

# CONCURRING WITH THE MINORITY JUDGMENT WHICH FINDS THE MAJORITY JUDGMENT TO BE JUDICIAL OVERREACH TO THE DOCTRINE OF SEPARATION OF POWERS ACCENTUATED IN THE CASE OF *ECONOMIC FREEDOM FIGHTERS VS. SPEAKER OF THE NATIONAL ASSEMBLY 2018 (2) SA 571 (CC)*

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## **Abstract**

*The doctrine of separation of powers is recognized by most civilized democratic countries. It was first presented in the Magna Carta. The doctrine dictates that power is divided into three branches of the government namely the executive, legislature, and the judiciary. For the doctrine to be implemented effectively and efficiently, there is a principle of checks and balances wherein each branch has power to exercise oversight on the others to check arbitrariness. The essence of checks and balances is to curtail and curtail any abuse of power by any of the branches. The courts have the power to interpret and apply the law and can even declare any provision of the Constitution or legislation invalid and unconstitutional. The courts wield enormous power to the extent that they have the power to review conduct of the other branches and spheres of the state and declare any of their action or conduct inconsistent with the Constitution. However, while exercising their judicial review powers, the courts too have limits or boundaries. The court cannot usurp the power of any of the other two organs of government. The only time a court might intervene in other branch is when the organ of the state has acted contrary to the Constitution. This paper accentuates that the majority judgement in the case of “Economic Freedom Fighters v Speaker of the National assembly 2018 (2) SA 571 (CC) (EFF2)” seemed to have encroached into the domain of the legislative arm of the government by not observing the limits of the judiciary in the exercise of judicial powers and therefore violated the doctrine of separation of powers. Against this backdrop, this paper concurs with the minority judgement in the case of EFF2 which held that the judiciary overarched by usurping the power and performing the functions constitutionally reserved for the parliament-the legislature. It concludes that the judiciary overreached and went beyond exercising checks and balances permitted by the Constitution in that the judiciary used its judicial power to dictate to the parliament to exercise its powers in a certain way. Whereas the Constitution reserved this power to the parliament to make its own rules in order to govern its processes.*

**Keywords:** separation of powers, judicial overreach, organs of state, checks and balances, South Africa.

**JEL Classification:** K30, K33, K38

## **1. Introduction**

During the apartheid era, the government adopted the Westminster model of governance which allowed for parliamentary sovereignty.<sup>3</sup> Then, there was no clear separation between the branches of government. The advent of democracy in 1994 led to constitutional democracy with a written Constitution of the Republic of South Africa, 1996 (“the Constitution”) which divided state power between the Legislature, Judiciary and Executive.<sup>4</sup> Each organ is independent and autonomous but at the same time they complement one another in ensuring good governance.<sup>5</sup> More importantly, there is also checks and balances.<sup>6</sup> Section 41(1)(f) of the Constitution provides that all spheres of government and organs of the state must not assume any power or function except those conferred on them in terms of the Constitution.

The legislative authority in the national sphere of government is vested in the parliament, the

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<sup>3</sup> Ademola Oluborode Jegede, Sidogi Tendani, *Interdependence Versus Checks and Balances of Power: A Reflection on the Role of Constitutional Court in South Africa*, in Michael Addaney, Michael Gyan Nyarko, Elsabé Boshoff (eds.), *Governance, Human Rights, and Political Transformation in Africa*, Springer, 2020, 71.

<sup>4</sup> *Ibid*, 71.

<sup>5</sup> de Vos, Freedman and Brand, *South African Constitutional Law in context* (2014) 60.

<sup>6</sup> Jegede and Tendani 72.

legislative authority in the provincial sphere of government is vested in the provincial legislature, and the legislative authority in the local sphere of government is vested in the municipal council.<sup>7</sup> The executive authority of the Republic in the national sphere of government is vested in the President, in the provincial sphere the executive authority is vested in the Premier of the province and in the local sphere of government it is vested in the municipal council.<sup>8</sup> The judicial authority of the Republic is vested in the courts.<sup>9</sup>

However, it is pertinent to point out that the Constitution does not provide for a strict separation of powers between the legislature and the executive.<sup>10</sup> While it establishes Parliament as the distinct legislative branch with its particularized function of law making and its own personnel, the Constitution also makes provision for the involvement of the executive in the performance of the legislative functions.<sup>11</sup> For instance, the Constitution requires the President to assent to legislation passed by the legislature for it to become law.<sup>12</sup> O'regan observes that the various branches of government are not hermetically sealed the President is elected by the National Assembly at its first sitting after an election and once the President is elected she or he ceases to be a member of the National Assembly even though it is the National Assembly who has the power to remove the President from office.<sup>13</sup>

