



THE RULE OF LAW THROUGH JUDICIAL ACTIVISM IN SOUTH AFRICA

Paul S. Masumbe

*Doctor of Law, Senior Lecturer and Research Supervisor, Walter Sisulu University,
Mthatha, South Africa*

Siphokazi Qikani

Master of Law, Lecturer, Walter Sisulu University, Mthatha, South Africa

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ABSTRACT

The South African Courts frequently juggle different roles within the country's governance. This causes discomfort among some of the role players within the polity as it is seen as judicial encroachment in matters outside the court's role. In the South African context of separation of powers, the role of each branch of government is not always clearly defined, and now and again, it gains perspective as courts interpret parliamentary legislation and executive policies. The court's role and limitations often come under scrutiny. This causes conflicts between the respective branches of government regarding the extent of judicial intervention concerning other branches of government, namely the legislature and executive. This article examines the role and limits of judicial intervention in the terrain of other branches of government within the context of separation of powers as envisaged by the South African Constitution. The doctrine of separation of powers entails the establishment of a trilateral government. The envisaged government consists of the legislature, which enacts laws, an executive that recognises and executes the law and an independent judiciary to regulate public power when all else fails. The article attempts to clarify the place and role of the judiciary in upholding the rule of law in a constitutional state such as South Africa amid rampant complaints of judicial overreach.

INTRODUCTION

South Africa is a constitutional state founded on, among other things, the supremacy of the Constitution¹ and the rule of law.² The government consists of three branches of government within each sphere, namely: the legislature, the executive, and the judiciary. The legislative authority is vested in Parliament.³ Section 44⁴ confers on the National Assembly the power to amend the Constitution and pass legislation in harmony with and within the limits of the Constitution. Section 55⁵ gives power to the National Assembly to consider, pass, amend or reject any legislation before the Assembly. The National Assembly is further obligated to provide mechanisms to hold the executive accountable and to maintain oversight on the exercise of the executive functions.⁶ In this way, each branch will be a check to the others.⁷

The executive authority is vested in the President, Deputy President, and cabinet members, consisting of Ministers and Deputy Ministers. Their function is to implement the law, develop and implement national policy and any other functions conferred to them by the law and the Constitution.⁸

Judicial authority is vested in the courts. Courts are constitutionally obliged to be impartial in their interpretation and application of the law, which is subject only to the law and the Constitution. No person or organ of the state shall interfere with the functions of the judiciary.⁹ Organs of the state must, at all costs, protect the independence and dignity of the courts. Decisions and orders issued by courts are binding to all persons or organs of

state to which they apply.¹⁰

The Constitutional Court is the highest in the land¹¹ and holds exclusive jurisdiction on certain matters.¹² Section 172 of the Constitution provides for judicial review and empowers competent courts to declare invalid any law or conduct that conflicts with the Constitution.¹³ At the heart of this article is testing the perceptions of judicial overreach within the context of South Africa's separation of powers structure in an attempt to clarify its role in a constitutional democracy. There is an introduction, part one tackles judicial encroachment, part two discusses judicial role and review powers, part three addresses upholding the rule of law, part four discusses judicial activism and constraints, and the last part is the conclusion.

1. JUDICIAL ENCROACHMENT OR A MATURING DEMOCRACY

South Africa may, arguably, be the most litigious state. This has been profoundly experienced throughout the last decade, and the trend does not seem to be declining to date. As the country's democracy matures, there has been an increase in litigants approaching courts to have their grievances resolved. These cases range from intergovernmental disputes to private individuals approaching courts to seek different remedies against the government. This right is, of course, constitutionally granted by section 34 of the Constitution, which reads as follows:

Everyone has the right to have any disputes that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.¹⁴

The access to courts and enforcement of rights is further entrenched, to the extent of approaching the courts in the interests of other persons, in section 38 of the Constitution.¹⁵ It is, therefore, on

1 The Constitution of the Republic of South Africa. (1996). (Hereinafter referred to as the Constitution).

2 *Ibid.* Section 1(c).

