutional adjudication in South Africa with the interpretation of the provisions entrenching socio-economic rights and the appropriate relief that could be ordered to enable the realisation of those rights since the judgments in *Government of the Republic of South Africa and others v Grootboom and others*[61] and *Minister of Health and others v Treatment Action Campaign.*[62] The question in the recent cases of *Allpay (No 1)*[63] and *Allpay (No 2)*[64] was completely different from those in the *Grootboom/Treatment Action Campaign*-type cases. In the *Allpay* cases, there was already in place, a national legislation which established the South African Social Security Administration (SASSA)[65] as the national institution charged with the obligation of ensuring effective payments to the beneficiaries of the social security grants[66] guaranteed to the indigent by the Constitution.[67] To that extent, the Government had complied with the dictates of section 27(2) of the Constitution because it had taken legislative and other measures to ensure that the guaranteed right to social assistance was realised. The matter before Court, therefore, involved the administrative bungling with the procurement contract to disburse the social security benefits to the beneficiaries, and what appropriate and just and equitable order the Court should make to remedy the unconstitutionality without disrupting the flow of social security benefits to the needy, while at the same time leaving the administration of the system to the executive agency. In *Allpay (No 1)* the procurement process was declared unconstitutional while *Allpay (No 2)* was designed to fashion the appropriate relief to remedy the constitutional breach.

In granting a number of structural interdicts and ordering a re-run of the tender process, the Constitutional Court raised accountability concerns centred on the modus operandi of SASSA. The level of competence or the absence thereof coupled with SASSA's conduct manifested in its handling of the procurement process obviously impelled the Court in taking that line of action. SASSA did not live up to the tenets and basic values and principles governing public administration as laid down in section 195 of the Constitution. Indeed, from the evidence emanating from the "merits" as well as the present "relief" judgments, the Court held that it was beyond doubt that it was "SASSA's irregular conduct" that was "the sole cause of the declaration and the setting aside of the contract between it and Cash Paymaster".[68] In the light of the importance of the right to social security; the impact, on and potential prejudice to, a large number of beneficiaries; and the interest of the public in a properly re-run tender process, the

[61] 2001 (1) SA 46 (CC)(*Grootboom*).

[62] 2002 (5) SA 721 (CC) (*Minister of Health No 2*).

[63] 2014 (1) SA 604 (CC)(*Allpay No1)*

[64] 2014 (4) SA 179 (CC) (*Allpay No 2).* See also, *Black Sash Trust v Minister of Social Development* [2017] ZACC 8

[65] See South African Social Security Agency Act 9 of 2004.

[66] Section 4(2)(a) of the Social Assistance Act 13 of 2004.

[67] Sections 27(1) and (2) of the Constitution.

[68] *Allpay No2* at para 73.

court considered it "appropriate to impose a structural interdict requiring SASSA to report back to the court at each of the crucial stages of the new tender process".

It is difficult to conceive an argument that the interdicts issued in *Allpay (No 2)* were non-intrusive, in fact, in respect of the executive function. An argument to similar effect would also be unconvincing in respect of the structural interdicts in *Minister of Health.*[69] Perhaps the intrusiveness or otherwise of an order of court with regard to the executive function in these circumstances could be measured by the extent to which the judicial ordering is permissible in law especially if the "just and equitable" catchphrase would seem to have guaranteed its constitutionality.

Structural interdicts are not limited to the issues involving socio-economic rights. One such illustration is the controversial case of *NDPP and others v Freedom Under Law*.[70] The question of the appropriate remedy to be granted arose after the Supreme Court of Appeal (SCA) had affirmed the trial judge's setting aside of the NDPP's decision to withdraw the fraud and corruption charges against Lt General Mdluli of the South African Police Service (SAPS); the setting aside of the Police Commissioner's decision to terminate the disciplinary proceedings against Mdluli; the reversal of the decision to withdraw the murder and related charges; and the decision of the Police Commissioner to reinstate Mdluli in his office. In addition to setting aside the four impugned decisions, the trial judge granted mandatory interdicts to the effect that: (a) the NDPP should reinstate all the criminal charges against Mdluli, and to ensure that the prosecution of these charges were re-enrolled and pursued without delay; and (b) the Police Commissioner should reinstate the disciplinary proceedings against Mdluli and to take all steps necessary for the prosecution and finalization of these proceedings diligently and without delay.[71]

The SCA held that these mandatory interdicts were an impermissible transgression of the doctrine of separation of powers because, in so ordering, the Court purported to assume the functions of the executive. In terms of the Constitution, the authority to prosecute is vested in the NDPP while the control and management of SAPS is the province of the Commissioner of SAPS, and the Court could only interfere with these constitutional arrangements on rare occasions and for compelling reasons. In the absence of this being a rare occasion or there being any compelling reason(s), the executive authorities should be given the opportunity to perform their constitutional mandates in a proper manner. The setting aside of the withdrawal of the criminal charges and the disciplinary proceedings would have had the effect of the charges and the proceedings being automatically reinstated and it was for the executive authorities

[69] *Minister of Health* at para113.