What becomes clear is that before members of the executive can assume positions as such, they must first be members of the National Assembly. It is only after they have been appointed to ministerial positions that they cease to be members of the National Assembly, but they still have the right to attend and speak in the National Assembly although they may not vote.<sup>14</sup> According to Labuschagne this perpetual fusion of the legislature and the executive in the present South African system seems to undermine the proper functioning of the separation of powers in principle. This fusion is the reason why the judiciary seems to be involved in the formulation of public policy through their judgments and pronouncements which is traditionally reserved for the executive.<sup>15</sup>

In the law-making process, members of Cabinet prepare and initiate legislation for introduction in the National Assembly or the National Council of Provinces.<sup>16</sup> After the legislation is debated and passed it has to be presented to the President to assent to and sign it into law.<sup>17</sup> The President may refuse to assent to and sign the Bill into law if he has reservations about its constitutionality in which case he has to send it back to the National Assembly for reconsideration.<sup>18</sup> If, after reconsideration, the Bill fully accommodates the President's reservations the President must assent to and sign the Bill and if not he must assent to and sign the Bill or refer it to the Constitutional Court for a decision on its constitutionality.<sup>19</sup> Section 79(5) of the Constitution provides that if the Constitutional Court rules that the Bill is constitutional, the President must assent to and sign the Bill. Certain instances such as the President's refusal to assent to and sign a Bill into law end up involving all the organs of state in the law-making process.

This demonstrates that the judiciary also has a role to play in the execution of legislative functions through checks and balances.<sup>20</sup>

In concurring with the minority judgment, this paper looks at the intrinsic role of the doctrine

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<sup>7</sup> S 43 of the Constitution.

<sup>8</sup> S 85 of the Constitution.

<sup>9</sup> S 165 of the Constitution.

<sup>10</sup> O'regan "Checks and balances reflections on the development of the doctrine of separation of powers under the South African Constitution" *Potchefstroom Electronic Law Journal/Potchefstroomse* 2005 2.

<sup>11</sup> de Vos and Freedman "Brand *et al* South African Constitutional Law in context" (2014) 65-66.

<sup>12</sup> S 84 of the Constitution.

<sup>13</sup> O'regan 2.

<sup>14</sup> S 54 of the Constitution.

<sup>15</sup> Labuschagne "The doctrine of separation of powers and its application in South Africa" *Politeia* (2004) 84.

<sup>16</sup> February More than a law-making production line? Parliament and its oversight role State of the nation- South Africa 2005-2006. 6-8.

<sup>17</sup> O'regan 3.

<sup>18</sup> Sec 79(1) of the Constitution.

<sup>19</sup> Wolf "Revisiting section 81 of the Constitution: the commencement date of legislation (legislative power) distinguished", *Southern African Public Law* 2015 193.

<sup>20</sup> O'regan 9.

of separation of power. It presents and reviews relevant literature and theoretical framework underpinning the doctrine. The paper accentuates that the judiciary plays a very crucial role because it has the power to declare any action of the executive and legislature invalid and inconsistent with the Constitution. This notwithstanding, the paper postulates that the judiciary is also enjoined to exercise restraint in the use of its judicial power of checks and balances by not encroaching or usurping the power and functions of the other organs of government. The paper stressed that the minority judgement in *EFF2* is in concert with the doctrine of separation of powers while the majority judgement is an affront to the doctrine of separation of powers and as such the court overreached.

## 2. Literature review

According to Currie and de Waal the doctrine of separation of powers entails that the functions of government are classified as the legislative, executive and judicial and that each branch performs its function separately without interference into the affairs of the others.<sup>21</sup> The legislative branch makes the law, the executive executes while the judiciary resolves disputes through the application of law.

The doctrine is the basis upon which institutional, procedural and structural division of public power create a just society in which there is no abuse of power by the government and ensuring that public powers is exercised wisely, or at least prudently and not in an abusive manner.<sup>22</sup>

In the *Certification case*<sup>23</sup> the Constitutional Court held that since there is no universal model of separation of powers, what any democratic systems of government should strive to do is to ensure proper implementation of checks and balances where one branch imposes restraints on the other branches of government. Hence there is no separation of powers that is absolute. On the one hand, the principle of separation of powers recognizes that each branch is independent and on the other hand, the principle of checks and balances ensures the desirability of the constitutional order which seeks to prevent the branches of government from usurping power from one another. But sometimes, there is necessary or unavoidable intrusion of one branch on the terrain of another. This is because there is no constitutional scheme that reflects a complete separation of powers. Hence, the scheme is always one of partial separation.

