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Justice Sandile Ngcobo and the Judicial Reinforcement of Intergovernmental Relations in South Africa

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ABSTRACT

The importance of co-operative governance is strengthened by the authority vested in the judiciary—to ensure the judicial review of any conduct, rule or law that runs contrary to the prescripts of the envisaged collaborative relations. Of particular significance is the establishment of the Constitutional Court, where retired Chief Justice Ngcobo distinguished himself as an independent thinker, within the limitations of judicial authority, in advancing the principles of co-operative governance. His rich intellect demonstrates an alternative way of arriving at the constitutionalised South African jurisprudence that has spanned twenty-two years of democracy in regulating public authority. This article reviews and provides an account of Justice Ngcobo's selected case law in the judicial enforcement of the principles of co-operative governance. The objective is to give impetus to the advancement of an unwavering commitment and a well thought-out, futuristic and progressive outlook on the evolution of South African jurisprudence. These were motivated by a zeal to establish his deep-rooted philosophy that informed his thoughts in judicial reasoning. The motivation raises a question that is intended to help determine whether his contribution has shifted the culture of dictatorship of the pre-democratic dispensation to the affirmation of the principles of constitutional supremacy in a way that befits the general populace affected by the different spheres of government.

Keywords: co-operative government; constitutionalism; democracy; legislative competence; foundational values

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Introduction

This article reviews and provides an account of Justice Sandile Ngcobo's selected judgments that exemplify his approach to the evolution of the judicial enforcement of the principles of co-operative governance in South Africa. The cases included in this article are limited to *Executive Council, Western Cape v Minister, Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others*[1] and *DVB Behuising (Pty) Limited v The North West Provincial Government & Others*.[2] The objective is to give impetus to the advancement of an unwavering commitment and progressive outlook on the evolution of South African jurisprudence. This is motivated by the necessity to exalt Justice Ngcobo's deep-rooted philosophy that informed his judicial reasoning—in order to determine the impact of his contribution to the evolution of the principles of co-operative governance in a way that befits the general populace affected by the different spheres of government. In essence, Justice Ngcobo's approach promotes mutual respect and integrity in constitutional adjudication in promoting the principles of co-operative governance.

The article begins by providing a conceptual analysis of the principles of co-operative governance in the regulation of public authority. This is followed by background on the selected cases, which provide a foundation for the assessment of his approach in his judicial reasoning. The article concludes by highlighting Justice Ngcobo's judicial identity regarding the indispensable contribution he has made to the jurisprudence that has shaped the future of South Africa, as envisaged in the country's transformative Constitution.[3]

South African Perspective on Co-operative Governance

Interjection of history into the modern system of co-operative governance

The importance of co-operative governance is traceable to the existence of humankind, which has spanned more than 100 000 years and where the system relied heavily on the co-operation of most, if not all, of the persons and institutions under a specific

1 1999 (12) BCLR 1360 (CC).

2 2000 (4) BCLR 347 (CC).

3 Dikgang Moseneke, 'Reflections on the South African Constitutional Democracy – Transition and Transformation' (Mistra – TMALI – UNISA Conference: 20 Years of South African Democracy: So where to now? 12 November 2014) <https://constitutionallyspeaking.co.za/dcj-moseneke-reflections-on-south-african-constitutional-democracy-transition-and-transformation/> accessed 17 November 2017. Moseneke (former Deputy Chief Justice of the South African Constitutional Court) emphasised the transformative nature of the Constitution.

jurisdiction or other foreign entities.[4] For example, the system of kings and chiefs that defines the African mechanism of governance in South Africa ensured that all people under its authority had access to and the use of all the resources within its jurisdiction. This sphere of governance works exactly the same as, if not better than, the Greek notion of governance—depending on context. As a result, contemporary Africa, to a greater degree, has some mixed versions of African forms of governance and a European system of governance. For civilisation to have existed in relative peace and harmony for more than 100 000 years, it would have had to align itself co-operatively with the hierarchy and structures in society that governed themselves. It is therefore important to note that modern co-operative governance owes its origin to the complex and sophisticated regulatory framework of antiquity.[5]

The encounter of Africans with Europeans has, however, disrupted and eradicated clear principles of African co-operative governance. It is in this light that Justice Ngcobo's jurisprudence is essential in elucidating constitutional values that are inclusive for all South African societies, and their rich history and experience. Therefore, given the legacy of parliamentary sovereignty during the colonial and apartheid governments,[6] and given the experience of the post-apartheid South African government during the period when Justice Ngcobo was appointed a judge and especially of the Constitutional Court (the Court)[7] when the democracy was still in its infancy, the state was faced with the daunting task of transforming the system of governance in South Africa.[8] South Africa's transition to democracy, which was reached at the multi-party negotiations, saved the country from the brink of collapse and produced strategic forms of regulating public authority.[9] This meant striving towards the transformation of governance, which was to be achieved through a system of co-operative governance. The foresight brought to the system, was based on several assumptions:

> No single [sphere] can effect change;
> Complementary and competing interests must be recognised;

4 South African Government, 'History', Discussing Early Inhabitants in South Africa <http://www.gov.za/about-SA/history#inhabitants> accessed 17 November 2017.