3 *Ibid.* Section 42 states that Parliament consists of the National Assembly and the National Council of Provinces.

4 *Ibid.* Section 44 provides for National Legislative Authority.

5 *Ibid.* Section 55 provides for powers of the National Assembly.

6 *Ibid.* Section 55 (2).

7 Vile, M.J.C. (1967). Constitutionalism and the separation of powers (2nd ed.) Oxford University Press Liberty Fund (hereinafter referred to as Vile, 1967), 13. ISBN: 0865971749, 9780865971745.

8 Constitution. Section 85 provides for executive authority of the Republic.

9 *Ibid.* Section 165 (3).

10 *Ibid.* Section 165 provides for Judicial Authority.

11 *Ibid.* Section 167 (3) (a).

12 *Ibid.* Section 167 (4).

13 *Ibid.* Section 172 (1) (a).

14 *Ibid.* Section 34.

15 Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may

this basis that people are becoming more inclined to approach the courts whenever an infringement of rights or the law seems imminent.

The governance of South Africa, over the past decade, seems to be heavily reliant on courts. This trend has been evident in the range of court cases brought by various political parties represented in Parliament against the different government institutions. The most notable one was the *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*.¹⁶ The court was approached to review the conduct of the legislature, which was alleged to be failing its constitutional obligation of holding the executive accountable, particularly the President.¹⁷ This was the peak in the series of various litigations that concerned the governance of South Africa, to the extent that even the then Head of the Judiciary, Chief Justice Mogoeng Mogoeng, criticised the extent of judicial involvement in matters of the politically elected arms of the state. In this matter, he referred to the judgement as a ‘textbook case of judicial overreach’ that cannot be permissible in a constitutional state like South Africa.¹⁸ This criticism fuelled an already ripe public outcry about judicial overreach within the country’s governance. This is conspicuous among politicians who hold public offices whenever litigation is imminent.¹⁹

grant appropriate relief, including a declaration of rights.

The persons who may approach a court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

16 *Economic Freedom Fighters and Others v. Speaker of the National Assembly and Another* (2017) ZACC 47 (hereinafter referred to as EFF2).

17 This case is about Parliamentary mechanisms for holding the President of the Republic accountable and the constitutional obligation of the National Assembly to hold him to account. It is not about holding any President of the Republic accountable as such but about the National Assembly holding the current President of the Republic, President Jacob Zuma, accountable for his failure to implement the Public Protector’s remedial action contained in the Public Protector’s report dated 19 March 2014, EFF 2, para. 1.

18 EFF 2, para. 223 (dissenting).

19 ‘Abuse of courts or the last line of defence? As the judiciary is asked to make decisions about the nation’s direction, some accuse it of meddling in politics’ Genevieve Quintal,

In *New Nation Movement NPC and Others v President of the Republic of South Africa and Others*,²⁰ the Constitutional Court had to pronounce on the constitutional validity of the Electoral Commission Act.²¹ The Electoral Act was declared unconstitutional to the extent that it required candidates to be elected to the National Assembly and provincial legislatures only through their membership to political parties and not as independent candidates without party affiliations.²² It was further held that the right to contest the National Assembly and provincial legislature as independent candidates existed from the time the Constitution took effect. Although it was initially not exercisable, there was a ‘sunset to that bar’, and there is no reason not to allow individual adult citizens to exercise the right that has always been there but initially dormant and not exercisable because of the restriction.²³ The Constitutional Court, in its order, suspended the operation of invalidity for twenty-four months to allow the opportunity for Parliament to remedy the deficiency which gave rise to the unconstitutionality. The court is thus testing parliamentary legislation for possible violation of rights and declaring invalid provisions found wanting to refer the matter back to the legislature to remedy the constitutional defect.