The doctrine of the separation of powers requires organs of the state to be independent from each other with each organ exercising powers which it is given by the Constitution.<sup>24</sup> Although independent, organs of the state sometimes intrude on the terrain of other branches of the state. This intrusion is justified by the principle of checks and balances. Checks and balances should be performed to ensure that there is no abuse of power by organs of the state.<sup>25</sup>

In the case of *Doctors for Life International v. Speaker of the National Assembly*<sup>26</sup> the applicant brought an application to court on the basis that the National Council of Provinces (NCOP), passed Bills without inviting written submissions and conducting public hearings as required by the law. The Bills passed were invalidated by the court because they failed the constitutional obligation which required the involvement of the public as a requirement of the law-making process. To reach this decision, the court acknowledged the separation of powers and autonomy of parliament which entail that the judiciary should not interfere in the process of another branch but can only do so when mandated by the constitution. It is on this premise that the court held that since there was no public involvement in the law-making process required by the constitution, the whole process was null and void. The parliament has abandoned its constitutional responsibility to involve the public hence the whole process was invalid, and the Bills were also invalid. The court indicated that the courts should avoid making orders that have an impact on the domain of the other branches of government. However, the court may be called upon to adjudicate whether a legislation is invalid because

<sup>21</sup> Currie and de Waal "The Bill of Rights Handbook" (2013) 18.

<sup>22</sup> de Vos and Freedman 65-66.

<sup>23</sup> *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of South Africa* 1996 (4) SA 744 (CC).

<sup>24</sup> Saunders "Separation of Powers and the Judicial Branch" *Judicial Review* 2006 337.

<sup>25</sup> Jegede and Tendani 71-72.

<sup>26</sup> *Doctors for Life International v Speaker of the National Assembly* (2006) ZACC 111.

Parliament did not adopt it in accordance with the provisions of the Constitution. The court has the duty to evaluate all processes utilized and if it is discovered that there were omissions, the court has a constitutional duty to invalidate the legislation. The court is obliged by the constitution to say that Parliament has failed to do so. Even though this constitutes an intrusion into the domain of the legislative branch of government, this sort of an intrusion is valid because it is mandated by the Constitution itself. It is important to stress that whenever it is appropriate to do so, the courts should not hesitate to use their powers to make orders that affect the legislative process. This is said against the backdrop that even though the doctrine of separation of powers plays an important role in constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the constitution. The courts have the constitutional right and duty to always protect the constitution and as such cannot turn a blind eye when called upon to discharge such duty.

Although it is the responsibility of Parliament to make laws, the Constitution empowers the judiciary to declare that a law is invalid if that law is in violation of the Constitution.<sup>27</sup> The court's powers in this regard are limited to checking whether or not the law in question is consistent with the Constitution.<sup>28</sup> If the Constitution sets out a procedure to be followed by Parliament in the law-making process and Parliament fails to follow such procedure, the court may declare the law to be invalid due to Parliament's failure to follow a constitutionally sanctioned process.<sup>29</sup>

In exercising its powers, the court must also observe its own boundaries. The court must guard against usurping Parliament's powers of law-making. The Constitution allows the judiciary to check if Parliament complied with its constitutional obligations. If the court finds that Parliament complied with its constitutional obligations, it (the court) will not interfere with the legislative process. In the event the court finds that Parliament did not comply with its constitutional obligations, the court is constitutionally bound to make a ruling that Parliament failed to observe constitutional obligations. The court will then decide which affects the law-making process.

The three arms of the state exist in order to ensure that there is an element of checks and balances to hold each other accountable<sup>30</sup>. The Constitution does not make use of the phrase "separation of powers" explicitly, but it is implied or implicit in the Constitution.<sup>31</sup> Ngcobo states that "our constitution does not require an absolute, categorical division of institutions, powers and functions. It contemplates that there will be some encroachment upon one branch by another branch or branches, resulting in the lines between the branches being blurred at times. That is why there are checks and balances in place to ensure the effective, efficient and constitutional discharge of power and functions by government as a whole." The manner in which the Constitution allocates powers to different organs of the state allows organs of the state to intrude into each other's terrain. This intrusion is one which is constitutionally permissible when checks and balances powers are exercised.<sup>32</sup> Checks and balances powers ensure that government performs effectively and efficiently.