5 ibid.

6 Israel Tsatsire, Kishore Raga, John D Taylor and Eric Nealer, 'Historical Overview of Specific Local Government Transformatory Developments in South Africa' (2009) 57 New Contree 129–147.

7 Appointed in 1999, and as Chief Justice in October 2009, succeeding the former and late Chief Justice Pious Langa.

8 See Vusi Gumede, 'Public Policy Making in Post-apartheid South Africa: A Preliminary Perspective' (2008) 38 (2) Africanus 7–23.

9 Antoinette Handley, Christina Murray and Richard Simeon, 'Learning to Lose, Learning to Win: Government and Opposition in South Africa's Transition to Democracy' in Edward Friedman and Joseph Wong (eds), *Political Transitions in Dominant Party Systems: Learning to Lose* (Routledge 2008) 191.

> New structures should be established to promote co-operative behaviour among [the sphere]; and
> The responsibilities of different partners need to be clarified.[10]

In giving effect to these assumptions and in order to transform the system of governance, the process of transition took place through ensuring that the final Constitution was consistent with thirty-four constitutional principles agreed upon by the various parties at the multiparty negotiating process. These principles were enshrined in Schedule 4 of the Interim Constitution of the Republic of South Africa Act 200 of 1993. Most of these principles dealt with the structure of government, which meant that the:

> Government shall be structured at national, provincial and local levels.
> Powers and functions of the various spheres had to be defined in the final Constitution, and they could not be substantially less or substantially inferior to those provided for in the interim Constitution.
> Functions of the national and provincial levels of government had to include exclusive and concurrent powers.
> Allocation of a competence to either the national or provincial spheres had to be in accordance with listed criteria.
> [N]ational sphere was precluded from exercising its powers if it encroached on the geographical, functional and institutional integrity of the provinces.
> Disputes concerning legislative powers allocated by the Constitution concurrently to the national and provincial spheres, had to be resolved by a court of law.[11]

These principles endorse the whole process of transforming the system of governance, which is traceable to those of constitutionalism in the Constitution of the Republic of South Africa, 1996 (the Constitution). Constitutionalism signified a change in how the structure of governance among the spheres of government should be regulated within the framework of the new constitutional democracy. As expressed by De Vos and Freedman, constitutionalism entails the following characteristics:

> First, constitutionalism is concerned with the formal and legal distribution of power within a given political community in which a government is established by a written constitution.
> Second, constitutionalism provides for the establishment of the institutions of government such as the legislature, executive and the judiciary.
> Third, constitutionalism brings about the creation of binding rules for the regulation of the political community, its institutions of governance and the governed.
> Fourth, constitutionalism plays an important role in determining the nature and basis of relations that exist between institutions of governance and those they govern.

10 Nico Cloete, Tembile Kulati, Teboho Moja and Nic Olivier, *Challenges of Cooperative Governance* (Centre for Higher Education Trust 2003) 5 <http://www.chet.org.za/books/challenges-co-operative-governance> accessed 17 November 2017.

11 Pierre de Vos and Warren Freedman (eds), *South African Constitutional Law in Context* (Oxford University Press 2014) 270–271 [footnotes omitted].

> Last, and implicit in the previous points, constitutionalism prescribes limits on the exercise of state power and provides mechanisms to ensure that the exercise of power does not exceed the limits set by the constitution.[12]

These principles mean that the Constitution underpins a new model of governance which embodies the ideals of the new constitutional dispensation. The structuring and functions of the spheres at national, provincial and local governments in Chapter 3 of the Constitution, and as endorsed in the Intergovernmental Relations Framework Act 13 of 2005,[13] demonstrate the quasi-federal form of government which South Africa envisages.[14] This demonstrates the significance of the system of co-operative governance that seeks to facilitate the integration and alignment of development in all three spheres of governance.[15] Such alignment is informed by the character of the spheres, as they are described as 'distinctive, interdependent and interrelated',[16] without each trampling on the domain of the other.[17] The nature of the relationship, as characterised in section 40, was given content by Nzimakwe and Ntshakula, who classify the features of co-operative governance as 'Distinctiveness which suggests the specificity that ensures that roles are best executed at a selected sphere of government';[18] interdependence entrenches co-operation between the spheres, which can 'be done through communication, consultation, coordination and assisting each other in different ways [because] no sphere can operate in isolation';[19] and interrelationship, which envisages a holistic system of government on which 'a solid and unified government' can flourish.[20]

12 De Vos and Freedman (n 11) 38–39.

13 The Long Title provides the purpose of this Act as follows:
To establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith. Other pieces of legislation regulating the system of cooperative governance include but are not limited to the Organised Local Government Act 52 of 1997; Intergovernmental Fiscal Relations Act 97 of 1997; and the Municipal Systems Act 32 of 2000.