Judicial intervention in the legislative process concerning the Electoral Act facilitated a progressive step towards advancing South Africa’s democracy in that, as a result of its pronouncement in *NPC v President*, the legislature affected an amendment. Thus, the Electoral Amendment Act²⁴ was enacted by the legislature and signed into law by the President of the Republic of South Africa. Among other things, the object of this Act is to:

To amend the Electoral Act, 1998...
insert certain definitions consequential to the expansion of this Act to include

see <https://www.businesslive.co.za/bd/opinion/2017-05-12-abuse-of-courts-or-the-last-line-of-defence> [last accessed in 5 April 2024].

20 *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* (CCT110/19) [2020] ZACC 11; 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC), (hereinafter referred to as *NPC v President*).

21 Act 73 of 1998 (hereinafter referred to as the Electoral Act).

22 *NPC v. President*, para. 128.

23 *NPC v. President*, para. 104 and 105.

24 Electoral Amendment Act 1 of 2023 (hereinafter referred to as the Electoral Amendment Act).

independent candidates as contesters to elections in the National Assembly and provincial legislatures;...to provide for the nomination of independent candidates to contest elections in the National Assembly and provincial legislatures; to provide for the requirements which must be met by persons who wish to be nominated as independent candidates; to provide for the inspection of copies of lists of independent candidates and accompanying documents; to provide for objections to independent candidates; to provide for the inclusion of a list of independent candidates entitled to contest elections; to provide for the appointment of agents by independent candidates; to provide that independent candidates are bound by the Electoral Code of Conduct; to provide for the return of a deposit to independent candidates in certain circumstances...²⁵

This was a significant milestone in South African democracy as it broadened the pool of participation of candidates outside partisan lines. This means that those who have been aggrieved by the conduct of political parties for the past thirty years of constitutional democracy now have a wider choice of independent candidates. One cannot help but be optimistic about the future of the South African Parliament. The seventh general election will take place in May 2024.

The South African context of separation of powers incorporates an element of checks and balances through the provisions of the Constitution. This demands that notwithstanding the separation of powers between the different government institutions, these institutions must still maintain an oversight role over one another. This constitutional system requires the legislature to hold the executive accountable for its exercise of public power, while the executive has a role in the enactment of legislation and the ultimate signing of bills into law in terms of section 79 of the Constitution. On the other hand, the courts are constitutionally empowered to review, declare and set aside any conduct that violates the Constitution. This also extends to the review of the conduct of any government institution or organs

25 See the preamble of the Electoral Amendment Act.

of state. Therefore, the checks and balances embodied in the South African Constitutional model of separation of powers doctrine anticipate the inevitable intrusion of one branch of government into the terrain of another. The doctrine's main objective is to control government by separating powers, however, the interaction between the respective branches of government occurs in a manner that avoids separating power so completely that the government is unable to take appropriate measures in the public interest.²⁶

In *United Democratic Movement v Speaker of the National Assembly and Others*,²⁷ the Constitutional Court reiterated the constitutionally entrenched oversight role over the conduct of the executive by the legislature and held that "Parliament's scrutiny and oversight role blends well with the obligations imposed on the Executive by section 92; it is provided for in section 55 of the Constitution".²⁸ In this case, Parliament was not clear about the extent of its powers to prescribe a vote by secret ballot when its members had to fulfil their constitutional mandate of holding the President to account; thus, removing him from office. This secret ballot vote may have been necessitated by the fact that the majority of the legislature were members of the ruling party, which was led by the President, and were simultaneously members of the Cabinet, which the President also headed. The Constitutional Court unanimously declared that the Speaker of the National Assembly has powers to prescribe vote by secret ballot, and this is a choice best left to the National Assembly through the Speaker to make in terms of section 57 (1) of the Constitution.

2. JUDICIAL ROLE AND REVIEW POWERS

Judicial review is the power conferred on courts by the Constitution to scrutinise and declare unconstitutional any legislation or any

26 *S v. Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC), (hereinafter referred to as *S v. Dodo*), para 16.