[70] 2014 (4) SA 298 (SCA) (*NDPP*).

[71] *Freedom Under Law v NDPP and others* 2014 (1) SA 254 (GNP) at para 241.

to deal with them. So, by issuing the mandatory orders, the trial court "went too far".[72] In the final analysis the SCA set aside the said mandatory orders.[73]

3.2 The justiciability angle to the debate

The principle of judicial constraint on adjudication stems not only from the courts' deference to the other arms of government on the separation of powers ground,[74] it also derives from the doctrine of justiciability.[75] The underlying theme is that judicial avoidance of those issues not properly suited for adjudication[76] is required because such issues belong to the domain of the executive, the legislature or the political process.[77] A dispute is not appropriate for adjudication and therefore not justiciable if it involves a "multiplicity of variable and interlocking factors, decision on each of which presupposes decisions on all the others," the so-called polycentric disputes.[78] It is therefore clear that where a decision will generally involve the application of

[72] *NDPP*at para 51.

[73] The SCA had previously warned, in *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA) at paras 29-31, that courts should be aware of making structural orders, that is, orders by which the court exercises some form of supervisory jurisdiction over an organ of State, since they tend to encroach on the functions of the executive, thereby violating the doctrine of separation of powers.

[74] In terms of this principle, the courts guard against any attempt by the executive branch to assign functions of a non-judicial character to serving judges – *SAAPIL* at para 897B-902A; *City of Cape Town* at paras 167-217; *NSPCA v Minister of Agriculture and Fisheries* 2013 (5) SA 571 (CC) at para 13.

[75] Lord MacDermott *Protection from power under English law* (London: Stevens 1957) at 56; Nwabueze B O *Judicialism in Commonwealth Africa the role of courts in government (*New York: St. Martin's Press 1977) at 20; Lockhart W B, Kamisar Y & Choper J H *Constitutional rights and liberties: cases, comments, questions* (West Publishing Company 1980) at 31; Marshall G "Justiciability" in Guest A G *Oxford essays in jurisprudence* (Oxford: Oxford University Press 1961) at 265; Summers R S "Justiciability" (1963) 26 *MLR* 530; Stone J "Non liquet and the function of law in the international community" (1959) 35 *Br YBIL* 124; Albert L A "Justiciability and theories of judicial review, A remote relationship" (1977) 50 *So Cal LR* 1139 at 1269; Lindell G "The justiciability of political questions: recent developments" in Lee H P & Winterton G *Australian constitutional perspectives* (Australia: The Law Book Company 1992) 180.

[76] See Okpaluba C "Justiciability and constitutional adjudication in the Commonwealth: the problem of definition (2003) 66 *THRHR* 424 & 610.

[77] See Okpaluba C "Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa (parts 1 and 2)" (2003) and (2004) 19 *SAPR/PL* 331 & 114, respectively; and Mhango (2014) at 480-486.

[78] This concept which originally derived from Polanyi M *The logic of liberty: reflections and rejoinders* (Chicago: University of Chicago Press 1951) at 171 has been advanced by Stone J *Social dimensions of law and justice* (London: Stevens (1966) at 653; Fuller L L "The forms and limits of adjudication" (1978) 92 *Harv LR* 353 at 395. See also the restraint of trade cases and the consideration of public interest by the courts: *Pharmaceutical Society of Great Britain v Dickson* 1968 (2) All ER 686 at 707D-708A (Lord Wilberforce); *Texaco v Mulberry Filling Station Ltd* 1972 (1) All ER 513 at 527*a*-f, per Ungoed-Thomas J; per Lord Scarman, agreeing with Lord Denning MR in the Court of Appeal in *Lim Poh Choo v Camden and Islington Area Housing Authority* 1979 (2) All ER 910 at 913j-914a-d. See *Kobatschenko v King NO and another* 2001 (4) SA 336 (CPD) at 353D-H where counsel having framed his submissions in line with Fuller's proposition, urged the court to be wary of disputes that may be analytically unsuited to resolution by an all-or-nothing suit between two parties, because they usually concern a large number of possible configurations of interests and intersections between them; and Mhango (2014) at 472.