The three branches of government perform separate functions and they exercise governmental power.<sup>33</sup> To this end, each branch is allocated specific functions, duties and responsibilities with defined competences and jurisdictions.<sup>34</sup> In *Glenister v President of the Republic of South Africa*,<sup>35</sup> the court stated that "the courts are the ultimate guardian of the Constitution." The applicant in this matter launched an application to the High Court for an order setting aside the decision of the Cabinet

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<sup>27</sup> D Landau "Political Institutions and Judicial Role in Comparative Constitutional Law" *Harvard International Law Journal* 2010 319.

<sup>28</sup> Gardbaum "Are Strong Constitutional Courts Always a Good Thing for New Democracies" *Columbia Journal of Transnational Law* 2014 285.

<sup>29</sup> Emeziem "From Judicial Transplants to Judicial Translations: Constitutional Courts in Southern Africa—A Comparative Review" *International and Comparative Law Review* 2019, 7-8.

<sup>30</sup> Munzhedzi "The Role of separation of powers in ensuring public accountability in South Africa: Policy Versus Practice" (2017) 80-86.

<sup>31</sup> Ngcobo "South Africa's transformative constitution: towards an appropriate doctrine of separation of powers" *Stellenbosch Law Review* 2011 38.

<sup>32</sup> Kapindu "Reclaiming the frontier of constitutional deference: Mazibuko v. City of Johannesburg—a jurisprudential setback" *Southern African Public Law*, 2010 471.

<sup>33</sup> Langa "The separation of powers in the South African Constitution" *South African Journal on Human Rights* (2006) 22.

<sup>34</sup> Mojapelo 39.

<sup>35</sup> *Glenister v President of the Republic of South Africa* 2009(1)287 (CC).

to originate legislation aimed at dissolving the Directorate of Special Operations known as scorpions. The High Court dismissed the application on the ground that it lacked jurisdiction. The applicant then approached the Constitutional Court. The court held that it was a necessary component of the doctrine of separation of powers to ensure that branches of the government exercise their power within constitutional bounds. The courts are the ultimate guardians of the Constitution and as such they have the right and duty to intervene in order to prevent the violation of the Constitution. In discharging this constitutional obligation and mandate, the courts are more likely to assess and consider thoroughly whether to venture into the domain of other branches of government and the extent of such intervention. The courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But while exercising this power, the courts too must observe the limits of their powers.<sup>36</sup> The court needs to consider all prevailing circumstances before venturing on whether to intervene or not. Interference should be guided by the principle of separation of powers. Interference should be based on the principle of checks and balances to ensure that there is constitutional order which seeks to prevent the branches of government from usurping power from one another. Over and above, the principle of checks and balances operates mainly as a safeguard to ensure that each branch of government performs its constitutionally allocated function effectively and efficiently and that it does so consistently with the constitution.

Before a court can intervene in another organ's domain, it must have regard to the principle of the separation of powers.<sup>37</sup> The court must not take powers belonging to another organ of the state. The only time a court should intervene is when an organ of the state has acted contrary to the obligations imposed by the Constitution. The courts also have a duty to ensure that organs of the state do not exercise powers they do not have. In other words, organs of the state should not go beyond the powers allocated to them by the Constitution.

### 3. A Critical analysis of *EFF2*

The applicants in this matter are registered political parties represented in the National Assembly. The application was made against the National Assembly. The applicants' complaint is that the National Assembly has breached its constitutional mandate to hold the President to account. This complaint is based on the applicants' allegation that the National Assembly did not do anything to hold the President accountable after the Constitutional Court's ruling that the Public Protector's remedial action is binding in the absence of any court order setting it aside.<sup>38</sup>

The genesis of this application lies in the investigations made by the Public Protector into the upgrades effected on President Jacob Zuma's Nkandla residence. After her investigations, the Public Protector issued a report dated 19 March 2014. This report contained remedial action taken by the Public Protector against the President. The remedial action included that the President had to pay a reasonable percentage of the non-security upgrades effected on his Nkandla residence and that the President should reprimand the Ministers under whose watch the project was carried out and funds were misused. According to the Public Protector's report, the President would be assisted by National Treasury in determining what a reasonable percentage would be.

The President did not comply with the remedial action recommended by the Public Protector. The President instructed the Minister of Police to conduct an investigation into the Nkandla project to determine the costs of the non-security measures. A report was produced. In terms of this report, the President was absolved from any wrong doing. The National Assembly adopted this report. The Public Protector's report was accordingly second guessed. The Economic Freedom Fighters then launched an application<sup>39</sup> to the Constitutional Court for an order declaring that the National Assembly violated the Constitution by failing to scrutinise and hold the President accountable and that the President also violated the Constitution by failing to implement the Public Protector's

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<sup>36</sup> Ibid, para 33.