27 *United Democratic Movement v. Speaker of the National Assembly and Others* [2017] ZACC 21 (hereinafter referred to as *UDM 2017*).

28 *UDM 2017*, para. 39.

conduct that infringes on the rights enshrined in the Bill of Rights or otherwise offends against the provisions of the Constitution.²⁹ The fundamental nature of judicial review is that it empowers courts to declare invalid any law or conduct that is found to be in contravention of the Constitution; if declared invalid such legislation or action will have no legal force or effect.³⁰ Courts are tasked with an enormous role of checking the exercise of power and averting any abuse of power by the other two branches of government.³¹ However, the constitutional mandate of judicial review, placed upon the courts occasionally comes under public scrutiny. In *Doctors for Life International v Speaker of the National Assembly*,³² the Constitutional Court held that courts are given the responsibility of being the ultimate guardians of the Constitution and its values.³³ It was further held that judicial interference must only occur when mandated by the Constitution; the Constitution requires courts to ensure that all branches of government act within the law and fulfil their constitutional obligations.³⁴

The judiciary is one branch that exists and functions alongside politically elected legislative and executive branches of government within the whole structure of the separation of powers doctrine. When exercising its judicial review powers, the judiciary must maintain independence as it has to uphold a constitutional state and its proper governance. When all political accountability-ensuring measures provided for by the Constitution prove to be ineffective, courts are usually called upon to pronounce the right steps best suited to uphold and enforce the Constitution.³⁵ In re: Certification of the Constitution of the Republic of South Africa³⁶ it was held that “as the separation of

powers doctrine is not a fixed or rigid constitutional doctrine, it is given expression in many different forms and made subject to checks and balances of many kinds”.³⁷

3. UPHOLDING THE RULE OF LAW

Section 2 of the Constitution states that “this constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.³⁸ The rule of law, on the other hand, entrenches the principle of legality and abolishes arbitrary actions.³⁹ Therefore, the country is governed in accordance with the Constitution and whatever action is taken within the Republic must conform to the Constitution.

Two theories of constitutionalism emerge from the debate on judicial review, namely political and legal constitutionalism.⁴⁰ The former is premised on the notion that political decisions should be taken by politicians, in that political matters require political remedies and there is no room for the judiciary to adjudicate on such matters. Judicial intervention would take political matters out of the hands of politicians to the hands of judges.⁴¹ Legal constitutionalism, on the other hand, is premised on the notion that judicial review should be the tool for holding those exercising political power into account as the judiciary can isolate itself from public pressure.⁴² Political constitutionalism

29 Hoexter, C. (2012). *Administrative Law in South Africa* (2nd ed.) Juta & Co. (Hereinafter referred to as Hoexter 2012) 113.

30 De Vos. (2017). *The South African Constitutional Law in Context* (8th impression). Oxford University Press (hereinafter referred to as De Vos 2017), 69. ISBN: 9780195991376

31 De Vos. (2017), 69.

32 *Doctors for Life International v. Speaker of the National Assembly* 2006 6 SA 416 (CC), (hereinafter referred to as *Doctors for life*).

33 *Doctors for life*, para. 38.

34 *Doctors for life*, para. 37 and 38.

35 UDM 2017, para. 10.

36 Re: Certification of the Constitution of the Republic of South Africa [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), (hereinafter referred to as *Certifica-*

tion case).

37 Certification case, para. 111.

38 Constitution. Section 2 (the supremacy clause).

39 “It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given”. See: *Pharmaceutical Manufacturers Association of SA and Another in re: The Ex Parte Application of the President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), (hereinafter referred to as *Pharmaceutical Manufacturers Association*) para. 85.