government[79] or departmental policy,[80] the balancing of competing claims on the purse and the allocation of economic resources,[81] or where the court has no manageable standards by which to judge the issue[82] the court would, in simple terms, be "in a judicial no man's land".[83]

However, in the constitutional scheme of things, the court remains the ultimate guardian of the Constitution and has the obligation to ensure through the principle of legality that the exercise of power by the other branches of government occurred within the bounds of their constitutional authorities.[84] It is fair to state in the present context that the problem of justiciability arises where the court finds that its judicial authority cannot be exercised because the subject matter of the proceeding is not amenable to the judicial process in one or more of the following circumstances. First, where a dispute raises political questions, which are not appropriate for judicial resolution.[85] When a

[79] Lord Diplock in *Council of the Civil Service Union v Minister for the Civil Service* 1984 (3) All ER 935 at 951. See also *Swissbourgh Diamond Mines v Government of the RSA* [1998] JOL 4144 (T) (holding that the act of State doctrine is applicable South Africa as it is in the United States; and that the judicial branch of government ought to be astute in not venturing into areas where it would be in a judicial no man's land).

[80] Where, as in *MEC for Environmental Affairs and Development Planning v Clarinson's CC* 2013 (6) SA 235 (SCA) at paras 18 & 30-32, the refusal by the political head of the department in accordance with departmental policy of an application to develop a piece of land was challenged on the ground of perceived bias. The SCA held that when the law entrusted a functionary with a discretion, the law gave recognition to the evaluation made by the functionary to whom the discretion was entrusted. It was not open to a court to second-guess his or her evaluation. When exercising a discretion on a matter governed by policy, the law requiries the functionary to bring an open mind to bear on the matter, but that is not the same as a mind that was untrammelled by existing principles or policy.

[81] Neill LJ in *R v Criminal Injuries Compensation Board and another, ex parte P and another* 1995 (1) All ER 870 at 881h.

[82] *Baker v Carr* 369 US 186 (1962).

[83] Lord Wilberforce in *Occidental Petroleum Corp v Buttes Gas & Oil* 1981 (3) All ER 616 at 633.

[84] *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC); *Merafong Demarcation Forum and others v President of the Republic of South Africa* 2008 (5) SA 171 (CC); *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC); *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 (3) SA 293 (CC); *Democratic Alliance v President of the Republic of South Africa and others* 2012 (1) SA 417 (SCA); *Minister of Local Government, Housing and Traditional Affairs, KZN v Umlambo Trading 29 CC and others* 2008 (1) SA 396 (SCA); *Democratic Alliance v Acting National Director of Public Prosecutions and others* 2012 (3) SA 486 (SCA); *Democratic Alliance v President of the Republic of South Africa* 2012 (1) SA 417 (SCA), confirmed *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC).

[85] For instance, in *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) at paras 19 & 38 - a case involving a politically motivated decision to change street names for which the council was accountable politically - the SCA considered whether the decisions of the council complied with the principles of legality and rationality within the context of *Fedsure Life Insurance v City of Johannesburg Transitional Municipal Council* 1999 (1) SA 374 (CC) at para 56; *Pharmaceutical Manufacturers Association of SA and another: in re Ex parte President of the RSA and others* 2000 (2) SA 674 (CC) at para 85 and *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC) at paras 74-75. It held that the determination of which streets should be renamed, and the new names chosen, 'admits of no right answer and is inherently political.' Accordingly, it was not for the SCA or any other court in the land to interfere in the politically motivated decisions taken by a deliberative assembly of the council in the exercise of its direct authority, with its origin in the Constitution. For more discussion on this subject, see Mhango (2014).

matter is said not to be suitable for adjudication because it raises a political question, it is not the same thing as saying that a matter has political implications or overtones or consequences. It only means that the issue cannot be resolved by the application of the law. On the other hand, once a matter comes to court and there is a constitutional or legal basis for the action, such as a claim that has ascertainable constitutional or statutory basis, such a matter ceases to be political notwithstanding its political flavour, consequences or outcome. In such circumstances, a party or indeed a judge cannot, through his or her personal views or convictions, convert a potentially constitutional matter into a political question even if it arises from an apparent administrative bungling by a Department of State.