14 Phephelaphi Dube, 'The Constitutional Case for Co-operative Government' (2015) <www.cfcr.org.za/index.php/docs-speeches?download...cooperative-government> accessed 17 November 2017.

15 Onkgopotse Madumo, 'Developmental Local Government Challenges and Progress in South Africa' (2015) 23 (2) Administratio Publica 158.

16 Section 40(1) of the Constitution, 1996, which provides that 'in the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.'

17 Section 40(2) of the Constitution, 1996, which provides that 'all spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.'

18 Thokozani I Nzimakwe and Thembi Ntshakala, 'Intergovernmental Relations and Cooperative Governance: Two Sides of the Same Coin' (2015) 50 Journal of Public Administration 831.

19 Nzimakwe and Ntshakala (n 18) 831–832.

20 ibid 832.

These features were earlier given judicial meaning and endorsed in *Premier of the Province of the Western Cape v The President of the Republic of South Africa*,[21] when the Court gave perspective to these concepts and held that:

> Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is "one sovereign, democratic State", and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government.[22]

Affirming the nature of the relationships between the spheres, the principles of co-operative government are entrenched in section 41(1) of the Constitution.[23] These principles are given credence by De Waal and Currie, who contend that

> the fact that the drafters of the 1996 Constitution opted for the system of co-operative governance envisioned the influence that the interpretation of the constitutional provisions may confer on the powers of the various spheres of government.[24]

It is therefore without doubt that section 41(1) endorses the

> entrenchment of the distribution of authority among the spheres; ensure the independence of each sphere to exercise its powers and perform its functions within the parameters of its defined space; reinforce the imposition of a duty on each sphere not to assume any power or function

21 1999 (3) SA 657 (CC).

22 ibid para 50.

23 Section 41(1) provides that:
Principles of co-operative government and intergovernmental relations 41. (1) All spheres of government and all organs of state within each sphere must—
(*a*) preserve the peace, national unity and the indivisibility of the Republic;
(*b*) secure the well-being of the people of the Republic;
(*c*) provide effective, transparent, accountable and coherent government for the Republic as a whole;
(*d*) be loyal to the Constitution, the Republic and its people;
(*e*) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(*f*) not assume any power or function except those conferred on them in terms of the Constitution;
(*g*) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
(*h*) co-operate with one another in mutual trust and good faith by—
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.
See also Timothy Layman, *Intergovernmental Relations and Service Delivery in South Africa: A Ten-Year Review* (August 2003) <http://sarpn.org/documents/d0000875/docs/Layman,%20Tim.pdf> accessed 17 November 2017.

24 Iain Currie and Johan de Waal, *The New Constitutional and Administrative Law* (Juta 2001) 121.

> except those conferred on it in terms of the Constitution and uphold the conferring of extensive powers on parliament including the power to pass legislation on "any matter," excluding only those matters that fall within the functional areas of exclusive provincial competence set out in Schedule 5.[25]

An examination of this relationship, as deduced from section 41(1) of the Constitution, entails, first, the development of intergovernmental forums at national and provincial level, and dealing with issues of alignment, integration and coherence. Secondly, there is the adoption of systems and processes in terms of which national, provincial and local governments pursue their common objectives. Finally, there is engagement in joint work and common projects to give effect to common objectives.[26] This reinforces the type of co-operative governance between the three spheres of government that requires each of them to fulfil a specific role. According to Malan, this system

> does not ignore differences of approach and viewpoint among the different spheres but encourages healthy debate to address the needs of the people they represent by making use of the resources available to government.[27]

Therefore, one of the many distinguished cases that dealt with the core content of the principles of co-operative governance is *Uthukela District Municipality & Others v President of the Republic of South Africa & Others*.[28] The case emanated from a legal dispute which arose between the two organs of State, where the Court had to clarify what the principles of co-operative government require of the State and the courts. In laying the foundation for its decision, the Court held that

> the spheres must foster co-operation and they have an obligation to avoid litigating against each other because the gist of Chapter 3 is to ensure the resolution of disputes at political level rather than through adversarial litigation.[29]

The Court affirmed its contention and held that the

> court will rarely decide intergovernmental disputes in fostering co-operation unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level.[30]

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25 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para 43. See also Warren Freedman, 'The Legislative Authority of The Local Sphere of Government to Conserve and Protect the Environment: A Critical Analysis of *Le Sueur v eThekwini Municipality* [2013] ZAKZPHC 6 (30 January 2013)' (2014) 17 PER/PEJL 569; and *Premier of the Western Cape* (n 21) paras 51–53.