40 Kawadza, H. (2018). *PER / PELJ (21) Attacks on the Judiciary: Undercurrents of a Political versus Legal Constitutionalism Dilemma?* (Hereinafter referred to as *Kawadza 2018*), 3. <http://dx.doi.org/10.17159/1727-3781/2018/v1i0a1696>.

41 Kawadza. (2018). fn. 23, above 4.

42 Kawadza. (2018). 4.

seems to be more popular among some politicians, however, such constitutionalism remains, nothing more than a theory. South Africa is a constitutional democratic state founded on constitutional supremacy and the rule of law.⁴³

All the South African government branches have one common goal, which is to uphold the Constitution. This should not be perceived as a competition between the branches; it requires all branches to work independently and collectively to give effect to the provisions of the Constitution.⁴⁴ The constitutional principles of cooperative government reiterate the nature of independence and interdependence between the three branches of government, and this is evident throughout the text of the Constitution. It demonstrates the kind of South African model of separation of power based on checks and balances, informed by the country's realities.

Judicial intervention on matters of other branches is a 'constitutional dialogue', where the court strikes down legislation and the legislature responds by amending it, or when the court invalidates executive decisions, and the executive responds by formulating new policy.⁴⁵ Indeed, the courts will and are still crafting a distinctively South African separation of powers.⁴⁶

4. JUDICIAL ACTIVISM AND CONSTRAINTS

In *S v Makwanyane and Another*,⁴⁷ the Constitutional Court was approached to test the constitutional validity of the death penalty provided for in Section 277(1) (a) of the Criminal Procedure Act No. 51 of 1977. The provisions of this section were declared unconstitutional, as they were in contravention of, *inter alia*, the right to life enshrined in section 9 of the Interim Constitution.⁴⁸ This landmark case marks the first

43 Constitution. Section 1 (c) (the founding values).

44 Ngcobo, J. (2011). 40.

45 Ngcobo, (2011). 42.

46 *De Lange v. Smuts* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC), (hereinafter referred to as *De Lange*) para. 60.

47 *S v. Makwanyane and Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), [1996] 2 CHRLD 164, 1995 (2) SACR 1 (CC), (hereinafter referred to as *Makwanyane*).

48 *Makwanyane*, para. 154.

opportunity for the judiciary to test parliamentary legislation for constitutional validity. It further illustrates the critical role of courts in exercising judicial review on laws that may be inconsistent with the Constitution and protecting the rights of individuals.

In *Mazibuko v Sisulu and Another*,⁴⁹ the courts pronounced judicial restraint and held that courts should not be drawn into political disputes, resolutions of which properly fall on another institution established under the Constitution; political issues should be resolved at the political level.⁵⁰ From this, it may be deduced that courts are constitutionally mandated to ensure their judicial oversight over other branches of government within the constitutional boundaries. This demonstrates reluctance on the side of the judiciary not to allow other organs to favour litigation over internal settlement procedures.⁵¹

The exercise of public power by government functionaries must be rationally connected to the purpose of that power and not be arbitrarily exercised.⁵² It follows then that if, when viewed objectively, the exercise of power is rational and within the authority of such functionary a court cannot intervene.⁵³ In the exercise of their powers, courts need to pay due regard to the role of the executive and the legislature in a democracy, and when it is appropriate to do so, must make orders that affect policy as well as legislation.⁵⁴ However, courts must always bear in mind that policy should be flexible and can be changed whenever the executive deems it fit to do so, as long as such change is consistent with the Constitution and the law. Therefore, court orders affecting policy choices should not be formulated in a manner that precludes the executive from exercising such

49 *Mazibuko v. Sisulu and Another* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC), (hereinafter referred to as *Mazibuko*).

50 *Mazibuko*, fn. 35, above para. 83.

51 O'Regan, J. (2005). *Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution* PER/PELJ (8)1, (hereinafter referred to as *O'Regan 2005*), 131. ISSN 1727-3781.

52 *Pharmaceutical Manufacturers Association*, para. 85.

53 *Pharmaceutical Manufacturers Association*, para. 90.