<sup>37</sup> Cachalia *South African Law Journal* 2015 285 – 286.

<sup>38</sup> *Economic Freedom Fighters and others v Speaker of the National Assembly and Another* 2016 (3) SA 580 (CC) (“EFF1”).

<sup>39</sup> Ibid.

remedial action. The court held that the Public Protector's remedial action is binding and that the National Assembly and the President violated the Constitution.

After the judgment in *EFFI* was delivered certain activities occurred in the National Assembly. These activities included:

**a.** A motion for the removal of the President in terms of section 89(1) of the Constitution on 05 April 2016. The basis for this motion was that the President had committed a serious violation of the Constitution by failing to implement the Public Protector's remedial action. This motion was moved by the leader of the official opposition party, Democratic Alliance (DA). The motion was debated and voted upon. It was unsuccessful.

**b.** Question and answer sessions were held in the National Assembly. The President attended these sessions and provided answers to the questions asked.

**c.** On the 10<sup>th</sup> November 2016, the leader of the DA moved a motion of no confidence in the President in terms of section 102 of the Constitution. This motion was debated and voted upon. It did not succeed.

**d.** On 08 August 2017, another motion of no confidence in the President was moved, deliberated and voted upon. The motion was defeated.

The applicants then brought an application to the Constitutional Court for an order, among others, declaring that the Speaker of the National Assembly failed to put appropriate mechanisms and processes in place to hold the President accountable for failing to implement the Public Protector's remedial action, that the Speaker failed to scrutinize violation of the Constitution by the President in failing to implement the Public Protector's report dated 19 March 2014, and that the Speaker should put in place mechanisms and processes which would hold the President accountable and whether the President's conduct satisfies the requirements of section 89(1) of the Constitution. The majority court granted the application. The majority judgment found that there were no mechanisms and processes designed to deal with an impeachment in terms of section 89(1) of the Constitution. The majority judgment concluded that the Speaker failed to hold the President accountable in terms of section 89(1) of the Constitution.<sup>40</sup>

#### 4. Majority judgment

In holding that the Speaker failed to put in place mechanisms and processes which satisfy the requirements of an impeachment process in terms of section 89(1) of the Constitution, the majority court acknowledged the existence of mechanisms and processes designed by the National Assembly to hold the President accountable and that it is not correct that the National Assembly did nothing to hold the President accountable.<sup>41</sup>

The majority judgment's approach to the matter is based not on whether mechanisms and processes to hold the President accountable exist but on whether such mechanisms and processes satisfy the requirements of section 89(1) impeachment process. In fact, the question asked by the majority judgment on this issue is whether the mechanisms and processes which are available were designed specifically to deal with the process of the removal of the President from office referred to in section 89(1) of the Constitution. This section of the Constitution empowers the National Assembly to remove the President from office only on the grounds of "a serious violation of the Constitution or the law; serious misconduct; or inability to perform the functions of office."

According to the majority judgment there should be an inquiry into the existence of a ground listed in section 89(1) before the removal of a President can occur. In other words, the National Assembly must first investigate the seriousness of the conduct of the President and then make a ruling that the conduct is indeed serious before the impeachment process envisaged in section 89(1) can be embarked upon. If the removal is not preceded by an investigation and a finding that the conduct the President is alleged to have committed is serious and in compliance with the requirements of section 89(1), the removal of the President will be unconstitutional and may be set aside on review. In this

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<sup>40</sup> Ibid, para 208.

<sup>41</sup> Ibid, para 199.

regard Jafta J, writing for the majority, records that “the process envisaged in section 89(1) involves necessarily an antecedent determination by the Assembly to the effect that one of the listed grounds exists. This is because those are grounds for the President’s removal”.<sup>42</sup> The court also observed that the parliament failed to establish that the President had indeed committed a serious violation of the Constitution which is the necessary condition for commencing a section 89 process. And more importantly, the President must be afforded the opportunity to defend himself before the parliament can hold the view that the President has committed a serious violation of the Constitution. Therefore, the procedure followed by the Parliament in this instance did not accord with section 89.<sup>43</sup>

According to the majority judgment, the starting point should have been to investigate the existence of a ground for the removal of the President from office. If a ground listed in section 89 of the Constitution has been found to exist, the Assembly would then authorize the commencement of a process aimed at the removal of the President from office. The majority judgment’s analysis of the facts in this matter presents a problem. The problem presented lies in the necessity of an investigation of a fact that has already been uncovered and has become common knowledge. The Constitutional Court had already ruled in *EFF1* that the President violated the Constitution by failing to implement the Public Protector’s remedial action contained in the Public Protector’s report dated 19 March 2014. This was common knowledge. It was debated in the National Assembly. The President even instructed the Minister of Police to institute a parallel investigation into the non-security upgrades effected on his Nkandla home and the costs associated therewith. The report by the Minister absolved the President of any wrongdoing.