26 Nzimakwe and Ntshakala (n 18) 826.

27 Lianne Malan, 'Intergovernmental Relations and Co-operative Government in South Africa: The Ten-year Review' (2005) 24 Politeia 229. See also R Malherbe, 'The Constitutional Distribution of Powers' in B de Villiers (ed), *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice* (Konrad-Adenauer-Stiftung 2008) 19–28.

28 2003 (1) SA 678 (CC).

29 *Uthukela* (n 28) para 13.

30 ibid para 14.

Without engaging with the argument of the deference of judicial authority to political appointees, as has been argued elsewhere,[31] the Court held that apart from avoiding litigation against each other, section 41(3) imposes a two-fold obligation on the organs of the State that requires them to 'make every reasonable effort to settle the dispute through the means and procedures provided for' and to 'exhaust all other remedies before [approaching] the courts'.[32]

It is this background that shapes the principles of co-operative government, which are strengthened by the authority vested in the judiciary to ensure the judicial review of any conduct, rule or law that runs contrary to the prescripts of the envisaged collaborative relations.[33] Of particular significance is the establishment of the Constitutional Court,[34] where Justice Ngcobo distinguished himself as an independent thinker, within the limitations of judicial authority, in advancing the principles of co-operative governance.

31 See Nomthandazo Ntlama, 'The Deference of Judicial Authority to the State' 2012 Obiter 135–144.

32 See *Uthukela* (n 28) para 19.

33 See s 165, read with s 172 of the Constitution, 1996. Section 165 provides that:

(1) The judicial authority of the Republic is vested in the courts.
(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) 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.
(5) An order or decision issued by a court binds all persons to whom and of organs of state to which it applies.
(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

Section 172 provides that:

(1) When deciding a constitutional matter within its power, a court:
(*a*) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(*b*) may make any order that is just and equitable, including:
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
(2)(*a*) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
(*b*) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
(*c*) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
(*d*) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

34 See s 167.

His rich intellect demonstrates an alternative way of arriving at the constitutionalised South African jurisprudence that has spanned twenty-two years of democracy in regulating public authority. The selected cases below indicate how the Chief Justice Sandile Ngcobo has advanced the afore-mentioned discussion relating to the advancement of South Africa's jurisprudence on co-operative government in the new constitutional democracy.

Background Facts of the Cases: Putting into Motion the Wheels of Co-operative Governance in Constitutional Adjudication

Executive Council, Western Cape v Minister, Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others[35]

These cases arose out of the challenge between the provincial governments of the Western Cape and KwaZulu-Natal and the national government over the constitutionality of certain provisions of the Local Government: Municipal Structures Act 117 of 1998 ('the Structures Act'), and the latter case as a whole relates to the authority to establish municipalities and their internal structures. It was contended that the Structures Act was in conflict with Chapter 7 of the Constitution, which deals with local government.[36] The applicants sought direct access to the Court, which they were granted because the matter was of national importance and because there were pending local government elections that could not be held later than 1 November 2000.[37] Despite the urgency of the matter, the main legal questions were whether

> the provisions of the Structures Act encroache[d] on the powers of the provinces [with particular reference] to the provincial power to establish municipalities in terms of section 155(6) of the Constitution and that the Structures Act impinged on the constitutional powers of the municipalities to elect executive committees or other committees in violation of section 160(1) (*c*) and the regulation of their internal affairs in terms of section 160(6) of the Constitution.[38]

In dealing with these questions, the Court first considered the concurrency argument made by the national government on its legislative capacity with the provincial and local governments—in all respects except for those excluded in Schedule 5.[39] The Court rejected the concurrency argument as being inconsistent with the provisions of

35 1999 (12) BCLR 1360 (CC) ('*Western Cape*').
36 ibid paras 1–6.
37 ibid para 11.
38 ibid para 22.
39 ibid para 23.