54 *Minister of Health and Others v. Treatment Action Campaign and Others (No 2) (CCT8/02)* [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033, (hereinafter referred to as *TAC*) para. 113.

legitimate choices.⁵⁵ Courts are mandated by the Constitution to be impartial arbiters who must apply the law without fear, favour or prejudice, subject only to the law and the Constitution.⁵⁶ The doctrine of separation of powers should not be construed as rendering courts ineffective when confronted with a constitutional challenge concerning executive action or legislation enacted by parliament.⁵⁷

Judicial independence is central to the constitutional arrangement of South Africa and is implicit in the rule of law and separation of powers, which are both foundational to the Constitution. The independence of courts is reinforced by the provisions of sections 165(3) and (4) of the Constitution.⁵⁸ Section 165 (3) states that “no person or organ of state may interfere with the functioning of the courts” and subsection four states that “organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts”.⁵⁹ Institutional independence of the judiciary is a constitutional norm and principle that goes beyond the Bill of Rights and therefore not subject to limitation.⁶⁰ Judicial independence is fundamental and indispensable to the effective functioning of courts in a constitutional democracy based on the rule of law.⁶¹

In *Matatiele Municipality and Others v President of the Republic of South Africa and Others*,⁶² it was held that the provisions of the Constitution must be construed purposively and in the light of the Constitution as a whole, taking into

account fundamental principles of the country’s democracy.⁶³ Courts should be less emphatic about the doctrine of separation of powers and more about how the judiciary should work within the boundaries of the doctrine to promote a better dialogue between the legislature, the executive and the judiciary. Furthermore, this mission should be aimed at advancing the principle of democratic accountability of public institutions and their commitment to constitutional rights.⁶⁴

The judiciary’s role is not to ‘second guess’ the legislative and executive branches of government or interfere in matters that are not their concern. Their task is to give meaning to the Constitution and, where possible, to carry this task in a manner that is not detrimental to effective governance.⁶⁵ This role extends to helping those who are constitutionally incapable of helping themselves; if the solution has already been provided by a branch of government concerned, and it is within their obligation to address their problem effectively, the judiciary is duty-bound to let them do it themselves. The running of state affairs is a trilateral responsibility shared by the executive, the legislature, and the judiciary.⁶⁶

CONCLUSION

The Constitution entrenches functional independence and interdependence for the various branches of government, accompanied by checks and balances. All branches of government and organs of state ought to acknowledge and respect this constitutional arrangement. All three branches of government have a common mission of upholding the Constitution; they need not be at war with each other but independently and collectively work towards giving effect to the provisions of the Constitution.⁶⁷ The judicial branch is tasked with the responsibility of safeguarding the Constitution

55 TAC, fn. 63, above para. 114.

56 Constitution. Section 165.

57 *The Relationship between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What About Separation of Powers?* DM Davis, PER / PELJ 2012(15)5 at 2 (hereinafter referred to as Davis (2012) 9). <http://dx.doi.org/10.4314/pelj.v15i15.20>.

58 *Van Rooyen and Others v. The State and Others* 2002 (8) BCLR 810 (CC), (hereinafter referred to as Van Rooyen) para. 17.

59 Constitution. Section 165 (3) and (4).

60 *Van rooyen*, para. 35.

61 *De Lange*, para. 59.

62 *Matatiele Municipality and Others v. President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC), (hereinafter referred to as *Matatiele* 2).

63 *Matatiele* 2, para. 36.

64 *Davis*. (2012). 10.

65 *Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others* 1995 (10) BCLR 1289; 1995 (4) SA 877, (hereinafter referred to as *Executive Council Western Cape v. President*) para. 99.

66 *EFF* 2, para. 236.