Several motions of no confidence and a motion for the removal of the President from office were moved, debated, and voted upon. Question and answer sessions were also held where the President was in attendance. The President answered questions in the National Assembly relating to the Public Protector’s report. These motions were dealt with in terms of the rules of the National Assembly. There was no submission on the papers filed in court or during argument that the Speaker prevented the leader of the opposition or any other member of the National Assembly from moving a motion of no confidence in or removal of the President. In conclusion Jafta J held that “section 89(1) implicitly imposes an obligation on the Assembly to make rules specially tailored for an impeachment process contemplated in that section. And I hold that the Assembly has in breach of section 89(1) of the Constitution failed to make rules regulating the impeachment process envisaged in that section.”

Plain reading of section 89(1) of the Constitution does not suggest that special rules dealing with impeachment in terms of the section have to be made. In any event the Constitution empowers the National Assembly to make its own rules to regulate the conduct of its business in the Assembly.<sup>44</sup>

The majority court dealt with the matter as if it involved President in general and not a specific President despite the facts being clear that the President in question was President Jacob Zuma. The Public Protector’s remedial action which triggered this application was taken against President Jacob Zuma and not any other President. The motions of no confidence and motions for removal from office were made against President Jacob Zuma. Resultantly, the court application was made against the Speaker for failing to hold President Zuma accountable.<sup>45</sup>

This case was about the impeachment of a specific President, Jacob Zuma. The majority dealt with the case as if it is an impeachment matter in general and not affecting a specific person. According to the Chief Justice, the court had to approach the matter with the understanding that they are dealing with facts which arose from a particular context. The facts arose from the speaker’s alleged failure to hold President Jacob Zuma accountable. This alleged failure arises from the security upgrades effected to President Zuma’s Nkandla residence. The Nkandla saga is the basis upon which the application was brought to court. This case was not about the possibility of any President committing a misconduct or a ground as listed in section 89 of the Constitution.

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<sup>42</sup> Ibid, para 204.

<sup>43</sup> Ibid, para 205.

<sup>44</sup> Section 57 of the Constitution.

<sup>45</sup> *Economic Freedom Fighters and others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) para 278.

## 5. An in-depth analysis of minority judgment

The minority judgment disagreed with the conclusion reached by the majority judgment. According to the minority judgment, there are already mechanisms and processes in place to hold the President accountable.<sup>46</sup> These are mechanisms and processes which have always been used by the applicants in the past. In fact, even before launching this application the applicants used these mechanisms and processes.

The minority judgment held that the Speaker did hold the President to account. According to Zondo DCJ, the National Assembly took steps to hold the President to account. This is evident from the fact that on different dates motions of no confidence in the President were moved, debated and voted upon. The moving, debating of and voting upon motions of no confidence are indicative of the steps taken by the National Assembly to hold the President to account. The applicants brought this application to court after several motions of no confidence in the President were moved, debated and voted upon but were unsuccessful. If the applicants' complaint is indeed that there were no appropriate mechanisms and processes available to hold the President to account in terms of section 89(1) of the Constitution, these motions of no confidence and for the removal of the President would have not been held.

In fact, it would appear that the application to court was triggered by the fact that the motions failed. If the motions had succeeded it is unlikely that the applicants would have approached the court in the manner that they did. In this regard Zondo DCJ observes that the applicants should not blow hot and cold air at the same time by taking it to mean that it is only when the motion succeeds that the President would have been held accountable but if the motion is defeated and failed it would mean that the President was not held accountable.<sup>47</sup>

Mogoeng CJ, who concurred in the minority judgment, characterised the majority judgment as a "textbook case of judicial overreach...". According to the Chief Justice, the majority judgment "is at odds with the dictates of separation of powers because the majority judgment dictated what the National Assembly, another arm of the state, should do in the exercise of its authority."<sup>48</sup>