section 164[40] because the power to sanction subordinate legislation is an incident of the legislative power and does not require a provision such as section 164.[41] The Court consolidated the rejection of the concurrency argument by drawing certainty from the provisions of sections 151(3) and 155(7), which affirm that the powers and functions of municipalities are subject to supervision by national and provincial governments, and national and provincial legislation takes precedence over municipal legislation.[42] In turn, these powers must, however, be 'respected by the national and provincial governments which may not use their powers to compromise or impede a municipality's ability or right to exercise its powers or perform its functions.' The duty is further placed on national and provincial governments 'by legislative and other measures' to support and strengthen the capacity of municipalities to manage their own affairs, and on an obligation imposed by section 41(1)(*g*) of the Constitution on all spheres of government to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. The Constitution therefore protects the role of local government and places certain constraints on the powers of parliament to interfere with local government decisions.[43] The Court then acknowledged the difficulty associated with the issues raised, as they were not without substance, because they involved matters of national importance regarding the authority to establish municipalities. However, it still established that even though the provinces may have been successful with many of the important issues, they failed in their challenge of the constitutionality of the Structures Act as a whole, and on their principal assertion that the power to apply the criteria was a provincial competence.[44]

DVB Behuising (Pty) Limited v The North West Provincial Government

This case emanated from the constitutional challenge of the legislative competence of the North West province relating to the enactment of the North West Local Government Laws Amendment Act 7 of 1998,[45] which purported to repeal Proclamation R293 of 1962[46] in its entirety.[47] The Proclamation gave effect to the Black Administration Act 38 of 1927 by providing for the establishment of a special kind of township by the

40 The section provides that 'any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.'

41 *Western Cape* (n35) para 28.

42 ibid para 29.

43 ibid para 29.

44 ibid para 138.

45 Hereinafter 'Amendment Act 7'.

46 Hereinafter 'Proclamation'.

47 *DVB Behuising (Pty) Limited v The North West Provincial Government & Others* Bophuthatswana High Court, Unreported case no 308/99, 27 May 1999 ('*DVB Behuising*') para 3.

Minister of Bantu Administration and Development—for African citizens in areas of land held by the South African Native Trust, as established in terms of the Native Trust and Land Act 18 of 1936.[48] The Proclamation also made provision for the establishment of special deeds registries and for the registration of deeds of grant.[49] This case hails from the Bophuthatswana High Court (the High Court),[50] which upheld the application and declared the repeal invalid, holding that the legislative repeal dealt with the question of land tenure which fell exclusively within the jurisdiction of the national legislature. It referred the matter to the Constitutional Court for confirmation of invalidity.

In the High Court, the applicant, DVB Behuising (Pty) Limited, challenged the constitutional validity of section 6 of Amendment Act 7, arguing that the envisaged repeal of Chapters 1, 2, 3 and 96 of the Proclamation was beyond the legislative jurisdiction of the province.[51] The challenge was borne out by the fact that the repeal of the Chapters was prejudicial to business, because the persons to whom the applicant sold houses in a township would have difficulty getting their deeds of grant registered by the Registrar of Deeds. In addition, the purchasers would not be able to secure loans which they normally receive from the banks.[52]

In resolving the stalemate, Ngcobo J, writing for the majority as the Court was divided on the outcome, identified the difficulty associated with the case. This was because the

> Proclamation was a pre-democratic order law, the application for the repeal of certain of its provisions and not the entire Proclamation and the section 235(6) criteria are concerned with executive powers at an administrative level, yet for its purpose, the section uses Schedule 6, which deals with legislative competences, and paragraphs (*a*) to (*e*) of section 126(3), which are concerned with how conflicts between provincial and national legislation in relation to Schedule 6 functional areas are to be resolved.[53]

The judge then considered the spirit and purport of the Proclamation in order to determine its substance, essence and the effect it had in the regulation of provincial powers.[54] In this process, the Court started by focusing on the historical context of the Proclamation and the impact it had had on the livelihoods of many South Africans.

The Court established the legislative and policy frameworks that were used as instruments to entrench racial segregation—especially their systemic discriminatory enforcement against the black majority of the South African population.[55] It went on to consider the substance of the Proclamation and found that it was an orchestrated scheme

48 ibid para 2.
49 ibid.
50 *DVB Behuising* (n 47).
51 ibid para 3.
52 ibid para 3.
53 ibid para 34.
54 ibid para 36.
55 ibid paras 41–47.

for authorising the establishment of informal townships designed for black people.[56] In essence, the general purpose of the Proclamation was to endorse the institutionalised form of apartheid-based local governments in townships.[57] The Proclamation was designed in a racist and discriminatory way, which made it impossible for black Africans to have a stake in eighty-seven per cent of the land in South Africa. This is evident in the judgment, as the Court highlighted that:

> the Proclamation made provision for the creation of sites and their acquisition by purchasers. It created a special form of 'tenure' for those who acquired sites in the township in the form of deeds of grant. This title was only available to purchasers of sites in the townships. In addition, the Proclamation established special deeds registries in the offices of Chief Bantu Affairs Commissioners to register these special forms of tenure and created special procedures for the registration of the deeds of grant. These special provisions applied only to deeds of grant issued in respect of sites in the township. They were well integrated into the scheme of the Proclamation and they were important for the efficacy of the Proclamation.[58]

Of great importance, and of direct relevance to this article, is the Court's affirmation of the legislative competence of the province as an independent sphere of government in the enforcement of the law-making function, in reviewing and amending any laws or conduct that runs contrary to the principles of the new dispensation. Such competence is essential in establishing the regulation of the relationship between the spheres of government in order to affirm the distinctive and interrelated function in the advancement of the principles of co-operative government. Such importance was captured by the Honourable Chief Justice Ngcobo, as follows:

> [T]he North West legislature is itself a democratic institution and, in my view, it was fully entitled to make the legislative choice of repealing the Proclamation [save regulations 1 and 3 and Chapter 9] for even if the effect was to put an end to the apartheid-based form of tenure. What the North West is in effect saying by the repeal of the Proclamation is that in that province apartheid forms of tenure will no longer be available in future. I should have thought that the provisions of section 25 of the Constitution and the Upgrading Act are a clear indication that apartheid forms of land tenure that are legally insecure are no longer to be tolerated in our new democratic dispensation. The repeal of the tenure provisions is consistent with this policy. The North West was fully entitled to adopt a policy that future land development should be undertaken in terms of the Less Formal Township Establishment Act and the Development Facilitation Act.[59]

The Court then declared the Proclamation invalid because of its racist nature, as its terms were a reminder of the past and derailed the progress made in our transformation

56 ibid para 49.

57 ibid paras 49, 50 and 51.

58 ibid para 57. The dissenting judgment by Goldstone J, O'Regan J and Sachs J was also indicative of the impact of the Proclamation. They also held that 'the myriad apartheid land laws, all characterised by pedantic detail, created a labyrinthine system. The chaotic nature of this system was further compounded by the creation of the homelands, each with its own legislative provisions': para 104.

59 *DVB Behuising* (n 47) paras 65 and 69.

to democracy. Therefore, without doubt, its provisions were in conflict with several provisions of the Bill of Rights in the interim Constitution and the 1996 Constitution and, on that account, was unconstitutional. The declaration of invalidity opened a gap and provided independence for the spheres to review and amend any laws that might have a bearing on co-operative relations regarding the evolution of the principles of co-operative governance in South Africa. This is of further importance for the distinct but interrelated and interdependent function bestowed on the spheres, as the judgment has great potential to be used as an instrument against which other spheres may follow suit.

Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature 2011 (11) BCLR 1181 (CC)

Even though this case emanated from the Premier as Head of the Provincial Executive[60] and his Provincial Legislature as the branch of government, at face value it might not have a direct link to the spheres. However, the principle it developed is of great importance for the evolution of the principles of co-operative governance. The bone of contention arose because the Premier of the Limpopo province (Limpopo) approached the Constitutional Court to provide guidance on the legislative competence of the province to pass legislation dealing with its own financial management.[61] The Premier had reservations about the constitutionality of the Financial Management of the Limpopo Provincial Legislature Bill, 2009.[62] There were also contrasting views between the Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the Minister of Finance (Parliament) about whether the Bill was unconstitutional, while, on the other hand, the Speaker of Limpopo maintained that it was indeed constitutional. The basis of the argument applied by the former three parties was that section 3 of the Financial Management of Parliament Act 10 of 2009 (FMPA) read with Schedule 1 did not expressly assign powers to provincial legislatures and consequently they had no power to pass legislation dealing with their own financial management. The province argued that it did indeed have legislative competence to regulate its own financial affairs.[63]

The Court had to determine whether:

1 sections 2(*e*) and 3 of the FMPA, read with Schedule 1 thereto, expressly assign to provincial legislatures the power to regulate their own financial management; and
2 whether financial management of provincial legislatures is a matter for which the Constitution envisages the enactment of provincial legislation.[64]

60 See s 125 of the Constitution, 1996.
61 *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature & Others* 2011 (11) BCLR 1181 (CC) paras 1–2 ('*Limpopo*').
62 A06-2009.
63 ibid paras 3–5.
64 ibid para 32.

