

## **Constitutional law 101: The doctrine of the separation of powers**

*National Director of Public Prosecutions and Others v Freedom Under Law (SCA)*  
(unreported case no 67/14, 17-4-2014)

By Kaelin Govinden

One of the first things that you learn when you enter law school is that our democratic system of government is characterised by a system of checks and balances and a separation of powers between the legislature, the executive and judiciary. This is to ensure accountability, responsiveness and openness, and to prevent these three branches of government from usurping power from one another. This division of state power between three distinctive institutions was introduced by Montesquieu, who is generally credited with devising the modern concept of separation of powers. For Montesquieu, the separation of powers doctrine was foundational to any constitution that sought to prevent the abuse of power and advance personal freedom:

'[There is no] liberty if the power of judging is not separate from legislative power and from executive powers. ... All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: That of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.' (S Woolman and M Bishop *Constitutional Law of South Africa* 2ed (Cape Town: Juta 2013) at 12-6).

On 17 April 2014 the Supreme Court of Appeal (SCA) delivered judgment in the matter of *National Director of Public Prosecutions and Others v Freedom Under Law (SCA)* (unreported case no 67/14, 17-4-2014) between the National Director of Public Prosecutions (appellant) and Freedom Under Law (respondent) and, in doing so, provided a subtle reminder of this fundamental principle of our constitutional democracy.

The first appellant in the matter was the National Director of Public Prosecutions (NDPP), advocate Nomgcobo Jiba, who was appointed on 28 December 2011 as the acting NDPP. The second appellant was advocate Lawrence Mrwebi (Mrwebi) who was appointed on 1 November 2011 as Special Director of Public Prosecutions as the Head of the Specialised Commercial Crimes Unit (SCCU) of the National Prosecuting Authority. The third appellant was the National Commissioner of the South African Police Service (the Commissioner), at the time of judgment being General Mangwashi Victoria Phiyega. The fourth appellant, who took centre stage in this matter, was Lieutenant General Richard Mdluli (Mdluli) who held the office of National Divisional Commissioner: Crime Intelligence in the South African Police Service (SAPS). The respondent, Freedom Under Law, is a non-profit company actively involved, *inter alia*, in the promotion of democracy and the advancement of respect for the rule of law in the Southern African region.

For purposes of this discussion, it is not necessary to present a detailed account of the facts. Suffice to say that the respondent launched an application in the court *a quo* seeking an order reviewing and setting aside the following four decisions –

- the decision made by Mr Mrwebi to withdraw the charges of fraud and corruption that had been made against Mr Mdluli;
- the decision by Mr KMA Chauke, the Director of Public Prosecutions South Gauteng, to withdraw the murder and related charges made against Mr Mdluli;
- the decision by the Commissioner to terminate the disciplinary proceedings that had been instituted against Mr Mdluli; and
- the decision by the Commissioner to reinstate Mr Mdluli to office as Head of Crime Intelligence following his suspension.

In addition to the orders setting aside the four impugned decisions, the respondent also sought mandatory interdicts directing –

- the prosecution authorities to reinstate the criminal charges against Mr Mdluli and to ensure that the prosecution of these charges are enrolled and pursued without delay; and
- the Commissioner to take all steps necessary for the prosecution and finalisation of the disciplinary charges.

The court *a quo* did not limit itself to the setting aside of the impugned decisions. In addition it granted the mandatory interdicts as sought by the respondents. Both the NDPP and the Commissioner argued that these mandatory interdicts were inappropriate transgressions of the separation of powers doctrine. The SCA agreed with these contentions, explaining as follows:

*'[The] doctrine [of separation of powers] precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime, while the Commissioner of Police is the authority mandated to manage and control the SAPS. As I see it, the court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons ... The setting aside of the withdrawal of the criminal charges and the disciplinary proceedings have the effect that the charges and the proceedings are automatically reinstated and it is for the executive authorities to deal with them. The court below went too far'* (my emphasis).

The power conferred on our courts is irrefutably substantial. However, this judgment by the SCA is a clear reminder that the power conferred on our courts should not be overstated as our judiciary is in the main limited to determinations of the constitutionality of laws made by the legislature and to the judging of the crimes or the disputes of individuals. This judgement also serves as a subtle reminder to all attorneys and legal advisers not only to consider carefully the relief being sought by their clients prior to instituting legal proceedings, but also to bear in mind and respect the limitation of powers placed on our courts in respect of the relief they may be entitled to provide in light of the facts and circumstances placed before them.

The independence of the judiciary entails more than merely an absence of undue influence, interference or control with the judicial function of the courts, but also contemplates a genuine accountability and meaningful relationship between the judiciary and the executive under our law and the Constitution. While judicial activism will no doubt to some extent encroach on government policy and performance, the judiciary, like all other organs and institutions established under our Constitution, remains accountable under the law and, as demonstrated by the SCA in this case, must adhere to and respect the doctrine of separation of powers and must function in unison with other organs of state.

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