For instance, there is a judgment of the High Court in *Section 27 and others v Minister of Education and another*[86] that the provision of textbooks in schools was an essential component of the constitutional right to a basic education guaranteed in section 29(1) of the Constitution and that respondent's failure to comply with their duty in this regard even by mid-academic year would *prima facie* constitute a violation of this right. Notwithstanding that this judgment has not been overturned by a higher court and is therefore the law in present day South Africa, there was the melodrama that was reported to have taken place in the North Gauteng High Court.[87] The "worrying" development concerned the utterances of a judge during proceedings in court on the same textbook saga in Limpopo Province. The judge had suggested to the parties before him that instead of coming to court, they should have approached the Democratic Alliance or the Economic Freedom Fighters for help or just written to the provincial Department of Education. In the course of the proceeding, the judge was quoted as saying:

> It's likely that opposition politicians would be more interested in raising these matters than government politicians …. So wouldn't that be a course open to you? Would Mr [Julius] Malema or Mrs [Helen] Zille not be interested in your submissions …. I don't see why [coming to court] is appropriate.[88]

One cannot find any better illustration of a Judge descending into the arena of politics than the foregoing speech. The judge thereby went off the mark in jurisprudential parlance. Surprisingly, in the judgment handed down following the proceedings in *Basic Education for All and others v Minister of Basic Education and others,*[89] where Tuchten J made the said objectionable observations, he did not decline jurisdiction in the matter for lack of a justiciable issue or because it raised a political issue. There was no mention of the political nature of the dispute throughout the judgment. Rather, there was a clear indication that there was after all a dispute before the court that needed to be resolved by the application of the law. This is evidenced by the Court's declaration that the non-

[86] 2013 (2) SA 40 (GNP) at para 32.

[87] "Education" Mail & Guardian 14 April -1 May 2014 at 9.

[88] "Education" Mail & Guardian, 25 April – 1 May 2014 at 9.

[89] *Basic Education for All v Minister of Basic Education* 2014 (4) SA 274 (GNP) at para 82.2.

delivery to the learners of some of the textbooks prescribed for their grades in the 2014 academic year before the teaching of the curricula for which the textbooks were prescribed was due to commence was a violation by the Department of Basic Education of the learners' rights to a basic education in terms of sections 29(1)*(a),* their right to equality under section 9 and dignity in section 10, of the Constitution.[90] Surely, the judge's outburst that the parties in court should have turned to the politicians was totally unwarranted and judicially out of line.

Second, where the court is called upon to make pronouncements that may fly by the wind since there is no legal source upon which such pronouncements will be based or no person against whom the orders of the court will be made. The Constitutional Court judgment in *Marikana 1,* which has already been discussed in this article, is authority for so asserting.[91] Third, where the case brought to court involves complicated economic, social or financial factors that may prove impossible for the court to untie, again because the matter has been improperly brought to court instead of it being kept within the executive realm.[92] Fourth, where the party seeking the intervention of the court initiates proceedings with indecent haste before the cause of complaint has clearly manifested, crystallised or matured.[93]

Fifth, where the subject matter for determination has become extinct, redundant, moot,[94] irrelevant or hypothetical. But, as the Court explained in *Van Wyk v Unitas Hospital*[95] it is now axiomatic that mootness did not constitute an absolute bar to the justiciability of an issue as the court has the discretion whether or not to hear a matter. The determining factor is what is in the interests of justice and this includes the consideration whether the order the court may make would have any practical effect either on the parties or on others. However, mootness would assume particular significance in a case where there was an inordinate delay and in the absence of a reasonable explanation for such delay.[96] On the other hand, a matter is hypothetical if it raises purely academic or abstract question(s) whereby the court is called upon to engage in theorising in the absence of a controversy or dispute between the parties. Courts do not appreciate such calls; they prefer to spend their time and scarce resources on matters properly before them which will involve an application or interpretation of

[90] Goosen J held in *Madzodzo obo Parents of Learners at Mpimbo Junior Secondary School v Minister of Basic Education* 2014 (2) All SA 339 (ECM) at paras 19-20 that the State's obligation to provide basic education as guaranteed by s 29(1)*(a)* of the Constitution is not confined to making places available at schools but requires a range of educational resources – schools, classrooms, teachers, teaching materials and appropriate facilities for learners; access to schools; non-teaching staff and the provision of adequate teaching resources.

[91] See text at n 12.

[92] *Scaw*; *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC); *UDM v President of RSA (1)* 2002 (11) BCLR 1164 (CC).

[93] *Ferreira v Levin NO* 1996 (1) SA 984 (CC); *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (T).

[94] *President, Ordinary Court Martial v Freedom of Expression Institute* 1999 (4) SA 682 (CC); *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC).

[95] 2008 (2) SA 472 (CC) (*Van Wyk* at para 29.

[96] *Van Wyk* at para 30.

the law. This was the attitude of the Constitutional Court in *Ferreira v Levin NO and others*[97] as applied recently in *Savoi and others v NDPP and another*[98] where it was stated that although the applicants plainly had standing to challenge the provisions of section 2(1) of the Organised Crime Act 121 of 1998 as invalid, void for vagueness and being over-broad, that did not make it irrelevant that the challenge was brought in the abstract. Courts generally treat abstract challenges with disfavour, because they ask them to peer into the future, and in doing so, they stretch the limits of judicial competence.