Ngcobo J, as he then was, writing for the majority, identified the difficulty associated with the opening phrase of Schedule 1. He highlighted that the Schedule is capable of three constructions. First, it is legislating in anticipation of a power yet to be assigned. Secondly, there is the assumption that provincial legislatures already enjoy the power, which raises the question of the source of this power. Lastly, there is the issue of the intention of the Schedule itself to assign legislative power to regulate financial management to the provinces, which can come about only by implication.[65] The Court invalidated the Bill with respect to the province's management of its finances, as it argued that the legislative powers should not be implied beyond those expressly set out in the Constitution—because that would diminish its expansive reading, which is vested in the residual legislative powers of parliament.[66]

Chief Justice Ngcobo's Judicial Thinking and Reasoning

The cases highlighted above lay the foundation for a rich jurisprudence in relation to Justice Sandile Ngcobo's contribution to a constitutionalised and transformative form of co-operative governance on the regulation of State authority. His thinking on the distribution of legislative, executive and local government power among the spheres is the major distinction and determinant that provides an insight into Justice Ngcobo's judicial philosophy in harnessing the principles of the new constitutional dispensation in relation to co-operative governance. It goes without saying that assessing Chief Justice Ngcobo's rich jurisprudence is critically important in the context of this article. Justice Ngcobo has proved to be the 'pinnacle' of promoting the values and principles that underpin the open and democratic society based on 'freedom, dignity, equality'[67] and which, as evidenced by his reasoned judgments, entail a radical departure from what used to be the case before the dawning of democracy in 1994.[68] Through his reasoned judgments, the judiciary has proved to be no longer the mouthpiece of the other spheres or branches of government in the execution of State authority. Justice Ngcobo has, in his judicial thinking, acknowledged the distinct but interrelated and interdependent character of the spheres of government in promoting the principles of co-operative governance.

With this in mind, there are defining characteristics that can be attributed to Justice Ngcobo which underlie his judicial philosophy in advancing the principles of co-operative government. Justice Ngcobo can, first, be described as a constitutional adjudicator. It is here that the Justice is affirmed as a specialist of the Constitution by

65 ibid para 46.

66 ibid paras 55–60.

67 See s 1 of the Constitution, 1996.

68 See Murray Wesson and Max du Plessis, 'The Transformation of the Judiciary: Fifteen-year Policy Review' The Presidency (2008), where they highlight the impact of judicial apathy, as they point out that 'apart from generally failing to interpret legislation in favour of human rights, judges also rarely commented on the racist and unjust nature of apartheid law, in their judgments or other forums' at 4.

the manner in which he directly ensured the protection and promotion of advances towards the impartial enforcement of the rule of law and other related prescripts of the new constitutional dispensation. For example, as a constitutional adjudicator, Justice Ngcobo never exercised 'self-restraint' in pronouncing on matters that were considered to be sensitive and which sought to regulate the relations between the three spheres of governments. The reasoning and method by which Justice Ngcobo encapsulated the law did not stifle the creation of an environment that enabled the principles of co-operative governance to evolve.

The *Western Cape* judgment is indicative of Justice Ngcobo's defining character as a constitutional adjudicator in the application of the law. This was a thorny and controversial case when it came to the matter of co-operative governance. It involved the determination of the level of co-operation, as envisaged in the Municipal Structures Act 117 of 1998, between the African National Congress (ANC)-led national government and the then New National Party (NNP)-led provincial government in the Western Cape province and the then Inkatha Freedom Party (IFP)-led provincial government in KwaZulu-Natal province and it went about determining the constitutional authority of each of the spheres as envisaged by that Act. Since the parties were always antagonistic towards each other because of their different ideologies on how to advance the principles of democracy, the way in which Justice Ngcobo reasoned ensured that 'two bulls can actually sleep in the same kraal'.[69] In determining this matter, the Chief Justice consolidated what is referred to as 'political questions' into judicial questions.[70] In this case, Justice Ngcobo proved to be fearless in his approach in using the Constitution as a yardstick against which to advance the principles of co-operative governance. This exemplified the character of Justice Ngcobo and his courage to 'take the bull by the horns'[71] and it also served to consolidate confidence in his ability to do what he saw as the right thing in promoting the principles of co-operative governance in the face of opposition. This case was of great importance for co-operative governance because the Chief Justice remained committed to upholding the independence of the different spheres of government despite, as usually happens with judgments which the government does not find comfort in, the judge finding himself at the receiving end of its ire.[72]

The *Limpopo* judgment is another case that gives credence to the view expressed in this article about the judicial character of Justice Ngcobo. Here, the judge used his constitutional adjudicator status to stop the provincial legislature 'putting of the cart

69 This is the idiom used to describe the high level of difference where parties can strike a compromise for the betterment not only of their own political agendas, but also of those of the general populace of the Republic.

70 Edwin Cameron, 'Judicial Independence – A Substantive Component' 2010 Advocate 24 at 25.

71 This is another idiom that indicates the sensitive relationship that exists in the regulation of public authority—especially in the multi-party character of South Africa's democratic dispensation.