67 *Ngocobo, J.* (2011). 40.

as courts are dubbed as ‘the ultimate guardians of the Constitution’.⁶⁸ The courts must ensure that the other two branches of government fulfil the obligations imposed by the Constitution.⁶⁹ In the same vein, the judiciary must apply judicial restraint and have a proper conception of their constitutional limits.⁷⁰ This is the only manner in which South Africa’s constitutional democracy can be preserved.

South Africa has come a long way since the abolition of apartheid in 1994, and everyone should

learn from the mistakes that have been experienced throughout its democratic development. The past decade has been the epitome of a truly developing democracy, one with many mistakes from which lessons must have been learnt. The institutions created by the Constitution to establish and maintain this democracy must be protected at all costs, of course, within the constraints of the Constitution. Public office bearers must always promote the spirit, objects, and purports of the Constitution. No person, from whatever social or professional status, must attempt to weaken government institutions to advance their ulterior motives. The sovereignty of every state depends on a functioning and independent judiciary that functions within the boundaries of the Constitution.

68 In *Glenister v. President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC), (hereinafter referred to as *Glenister*) para. 33.

69 *Doctors for life*, fn. 9, above para. 38.

70 *Doctors for life*, para. 37.

BIBLIOGRAPHY

Books:

1. De Vos. (2017). *The South African Constitutional Law in Context* (8th impression) Oxford University. ISBN: 9780195991376.
2. Vile, M. J. C. (1967). *Constitutionalism and the separation of powers* (2nd ed.) Oxford University Press Liberty Fund. ISBN: 0865971749, 9780865971745.
3. Hoexter, C. (2012). *Administrative Law in South Africa* (2nd ed.) Juta & Co. ISBN: 0702194271, 9780702194276.

Journal articles:

1. Davis, D.M. (2012). *The Relationship between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What About Separation of Powers?* PER / PELJ, (15)5. <http://dx.doi.org/10.4314/pelj.v15i5.20>.
2. Ngcobo, S. (Former Chief Justice of the Republic of South Africa). (2010). *South Africa’s Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers*, Annual Human Rights Africa, STELL LR 2011 1. DOI:10.25159/2522-6800/3572.
3. Kawadza, H. (2018). *PER / PELJ (21) Attacks on the Judiciary: Undercurrents of a Political versus Legal Constitutionalism Dilemma?* <http://dx.doi.org/10.17159/1727-3781/2018/v1i0a1696>.
4. O’Regan, J. (2005). *Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution*. PER/PELJ (8)1. ISSN 1727-3781.

Legislation:

1. The Constitution of the Republic of South Africa [1996].
2. Electoral Amendment Act [2023].

Cases:

1. *Glenister v. President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC).
2. *De Lange v. Smuts* [1998] (7) BCLR 779 (CC); 1998 (3) SA 785 (CC).
3. *S v. Makwanyane and Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), [1996] 2 CHRLD 164,

- 1995 (2) SACR 1 (CC).
4. Van Rooyen and Others v. The State and Others [2002] (8) BCLR 810 (CC).
 5. Matatiele Municipality and Others v. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC).
 6. Mazibuko v. Sisulu and Another [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC).
 7. Minister of Health and Others v. Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033.
 8. Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others [1995] (10) BCLR 1289; 1995 (4) SA 877.
 9. Doctors for Life International v. Speaker of the National Assembly [2006] 6 SA 416 (CC)
 10. United Democratic Movement v. Speaker of the National Assembly and Others [2017] ZACC 21.
 11. Pharmaceutical Manufacturers Association of SA and Another in re: The Ex Parte Application of the President of the Republic of South Africa and Others [2000] (2) SA 674 (CC).
 12. S v. Dodo [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC).
 13. Re: Certification of the Constitution of the Republic of South Africa [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).
 14. Economic Freedom Fighters and Others v. Speaker of the National Assembly and Another [2017] ZACC 47.

Internet sources:

1. <https://www.businesslive.co.za/bd/opinion/2017-05-12-abuse-of-courts-or-the-last-line-of-defence> [Last accessed: 15 March 2024].