Sixthly, the applicant has not exhausted the domestic remedies or internal procedures.[99] The rule of exhausting internal remedies has exceptions. The Constitutional Court made it clear in *Ramakatsa and others v Magashule and others,*[100] that a court will not uphold that plea where: (a) various irregularities pointed out by the appellants to the Free State branch of the Provincial Executive Committee (PEC) of the African National Congress (ANC) had occurred in the branch processes aimed at electing delegates to attend the then impending party's National Congress had gone unattended; (b) the Secretary-General had already said that the ANC would do nothing more about the matter; (c) the National Executive Council of the ANC had already endorsed the PEC and the proceedings of the Provincial Committee; and (d) there was thus no other internal remedy left to the appellants. The majority of the Constitutional Court held that the High Court was wrong to have refused to hear the merits of the application on this procedural ground. It held that failure to hear the merits of the dispute between the parties seriously compromised the appellants' right to have a justiciable dispute determined in a fair public hearing before a court. The underlying justiciable dispute was whether the PEC was properly elected. In the words of Yacoob J at para 27 "that dispute was never heard let alone unfairly heard. And, what is more, not heard on unsustainable grounds. The High Court ought to have heard the merits of the dispute." The majority accordingly declared the provincial elective conference of the ANC and the decisions taken at the conference unlawful and void.

Finally, where the wrong party initiates proceedings of which the outcome would be of no benefit to him or her,[101] or indeed, anyone else. Thus, the Constitutional Court held in *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd,* [102] that if it determined the recusal dispute in the case, it would have no practical effect on the

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[97] 1996 (1) SA 984 (CC) at paras 162 & 165.

[98]2014 (1) SACR 545 (CC) at paras 9-13.

[99] See s 7(2)*(a)* PAJA; *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C); *Cronje v Unted Cricket Board of SA* 2001 (4) SA 1361 (T); *Pennington v Friedgood* 2002 (1) SA 251 (C). See also ss 79 and 121 of the Constitution on the referrals of the constitutionality of Bills by the President and Premiers – *Constitutionality of the Mpumalanga Petitions Bill*, 2000 [2001] ZACC 10; 2002 (1) SA 447 (CC); 2001 (11) BCLR 1126 at paras 9-11; and *Ex parte President of the Republic of South Africa In re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC).

[100]2013 (2) BCLR 202 (CC) at paras 27-28 & 124.

[101] See *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 2013 (5) SACR 443 (CC); *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC).

[102] 2011 (1) SA 267 (CC) at para 8.

material issues between the parties. [103] It was not in the interests of justice to grant leave to appeal against the refusal of the judge in the court a quo to recuse himself, where the judge had subsequently retired and would not be hearing any further proceedings between the parties.

It has also been demonstrated that most of these obstacles to judicial review are judge-made although the courts have often found a justification by way of interpreting the provisions of the Constitution or statute as authorizing or mandating them to arrive at such conclusions. In other instances, the Constitution has in itself set the limits for justiciability by delineating the scope of judicial power,[104] or by outright demarcation of the jurisdiction of the court,[105] or by creating inchoate obligations on the State, or by making the language of a provision absolutely or expressly unenforceable.[106] Or, as in the case of socio-economic rights in the Constitution, by employing words that would not convey forthright or outright judicial enforcement of the rights[107], such as, conferring on the individual the "right of access to" and making the right realisable "within available resources". This, in turn, makes it imperative for the court to go beyond the law and investigate whether government policy was reasonable or justifiable in the realisation of the rights entrenched.[108] In simple terms, a matter is justiciable when the court can lawfully enter into adjudication in light of its jurisdiction,

[103] See also *Van Wyk* at para 29; *IEC v Langeberg Municipality 2001* (*3*) SA *925* (*CC*) at para 9; *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC) at para 17.

[104] This anomalous provision has been present in the Nigerian Constitutions of 1979 and 1999 and was ostensibly designed to protect the Military Regimes that crafted these Constitutions ostensibly from criminal prosecutions and political recriminations that might arise out of the laws they passed and actions taken when they were in office.

[105] See eg the special jurisdiction of the Constitutional Court in s 167(4)(e) of the Constitution which vests in it the power to "decide that Parliament or the President has failed to fulfil a constitutional obligation". See further *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) (*Doctors); Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC).