The minority judgment approaches the matter from the angle that the National Assembly has rules which are designed to hold the President accountable. The minority's view is that the flexibility of the mechanisms and processes which are in place allows a member of the National Assembly or the National Assembly to hold the President to account. These processes include the establishment of an *ad hoc* committee. The minority observes that the applicants participated in an *ad hoc* committee in the past without hindrance. In this application, the applicants suggest that an *ad hoc* committee should be established to investigate the President's conduct. This step, the minority held, is available to the National Assembly and does not require court intervention.<sup>49</sup>

The applicants have accepted in the founding affidavit that an *ad hoc* committee may be established to investigate the existence of a ground listed in section 89 and whether or not the President misled Parliament. If an *ad hoc* committee were to be established, it would not be for the first time that it is done. An *ad hoc* committee was established in the past. The Applicants were represented in the *ad hoc* committee, and they participated. The applicants, being political parties, are represented in the National Assembly. Members of the National Assembly are entitled to participate in the National Assembly in terms of the rules of the National Assembly.<sup>50</sup> If the applicants accept that they could establish an *ad hoc* committee through which the National Assembly could hold the President accountable, they could have done so without even approaching the court. As a result, it was not appropriate for the majority court to dictate to the National Assembly to establish rules and/or mechanisms through which to hold the President accountable.

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<sup>46</sup> Ibid, para 43.

<sup>47</sup> Ibid, para 93.

<sup>48</sup> Ibid, para 224.

<sup>49</sup> Ibid, para 124.

<sup>50</sup> Section 57 of the Constitution.



## 6. Judicial overreach

The minority judgment finds the majority judgment to be offensive to the doctrine of separation of powers. The minority judgment accuses the majority of encroaching into the exclusive domain of Parliament. According to the minority, this encroachment into the domain of Parliament is not sanctioned by the Constitution and therefore not justifiable. Mogoeng CJ labels the majority judgment in the following manner: “the second judgment is a textbook case of judicial overreach—a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament.”<sup>51</sup> The minority holds that it is not necessary for the court to enter into the affairs of Parliament in cases where the issues involved require Parliament to exercise its authority in terms of its own rules. In this case, the minority held, Parliament had solutions to its own problems, and it was not necessary for the applicants to rush to court. Mogoeng CJ, in support of the minority, stated the following:

“When approached for intervention, this Court’s role is to help only those who are constitutionally incapable of helping themselves. And, if the solution has already been provided and it is within the applicants’ remit to address their own problem effectively, this Court is duty-bound to let them do it themselves. Mindful of the dictates of separation of powers, this ought to be even more so when help-seekers are the bearers of the primary constitutional responsibility, in another arm of the State, to do what they seek to achieve through an order of this Court. The running of State affairs is a trilateral responsibility – shared by the Executive, the Legislature, and the Judiciary. It would be quite concerning if a court were to grant an order that does not serve or advance any practical purpose and in circumstances where that order deals with what has been achieved already or could be improved on if only cooperation were forthcoming from applicants, in a process that is already under way.”<sup>52</sup>

The evidence before court was to the effect that there are mechanisms in place through which the National Assembly can hold the President to account. Some of these mechanisms were already used to hold the President to account. Mogoeng CJ emphasizes that parties should come to court only when they have problems which they do not have solutions to. In the present case, the parties have solutions to their problems. The parties are aware that there are parliamentary processes and mechanisms of holding the President to account. Prior to coming to court, the applicants moved motions of no confidence in the President. These motions were debated and voted upon but defeated. A court approached under these circumstances should resist temptation to enter into the exclusive terrain of the legislative organ of the state.

The question that arises is whether the decision reached by the majority in this matter amounts to judicial overreach. In other words, does the majority judgment limit itself to the interpretation of section 89(1) of the Constitution or does it do more? The answer to this question lies in the determination of the issues before the Constitutional Court. The nature of relief sought by the applicants and the court’s answer thereto will assist in determining whether or not the majority judgment did more than what it was constitutionally mandated to do. The reliefs sought by the applicants were among others for the declarations that the first respondent dismally failed to institute necessary disciplinary processes to hold the President accountable for violating the Constitution in failing to implement the report of the Public Protector dated 19 March 2014. And for this failure, the respondent is found wanting for dereliction of the constitutional duty. Therefore, the applicants requested the court to direct the respondent to put necessary processes and mechanisms in place in holding the President accountable.