72 Editorial Staff, 'ANC Increasingly Resentful of Our Independent Judiciary' *Times Live* (Johannesburg, 24 June 2015) <http://www.timeslive.co.za/thetimes/2015/06/24/ANC-increasingly-resentful-of-our-independent-judiciary> accessed 17 November 2017.

before the horse' by indicating the limitations that are imposed by the Constitution on regulating the relations between the different spheres in co-operative governance. Although this case was not directly about the relations between the spheres but between the Premier as head of the provincial executive and his provincial legislature, the principle it developed can be directly used to contribute to the evolution of co-operative governance. Secondly, Chief Justice Ngcobo's philosophy is deeply rooted in the foundational values and principles of the Constitution, which include dignity, equality and constitutional supremacy. The *DVB Behuising* judgment is a case in point: there he emphasised the values of the new dispensation in dealing with the history of the country that had marginalised black people as being less than human beings. It is this history that was characterised by the laws designed to determine where the black majority of the country had to live, work and receive an education, among other entrenched forms of racial and gender oppression. The Justice's bold and critical awareness of the transformative Constitution has enabled him to chart a new avenue of jurisprudence.

It was therefore of great importance that Justice Ngcobo endorsed the legislative competence of the province, which can translate directly to the autonomy of the other spheres through facilitating the principles of co-operative governance. The affirmation of the law-making powers of the different spheres strikes a balance according to which each sphere should exercise its distinctiveness within the collective framework of interdependence and interrelationship with one another. It is here that the different spheres were sensitised to ensure that in their policy- and law-making functioning they take cognisance of the ideals of the new democracy in order to regulate public authority in a way that does not negate the fundamental principles of the rule of law.

Thirdly, the intersection of the language of rights and that of values is another determinant of Ngcobo's judicial character, one that is evident in the *DVB Behuising* judgment. In this case, the challenge was based on the legislative competence of the province to amend and review any historic laws that continue to manifest themselves and subjugate the black majority in South Africa. Clearly, those laws needed to be amended, given their incompatibility with the values of the new dispensation. The Justice's approach affirmed the commitment framed within the language of a Constitution that seeks to 'heal the injustices of the past' and speaks of 'the need to establish a society based on democratic values, social justice and fundamental human rights and improve the quality of life of all citizens and free the potential of each person.'[73]

Finally, another element is Justice Ngcobo's 'Africanist adjudicative approach', which is derived from the customary-law principle of ubuntu in regulating public authority. This principle is indirectly deduced from the *DVB Behuising* judgment, which can be viewed as another step in the evolution of co-operative governance, because the Court viewed the intersection of the language of rights and values in customary law as a legitimate system of the new democratic dispensation. Ubuntu is a long-standing principle of

73 See Preamble to the Constitution, 1996.

customary law, the practical traits of which require equal development to ensure their substantive conception in judicial reasoning. This contention is borne out by the fact that the evolution of the principles of co-operative government should be informed by humanity, humanness, respect and other related factors[74] in the process of ensuring their transmission from the national to the lower sphere of government, and vice versa. The *DVB Behuising* judgment has therefore seen the interjection of the customary-law principle of ubuntu into the general framework of the law of co-operative governance. It is also worth pointing out that Justice Ngcobo's Africanist adjudicative approach in the *DVB Behuising* judgment dealt with an apartheid Proclamation that was designed to subjugate the majority of black South Africans. It is in this instance that elements of ubuntu were needed to redesign the focus of the new dispensation for regulating public authority in order to ensure that the principles of co-operative governance were meaningfully developed. The *Makwanyane*[75] judgment had long settled the importance of ubuntu in judicial reasoning that, as argued in this section, has determined Justice Ngcobo's judicial approach.

Conclusion

The evolution of the principles of co-operative governance is a major determinant of the richness of South Africa's maturing democracy. These principles reflect the strides that have been made since the attainment of democracy; they are of particular significance in the way in which the three spheres of government foster co-operation between one another, for the benefit of the general populace of the Republic. The cases identified in this article that were presided over by the Chief Justice Sandile Ngcobo indicate the kind of jurist that South Africa has cultivated and nurtured. His qualities—as evidenced in his approach to his judicial reasoning—provide fertile ground for his deep-rooted philosophy which has created a rich legacy of jurisprudence that is continuing to shape the South African legal landscape. Justice Ngcobo gave impetus to the transformative and liberal constitutionalism that affords dignity to all. The learned former Chief Justice has also led a constitutional revolution which has set in motion a trajectory of South African emancipation that is heralding an improvement in the lives of most South Africans.

74 See Mokgoro J in *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 308.
75 ibid.

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