[106] Take the example of the unenforceable political charters in the form of Fundamental Objectives and Directive Principles of State Policy in the Constitutions of India 1947-48 (ss 36-51); Lesotho 1993 (chap III); Namibia 1990 (chap 11); Nigeria 1979; 1999 (chap 2). See also *New Patriotic Party v Attorney General* 1997 SCGLR 729 where the Supreme Court of Ghana held that the Directive Principles under chap 6 of the Constitution of Ghana 1992, are in general not justiciable except when read with other justiciable provisions of the Constitution; and Mhango "Separation of powers in Ghana" (2014) at 2726-2733 for a deeper discussion of the directive principles under the Constitution of Ghana. However, see *Ghana Lotto Operators Association v National Lottery Authority* 2007-2008 SCGLR 1088 where, in relation to the directive principles under chap 6 of the Constitution of Ghana 1992, Justice Date-Bah held that "there may be particular provisions in chapter 6 which do not lend themselves to enforcement by a court. The very nature of such a particular provision would rebut the presumption of justiciability in relation to it. In the absence of a demonstration that a particular provision does not lend itself to enforcement by courts, however, the enforcement by this court of the obligations imposed in chapter 6 should be insisted upon and would be a way of deepening our democracy and the liberty under law that it entails...This court will need to be flexible and imaginative in determining how the provisions of chapter 6 are to be enforceable;"

[107] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at para 36; *Grootboom* at paras 24 & 38.

[108] *Grootboom*; *Minister of Health No 2; Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* 2012 (2) SA 104 (CC) (*City of Johannesburg*).

the subject matter of the complaint, the parties before court, and the nature of the relief sought.

3.2.1 *Executive policy formulation*[109]

The term "policy" or "government policy" refers to a proposal or viewpoint of government on a subject matter that underlies a law already enacted or to be enacted. It sometimes stands for the purpose for taking a particular line of action, such as, the reason for taking a particular decision, enacting a law or initiating a measure. As far as legal principles or understanding goes, once a policy is translated into an enactment, it ceases to be in the realm of policy and steps up into being law. The enactment becomes a source of right(s) or obligation(s). At this stage, what was policy has transformed into a justiciable matter capable of being binding on the parties and subject to judicial interpretation and powers of review. And, as Harms JA said, laws, regulations and rules are legislative instruments whereas policy determinations are not; and further:

> As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws. Otherwise the separation between legislature and executive will disappear.[110]

But when it is still in the pipeline such as going through the stages of a parliamentary bill, it is not law, hence unenforceable and not justiciable.[111] The boundaries of law and policy as regards the implementation of administrative functions and the exercise of statutory discretions, are in this genre of the policy for the purposes of this discussion.[112] Similarly, policy encountered in the operational/policy dichotomy debate in the law of bureaucratic negligence is another species of this meaning of policy. When it is said in this context that the public authority was implementing policy and was not acting in operational capacity the court was expressing

> [T]he need to exclude altogether those cases in which the decision under attack is of a kind that a question whether it has been made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of

[109] While considering whether the conduct of the Director General in closing the Refugee Reception Office in Cape Town was an administrative action in *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) at para 58, Nugent JA held that whether such an office was necessary for achieving the purpose of the Act was "quintessentially one of policy."

[110] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) (*Akani* at para 7.

[111] The three different stages which a Bill passes through in Parliament and the relative legal status of the Bill at each stage were analysed in *Doctors* at paras 57-58, 60, 63-65 & 71.

[112] On the question, whether government policy is justiciable, see *Permanent Secretary, Department of Education, EC v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) (the school subsidy case); *Minister of Education v Harris* 2001 (11) BCLR 289 (CC) (ministerial age prescription case) and the government policy in the Nevirapine affair – *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC); *Minister of Health* (health care policy to provide nevirapine*)*; *City of Johannesburg* (municipality's policy to provide accommodation to persons it evicted from "bad buildings"). See also the school pregnancy policy cases: *HOD, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC); *HOD, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC).

> scarce resources or the distribution of risks….[113] If this is right, classification of the relevant decision as a policy or planning decision in this sense may exclude liability; but a conclusion that it does not fall within that category does not, in their Lordships' opinion, mean that a duty of care will necessarily exist.[114]