The majority judgment granted the relief sought by the applicants despite evidence having been presented that there were mechanisms and processes in place to hold the President accountable. A closer reading of the minority judgment reveals that the cause of complaint is that the majority judgment dictates to Parliament the manner in which Parliament should run its affairs. Among others, the majority judgment directs the National Assembly to make rules consistent with section 89(1) of the Constitution despite the fact that the National Assembly already has rules which can be and are

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<sup>51</sup> Ibid, para 223.

<sup>52</sup> Ibid, para 236.

used to hold the President to account.<sup>53</sup>

In *Magidiwana and Others v. President of the Republic of South Africa*,<sup>54</sup> the Constitutional Court refused to enter into the domain of the executive. In this case, the President had set up a commission of inquiry pursuant to the injuries sustained and killings that occurred at Marikana. The applicants sought funding from the Minister of Justice and Constitutional Development and the Legal Aid South Africa in respect of legal fees for participation in the commission. The Minister refused to fund because there was no legal framework in terms of which the ministry could fund the applicants. The Legal Aid South Africa also declined the request for legal aid on the bases that the legal Aid South Africa was operating under financial constraints and that their policy did not allow for commissions of inquiry. The applicants then brought an urgent high court application for the respondents to provide legal aid at state expense. The application was dismissed. The applicants then appealed to the Constitutional Court. The Constitutional Court recorded that “this means that unfairness may arise when adequate legal representation is not afforded. But this does not mean that courts have the power to order the executive branch of government on how to deploy state resources.”<sup>55</sup> Although the court understands that a party not afforded legal representation may suffer prejudice, it has to respect the decisions of the executive branch of the state in instances where the executive’s decision does not violate the Constitution.

## 7. Conclusion

This paper demonstrates that the doctrine of separation of powers was trampled upon in *EFF2*. The basis for this conclusion is that the majority judgment went beyond just interpreting the provisions of section 89(1). The Court dictated what steps the National Assembly must take over and above what the National Assembly already has as mechanisms and processes for holding the President accountable. It was not necessary for the majority court to order the National Assembly to put “requisite processes and mechanisms” in place to hold the President accountable because there is evidence on record that there are already mechanisms and processes through which the President was held accountable.

The rejection of the already existing mechanisms and processes by the majority judgment is mind boggling. This is so because the applicants’ complaint that the President violated the Constitution was already dealt with in various processes of the National Assembly. Opposition parties participated in the motions of no confidence in the President and in the motion for the removal of the President. What becomes more questionable on the part of the applicants is the fact that they approached the Constitutional Court after their motions of no confidence in and the removal of the President were tabled, debated and voted upon. This study agrees with the views held by the minority that the majority judgment encroached into the exclusive terrain of Parliament.

Therefore, the minority judgment found the majority judgment to be violating the separation of powers doctrine. According to Mogoeng CJ, the majority judgment encroached into the domain of Parliament by not observing the limits of the judiciary in the exercise of judicial powers. The intrusion by the judiciary into the exclusive domain of Parliament is constitutionally not permissible. To this end, the majority decision in *EFF2*<sup>56</sup> poses a threat to the principle of separation of powers in South Africa. The decision dictates how the National Assembly has to run its affairs. It does not only deal with the interpretation of the Constitution with regard to the responsibilities of the National Assembly, but it extends to dictating how these responsibilities should be carried out.

The Constitution requires that each organ of the state should exercise powers bestowed upon it and not usurp powers bestowed upon another organ of the state.

The judiciary went beyond exercising checks and balances permitted by the Constitution. The

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<sup>53</sup> Ibid, para 236.

<sup>54</sup> *Magidiwana and Others v President of the Republic of South Africa and Others* (CCT 100/13) [2013] ZACC 27; 2013 (11) BCLR 1251 (CC).

<sup>55</sup> Ibid, para 16.

<sup>56</sup> *Economic Freedom Fighters and others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC).

judiciary dictated to Parliament to exercise its (Parliament's) powers in a certain way. The judiciary did this despite the fact that the Constitution allows Parliament to make its own rules to govern its processes.

## 8. Recommendations

It is recommended that, whilst courts are the ultimate guardians of the Constitution, they must observe their own boundaries. Courts must not allocate to themselves superior wisdom of being able to run all state affairs in total disregard of the dictates of separation of powers. Courts should exercise their "checks and balances" powers but in doing so should be careful not to usurp powers constitutionally allocated to another organ of the state.

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

In exercising their power to observe constitutional compliance, courts should resist a temptation to dictate how other organs of the state should run their affairs. Courts should limit themselves to ordering constitutional compliance and leave the organs of the state concerned to exercise their constitutional powers. More importantly, organs of the state should respect the principle of the separation of powers and understand their own powers and functions.

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