A classical illustration of a situation where the court was confronted with executive policy formulation was in *Scaw* where the Constitutional Court reiterated the limits of judicial ordering given the facts of that case. The order of the High Court had restrained two members of the Cabinet from exercising executive powers vested in them by both the Constitution and national legislation. In terms of sections 85(2)*(a)*, *(b)* and *(e)* of the Constitution, the President together with members of the Cabinet are empowered to exercise executive authority, inter alia, by: (a) implementing national legislation; (b) developing and implementing policy: and (c) performing any other executive function in terms of the Constitution or national legislation. Again, the International Trade Administration Act 2002[115] and the Board on Tariffs and of Trade Act 1986[116] required the relevant Ministers to formulate and implement national policy and to perform specified executive functions in relation to the import and export of goods and other international trade activities. In particular, they were required by these laws to impose, change and remove anti-dumping duties in order to realise the primary economic and developmental objects of the statutes.[117] In its judgment in *Scaw*, the Constitutional Court considered a number of points relating to whether it was in the interest of justice to entertain an appeal against a temporary order;[118] whether an interim interdict was appealable;[119] whether it was appropriate for the High Court to have granted the interim interdict;[120] and the application of the doctrine of separation of powers in this type of case. [121] The Court held that the restraining order brought to the fore the important question of separation of powers between the courts and the executive and the potential breach of the State's international obligations in relation to international trade. It was held:

> The setting, changing or removal of an anti-dumping duty is a policy-laden executive decision that flows from the power to formulate and implement domestic and international trade policy. That power resides in the heartland of national executive authority."[122]

Therefore, the interdict granted by the trial court clearly amounted to an unwarranted intrusion into the formulation and implementation of international trade policy, matters

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[113] Craig P *Administrative Law* 5 ed (India: Satyam Books 2007) at 534-538.

[114] *Rowling v Takaro Properties Ltd* 1988 (1) All ER 163 at 172.

[115] International Trade Administration Act 71 of 2002.

[116] Act 107 of 1986.

[117] *Scaw* at para 42.

[118] *Scaw* case at para 41.

[119] *Scaw* at paras 46-59.

[120] *Scaw* at paras 68-89

[121] *Scaw* at paras 90-111.

[122] *Scaw* at para 44.

that resided squarely within the executive domain. It was set aside for being in breach of the doctrine of separation of powers.[123]

It was held that since the interdict granted by the trial court had the effect of curtailing executive power to formulate and implement trade policy, and also caused the applicant irreparable harm by maintaining anti-dumping duties which would otherwise have ended, leave to appeal had to be granted even though the interdict was characterised as being of an interim nature.[124] More importantly, it was held that courts should observe the constitutional limits of their powers and refrain from making decisions reserved for other branches of government.[125] For instance, a court should be slow to override mandatory legislative provisions buttressed by international obligations.[126] If a specific power or function – such as the extension of a legislatively determined anti-dumping duty – was validly entrusted to the executive, courts should resist the temptation to usurp it, especially if the determination in question was, as in the present case, policy-laden and polycentric.[127]

3.2.2 *Allocation of resources*

So, when the High Court dismissed the application of a class of Marikana mineworkers for temporary relief on the refusal of the government to bear the financial costs for their legal representation at the then on going Marikana Commission of Inquiry (Commission), they approached the Constitutional Court for leave to appeal urgently and directly. They sought urgent temporary relief to the effect that the President, the Minister of Justice and the Legal Aid Board, must provide and ensure legal aid to them at State expense to enable them to participate in the Commission's proceedings

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[123] *Scaw* at para 111. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC); *Van Rooyen and others v The State and others* 2002 (5) SA 246 (CC); *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); *Doctors.*

[124] *Scaw* at paras 42-45 & 56-61 (Moseneke DCJ).

[125] *Oriani-Ambrosini MP v Sisulu MP, Speaker of the National Assembly* 2012 (6) SA 588 (CC) at para 84 held that it is not for the courts to dictate to the National Assembly "how it should go about regulating its own business". See also, Mhango "Separation of Powers in Ghana" (2014) (discussing how the Supreme Court in Ghana has developed a political question doctrine to restrain itself from making decisions reserved for other branches of government; and calling on the Constitutional Court to develop a coherent political question doctrine to enable it to jurisprudentially refrain from usurping the powers of other branches of State).

[126] The *Scaw* case (2012) at para 87. For this same reason, two unreported High Court judgments were overruled for being inconsistent with the principles articulated in the present case - *African Explosives Ltd v ITAC and others* Case No 15027/2006, 5 August 2008 (GNP); *Algorax (Pty) Ltd v ITAC and others* Case No 25233/05, 10 September 2005.

[127] *Scaw* at para 95. The doctrine of separation of powers does not necessarily stand between the court and judicial review of legislative acts or processes if the subject of challenge is regulated by law. This is the difference between the traditional common law non-interventionist approach where the courts tend to refrain from interfering in the legislative process as represented by the trial court and minority judgments on the one hand, and the majority judgment of the Constitutional Court, on the other, in *Mazibuko 2* case (2013) where the court based its intervention on the defect inherent in the Rules of the National Assembly in what, the traditionalists would describe as an internal affair of the legislature. See also, *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP).

established by the President to investigate and report on "matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana".[128] In rejecting the application, Raulinga J referred to the principles discussed above and held:

> Although in this case, the court dealt with a temporary restraining order, the principle is the same. I need therefore to ask myself not only whether an interim interdict against an authorised state functionary is competent, but rather whether it is constitutionally appropriate to grant the interdict. The funds allocated to the second and third respondents is a result of an executive decision about ordering of public resources, over which the government disposes and for which it, and it alone has the public responsibility. The duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive government function domain. I can only grant such an order if there is proof of unlawfulness or fraud or corruption. I do not find any in this case. Therefore, I will not interfere with the power and the prerogative to formulate and implement policy on how to finance public projects and even how the applicants must be funded.[129]

The Constitutional Court upheld the judge's approach as "prudent and appropriate".[130] It held that since there was indeed no claim of fraud or corruption, the High Court's finding that there was no unlawfulness, was "a conclusion that must be treated with deference in an appeal against an interim order".[131] In considering the High Court's finding that the respondents' refusal to provide legal aid to the applicants did not justify the granting of the interim relief they sought and without appearing to be anticipating the outcome of the main review application and the final relief sought,[132] the Court stated the three provisions (sections 28(1)(h); 35(2)(c); and 35(3)(g)) in the Bill of Rights which explicitly entitle anyone to claim legal representation at State expense.

It was held that none of these provisions applied to the circumstances of the Marikana mineworkers because: they were neither children nor detained or accused persons, and that the proceedings of the Commission were neither civil nor criminal trials.[133] The reliance on other provisions of the Bill of Rights to support their claim for state funded legal representation on grounds of alleged infringements of their rights of access to court;[134] equality rights[135] and general considerations of fairness were rejected by the Court as not warranting its intervention in the order of the trial judge.[136] There was no doubt that it would have "been commendable and fairer" had the

[128] See Proclamation 50 of 2012 in GG 35680 of 12 September 2012.

[129] *Magidiwana and another v President of the Republic of South Africa and others* [2013] ZAGPPHC 220; [2014] 1 All SA 61 (GNP) at para 44.

[130] *Marikana 1* at para 10.

[131] *Marikana 1*.

[132] *Marikana 1* at para 11.

[133] *Marikana 1* at para 12

[134] Constitution s 34.

[135] Constitution s 9.

[136] *Marikana 1* at para 13.

applicants been afforded legal representation at State expense given that State organs, such as the SAPS, were given such privileges and the mining corporations were able to afford "the huge legal fees involved", yet the power to appoint a commission of inquiry is the constitutional prerogative of the President.[137] Although the search for truth is always the reason to establish a commission of inquiry and as much as it is always in the interest of the entire nation that such truth be established, unfairness might however occur where adequate legal representation was not afforded. In spite of the fact that the absence of a fair opportunity in terms of legal representation may compromise the essence of establishing a Commission, the courts do not have the power to order the executive branch of government on how to deploy State resources.[138]

4 CONCLUSION

The ratio of the Constitutional Court's judgments in *SANRAL 1* and *Marikana 1* can be put simply: the Constitutional Court as an apex court, is reluctant to entertain appeals on interim relief where its order(s) would infringe the doctrine of separation of powers by constituting an unwarranted intrusion into the formulation or implementation of government policy; or by practically frustrating the executive authority of government. It could be argued that the reason for that conclusion in *Marikana 1* is the lack of a proper identification by the applicant of the legal framework on which the right claimed could be based and the absence of the appropriate respondent against whom an order of court could be made. Although mention was made of separation of powers and allocation of government financial resources, that was, it is submitted, by way of explanation.

On the other hand, the reason behind the judgment in *SANRAL 1* was substantially based on the doctrine of separation of powers and the non-amenability of the subject matter of the dispute to adjudication. After all, the Court was invited in that case to make an order to prevent the Government from going ahead with its e-tolling arrangements. Such an order would have meant that having spent huge sums of borrowed money, the State would be unable to repay its debts since its plans to levy and collect the e-tolls from motorists would have been blocked through a court order. Had such an order been made, it would have culminated in the Court descending into the arena of controversy surrounding the project, and jurisprudentially, no better illustration could have been found of a court being entangled in the web of polycentric wrangling and in the violation of the doctrine of separation of powers.

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137 Constitution s 84(2)(f). For a discussion of the scope of the power to appoint a commission of inquiry see, *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at paras 146-155.

138 *Marikana 1* at paras 15-16.